Adversary Proceedings: Does 28 U.S.C. § 1109(b) Confer an Absolute Right of Intervention?

Stacey A. Fabrizio
Maria T. Rivero

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred
ADVERSARY PROCEEDINGS: DOES 28 U.S.C. § 1109(b) CONFER AN ABSOLUTE RIGHT OF INTERVENTION?

Chapter 11 of the Bankruptcy Reform Act of 1978 provides

1 See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Congress was granted the power to enact bankruptcy legislation through Article 1 of the United States Constitution. See U.S. Const. art. I, § 8, cl. 4. This clause provides in pertinent part that: "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Id.


The broad grant of judicial power given to bankruptcy judges under the Bankruptcy Reform Act of 1978 was subsequently found to be unconstitutional. See Northern Pipeline, 458 U.S. at 87. The Court in Northern Pipeline held that untenured federal judges could not exercise the broad powers granted to them under the Act, since judicial power of Article III district courts had been impermissibly vested in non-Article III courts by the Act. Id. at 86-87. The Court's decision applied prospectively and was stayed to allow Congress
for the reorganization of an insolvent business.\textsuperscript{2} While the debtor-in-possession\textsuperscript{3} or the trustee\textsuperscript{4} continues to operate the business, a


A business reorganization restructures a business' debts in order to maintain operations, employ workers, pay creditors, and yield a return for its stockholders. H.R. REP. No. 595, 95th Cong., 2d Sess. 220, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6179. "The purpose of the reorganization . . . case is to formulate and have confirmed a plan of reorganization . . . for the debtor. The [reorganization] plan determines how much creditors will be paid, and in what form . . . whether the stockholders will continue to retain any interest . . . and in what form the business will continue . . . ." \textit{Id.} at 6180.


\textit{See} 11 U.S.C. \textsection 1101(1) (1988) (definition of debtor-in-possession). This section provides in pertinent part: "'debtor in possession' means debtor except when a person that has qualified under . . . this title . . . is serving as trustee in this case." \textit{Id.}

After a Chapter 11 petition is filed, there is a presumption that the debtor will remain
plan for reorganizing the business’ debt is formulated. Although


The debtor-in-possession may be removed from controlling the business and a trustee appointed by the court upon a showing of cause or if such appointment is in the best interests of the creditors and of the bankrupt estate itself. See 11 U.S.C. § 1104(a) (1988) (listing circumstances for trustee’s appointment). See, e.g., In re Ford, 36 Bankr. 501, 504-05 (Bankr. W.D. Ky. 1983) (need for trustee appointment where debtor-in-possession failed to submit factual monthly financial reports and comingled estate assets with his own); In re Main Line Motors, Inc., 9 Bankr. 782, 784-85 (Bankr. E.D. Pa. 1981) (trustee appointment necessary where president and sole shareholder of debtor corporation transferred corporate funds prior to filing of bankruptcy petition).

A trustee acts as chief executive officer in charge of the business’ operation, investigator of the debtor’s actions, and formulator of the Chapter 11 plan. J. BEINSTOCK, BANKRUPTCY REORGANIZATION 285 (1987). The trustee is obligated to act in the “best interest of general creditors” in managing the debtor’s estate and “in preserving estate assets.” WINTRAUB & RESNICK, supra note 1, ¶ 6.08[3], at 6-40. Pursuant to 11 U.S.C. § 1121, a debtor may file a plan in a reorganization case “until after 120 days after the date of the order for relief under [Chapter 11].” 11 U.S.C. § 1121(b) (1988). However, if a trustee in bankruptcy has been appointed or the debtor missed the statutory deadline for filing or the debtor’s plan was not accepted, any party in
creditors are stayed⁶ from further pursuit of their claims, a creditors’ committee is appointed⁷ to represent and protect the cred-

interest may file a reorganization plan. 11 U.S.C. § 1121(c) (1988).

For a discussion on who may file a reorganization plan, see In re Crescent Beach Inn, Inc., 22 Bankr. 155, 160 (Bankr. D. Me. 1982). In Crescent Beach, the court held that allowing any party in interest to file a plan would best serve the interests of both the debtor and the creditors. Id. See also In re K. C. Marsh Co., Inc., 12 Bankr. 401, 403 (Bankr. D. Mass. 1981). “The debtor requesting relief has a duty to formulate a reorganization plan.” Id. See generally WEINTRAUB & RESNICK, supra note 1, ¶ 8.19, at 8-84 to 8-86 (discussion of who may file plan).

⁶ See 11 U.S.C. § 362(a) (1988) (dealing with automatic stay). See also Pizza of Hawaii, Inc. v. Department of Taxation, State of Hawaii (In re Pizza of Hawaii, Inc.), 12 Bankr. 796, 798 (Bankr. D. Haw. 1981). “The automatic stay is one of the fundamental protections afforded a debtor by the Bankruptcy Code. It gives the debtor an opportunity to attempt a repayment or reorganization plan.” Id.; BIENSTOCK, supra note 4, at 97. “The filing of a petition with the bankruptcy court instantaneously shields the debtor from creditors’ predatory acts - as if by magic.” Id. Filing a petition for bankruptcy automatically invokes the automatic stay. Id. The automatic stay precludes dismemberment of the debtor’s business, which aids the business’ continued operation. Id.; WEINTRAUB & RESNICK, supra note 1, ¶ 1.09[1], at 1-51. The automatic stay relieves the debtor of the financial burdens which led to bankruptcy, such that the business may continue to operate. Id. The stay, however, does not affect the creditors’ substantive rights. Id. “[The stay] merely stops collection efforts pending a determination of the creditors’ and debtor’s rights by the bankruptcy court.” Id.

⁷ See 11 U.S.C. § 1102 (1988). The statute provides in pertinent part:

(a)(1) As soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims . . .

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors . . . if necessary to assure adequate representation of creditors . . .

(b)(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

Id. “The court is obligated to appoint a committee of creditors holding unsecured claims ‘as soon as practicable’ after the order for reorganization relief under chapter 11.” WEINTRAUB & RESNICK, supra note 1, ¶ 8.12[1], at 8-60. Neither notice nor hearing are required when the court appoints a creditors’ committee. Id. at 8-60 n.2. See also Note, Standards and Sanctions for the Use of Cash Collateral Under the Bankruptcy Code, 63 Tex. L. Rev. 341, 344 n.24 (1984) (§ 1102 provides for mandatory appointment of unsecured creditors’ committees in Chapter 11 cases).

Adversary Proceedings

tors' interest in the ongoing business.\(^8\)

In order to preserve the bankrupt estate, the debtor-in-possession or the trustee may institute an adversary proceeding.\(^9\) Often,


In addition to the mandatorily created committee, the United States trustee or the court upon request of a party in interest, may appoint additional creditors' committees. \(\text{See, e.g., In re Texaco Inc., 79 Bankr. 560, 566 (Bankr. S.D.N.Y. 1987) (additional creditors' committee not necessary if adequately represented); In re McLean Indus., 70 Bankr. 852, 861 (Bankr. S.D.N.Y. 1987) (no "hard and fast rule" for appointment of additional creditors' committees; determination should be on case-by-case basis in order to achieve adequate representation of creditors); Shaffer-Gordon, 40 Bankr. at 959 (additional creditors' committee not appointed since existing creditors' committee adequately represented).}\)

\(\text{See In re AKF Foods, Inc., 36 Bankr. 288, 289 (Bankr. E.D.N.Y. 1984). "The function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents." Id.; In re Daig Corp., 17 Bankr. 41, 43 (Bankr. D. Minn. 1981). The creditors' committee not only negotiates with the debtor on behalf of the creditors but also represents the varied interests of its members. Id. See also Sowerwine v. Air Canada (In re REA Holding Corp.), 8 Bankr. 75, 81 (Bankr. S.D.N.Y. 1980). "Those who serve on a creditors' committee owe a fiduciary duty to all creditors which they fulfill by advising creditors of their rights and of the proper course of action in the bankruptcy proceeding." Id. (citing Bohack Corp. v. Gulf & Western Indus., Inc., 607 F.2d 258, 262 n.4 (2d Cir. 1979)).}\)

The scope of a creditors' committee's authority is encompassed in Section 1103 of Title 11 of the United States Code. \(\text{See 11 U.S.C. § 1103 (1988). The statute states in pertinent part:}\)

(a) [W]ith the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) . . . .

(c) A committee . . . may -

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner . . . ; and

(5) perform such other services as are in the interest of those represented.

\(\text{Id. See generally Weintraub & Resnick, supra note 1, ¶ 8.12[2], at 8-62 to 8-64 (general discussion of functions and powers of committees); DeNatale, supra note 7, at 51-52 (examination of functions and duties of creditors' committees under Chapters 7 and 11).}\)


An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien of other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke
a creditors' committee, which has a vested interest in the bankrupt estate, seeks to intervene in this proceeding. Bankruptcy courts are divided as to whether a committee's right to intervene in an adversary proceeding is absolute pursuant to Section 1109(b) of Title 11 of the United States Code [hereinafter § 1109(b)].

an order of confirmation of a chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.


See 11 U.S.C. § 1109(b) (1988). See infra note 26 and accompanying text (text of § 1109(b)).

Two United States courts of appeals decisions illustrate this division. In *Official Unsecured Creditors' Committee v. Michaels* (In re *Marin Motor Oil, Inc.*), the Third Circuit held that § 1109(b) gave a creditors' committee an absolute right of intervention. The Court of Appeals for the Fifth Circuit in *Fuel Oil Supply and Terminaling v. Gulf Oil Corporation* held that § 1109(b) granted no such absolute statutory right. Recently, in *Official Committee of Unsecured Creditors of Allegheny International, Inc. v. Mellon Bank, N.A. (In re Allegheny International, Inc.*) a district court in the Third Circuit followed *Marin* but highlighted the split between the Third and Fifth Circuits.

This Note will attempt to resolve the conflict between the circuits as to whether a creditors' committee has an absolute right to intervene in an adversary proceeding. First, it will discuss the applicable statutes which provide for the right of intervention. Next, it will address the decisions of the Courts of Appeals for the Third and Fifth Circuits as well as the decision in *Allegheny*. In light of this discussion and several policy considerations, this Note will then assert that there is no absolute right of intervention.

I. STATUTORY FRAMEWORK FOR THE RIGHT OF INTERVENTION

In a civil action, the result of the litigation often affects non-parties to the suit. Through the procedure of intervention, (Bankr. W.D. Okla. 1983) (no statute granting unconditional right to intervene) and *Segarra v. Banco Central y Economias* (In re *Segarra*), 14 Bankr. 870, 878 (Bankr. D.P.R. 1981) (§ 1109(b) does not permit creditors to intervene in proceedings).

See infra notes 13-16 and accompanying text (holdings of *Marin* and *Fuel Oil*).


Id. at 446. See infra notes 45-64 and accompanying text (discussion of *Marin* opinion).

762 F.2d 1283 (5th Cir. 1985).

Id. at 1284, 1287-88. See infra notes 65-75 and accompanying text (discussion of *Fuel Oil* opinion).


Id. at 523-25. See infra notes 76-89 and accompanying text (discussion of *Allegheny* opinion).

these non-parties are able to protect their interests by participating in the lawsuit.\textsuperscript{21} Intervention also contributes to the efficiency of the dispute's resolution.\textsuperscript{22} Rule 24 of the Federal Rules of Civil Procedure provides for intervention as a matter of right.\textsuperscript{23} Intervention as of right can be triggered when a United States statute grants an unconditional right of intervention.\textsuperscript{24}

\textsuperscript{20} See F. JAMES \& G. HAZARD, CIVIL PROCEDURE 548-49 (3d ed. 1985). "Intervention means . . . a procedure by which one who was not originally a party to an action can interject himself into litigation commenced between others. By doing so, intervenors can protect their interests against possible adverse effects of a judgment . . . ." Id. at 548-49;

\textsuperscript{21} See Moore \& Levi, supra note 19, at 565 (intervention useful in protecting non-parties); Shreve, Questioning Intervention of Right - Toward a New Methodology of Decision Making, 74 NW. U.L. REV. 894, 895 (1980) ("need to intervene is traditionally measured by the possible adverse consequences of the adjudication upon [absentee's] interests"); See also Note, supra note 19, at 541 ("to deny intervention is tantamount to denying [an interested non-party] a day in court").

In granting intervention, competing interests need to be considered. Kennedy, supra note 19, at 334. "In the usual intervention question, there are three interests to be considered - the protection of the nonparties, trial convenience, and the protection of the original parties." Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1232 (1966).

\textsuperscript{22} See Brunet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Geo. L. REV. 701, 719-20 (1978). Through intervention, the main case and corollary issues are consolidated into one action thereby avoiding duplicative litigation. Id. at 719. As a result, the time and costs of litigation are reduced, inconsistent "fact finding or law determination" is prevented, and the complications of collateral estoppel are avoided. Id. at 719-20. See also Note, supra note 19, at 531 ("Procedural devices permitting multiparty litigation are designed to achieve the prompt adjudication of an entire dispute and to eliminate unnecessary and repetitive litigation."). But see Stadin v. Union Elec. Co., 309 F.2d 912 (8th Cir.), cert. denied, 373 U.S. 915 (1962). The court noted that intervention brings "added complexity; the inevitable problems attendant upon additional witnesses, interrogatories and depositions; expanded pretrial activity; greater length of trial; and elements of confusion." Id. at 920. The court then noted "[t]hese problems in themselves suggest delay and the clouding of the issues involved in the original causes of action." Id.

\textsuperscript{23} See Fed. R. Civ. P. 24(a). The statute reads in pertinent part:

(a) Intervention of Right. 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; or (2) 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.

Id. See also Fed. R. Civ. P. 24(b) (provides for permissive intervention). See generally Kennedy, supra note 19, at 331-38 (discussion of Federal Rule 24).

\textsuperscript{24} See supra note 23 (text of Federal Rule 24(a)(1)). For examples of statutes which grant an unconditional statutory right of intervention, see Carter v. School Bd. of W. Feliciana Parish, 569 F. Supp. 568, 570-71 (M.D. La. 1983) (construed 42 U.S.C. § 2000h-2 as giv-
Some bankruptcy courts interpret § 1109(b) as a statute providing for an unconditional right of intervention in adversary proceedings.26 Section 1109(b) of the Bankruptcy Code provides 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


Intervention as a matter of right is also granted when the intervenor has a related interest in the litigation which is not being protected by the existing parties. See Fed. R. Civ. P. 24(a)(2); see supra note 23 (text of Federal Rule 24(a)(2)). See also Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 637 (1st Cir. 1989) (one requirement for intervention is that applicant must be so situated that disposition of action may as practical matter impair or impede applicant's ability to protect that interest); Moosehead Sanitary Dist. v. Phillips Corp., 610 F.2d 49, 52 (1st Cir. 1979) (same); Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 381 (Miss. 1987) (same). See generally Kennedy, supra note 19, at 340-54 (discussing Federal Rule 24(a)(2)); Note, Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2), 50 CALIF. L. REV. 89 (1962) (same).

Applications for intervention must be made in a timely manner. See Fed. R. Civ. P. 24(a), (b). "Upon timely application anyone may be permitted to intervene in an action . . . ." Id.; see supra note 23 (text of Federal Rule 24(a)). "The timeliness requirement was not designed to penalize prospective intervenors for failing to act promptly; rather, it insures that existing parties to the litigation are not prejudiced by the failure of would-be intervenors to act in a timely fashion." Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983). "Timeliness is a function of the relative prejudice to the existing parties and the would-be intervenor." United States v. Marion County School Dist., 590 F.2d 146, 148 (5th Cir. 1979).


may appear and be heard on any issue in a case under this chapter."\textsuperscript{28}

The language of § 1109(b) is derived from Chapter X Section 206 of the Bankruptcy Act of 1938,\textsuperscript{27} and correspondingly from Chapter X Bankruptcy Rule 10-210(a)(1), itself originating from Section 206.\textsuperscript{28} Chapter X Section 206, in turn, was based upon Section 77B, which Congress found too restrictive\textsuperscript{29} because the section provided creditors and stockholders with an absolute right to be heard in only two circumstances.\textsuperscript{30} Congress enacted Section 206 to expand participation rights in corporate reorganization proceedings in order to contribute to the case’s

\textsuperscript{28} 11 U.S.C. § 1109(b) (1988).

\textsuperscript{27} See S. Rep. No. 989, 95th Cong., 2d Sess. 116, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5902. "Subsection (a) . . . is derived from . . . Chapter X (11 U.S.C. 608)." Id. "The Senate Report actually referred to this section (§ 1109(b)) as 1109(a), since prior to final amendments 1109(a) and 1109(b) were the reverse of their final version." Marin, 689 F.2d at 451 n.5.

Section 206 of Chapter X of the Bankruptcy Act of 1938 read in relevant part: "The debtor, the indenture trustees, 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." Bankruptcy Act of 1958, Pub. L. No. 75-575, § 206, 75 Stat. 840, 894 (1938).

\textsuperscript{29} See 5 COLLIER, supra note 2, ¶ 1109.02[2], at 1109-17. Chapter X Bankruptcy Rule 10-210(a)(1) read as follows: "(a) Standing to Be Heard. (1) The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a Chapter X case." Chapter X Bankruptcy Rule 10-210(a)(1), reprinted in 13A COLLIER ON BANKRUPTCY 10-210-1 (14th ed. 1977).

\textsuperscript{30} See S. Rep. No. 1916, 75th Cong., 3d Sess. 33 (1938) (noted in In re Keystone Realty Holding Co., 117 F.2d 1003, 1005 (3d Cir. 1941)). "Former restrictions on such right to be heard are eliminated as being undesirable." Keystone, 117 F.2d at 1005. See also Horowitz v. Kaplan (In re Waltham Watch Co.), 193 F.2d 64, 66 (1st Cir. 1951) (§ 206 was "intended by Congress to eliminate procedural barriers to full participation in the reorganization proceedings by interested persons"), cert. denied, 342 U.S. 946 (1952); Chemical Bank v. Slaner (In re Duplan Corp.), 450 F. Supp. 790, 791 (S.D.N.Y. 1978) (§ 206 "eliminate[d] the previously restricted rights of interested parties" under 77B). See generally 6 COLLIER ON BANKRUPTCY, Part 2 ¶ 9.23[1], at 1689-1700 (14th ed. 1978) (discussing purpose, scope, and effect of § 206).

\textsuperscript{356}
Adversary Proceedings

"democratization." 81

The current version of § 1109(b) was also derived in part from Chapter X Bankruptcy Rule 10-210(a)(1). 82 Pursuant to Chapter X Section 206 and Chapter X Bankruptcy Rule 10-210(a)(1), the debtor, the indenture trustees, and any creditor or stockholder of the debtor had an absolute right to be heard in a bankruptcy case. 83 In contrast, Chapter X Section 207 of the 1938 Bankruptcy Act 84 and Bankruptcy Rule 10-210(b), its corresponding rule, provided for permissible intervention for cause. 85 When Congress derived the language of § 1109(b) from a mandatory statute rather than from a permissive one, it revealed a congressional intent to carry over an unconditional right of the creditors' committee to be heard in a case under § 1109(b). 86 Whether this

81 6 COLIER, Part 2, supra note 29, ¶ 9.23[1], at 1692 (footnote omitted). See SEC v. American Trailer Rentals, 379 U.S. 594, 604 (1965) (aims of revised Chapter X includes providing more protection to creditors and stockholders than previously provided by § 77B); Wolf v. Weinstein, 372 U.S. 633, 640 (1963) (Chapter X sought to broaden participation of interested groups). Cf. Continental Mortgage Investors v. SEC, 578 F.2d 872, 875 n.2 (1st Cir. 1978) (Chapter X intended to protect public investors better and to allow for more extrinsic corporate reorganizations).

82 See In re Amatex Corp., 755 F.2d 1034, 1042 (3d Cir. 1985) (Rule 10-210(a) is a predecessor of § 1109(b)); Marin, 689 F.2d at 451 (noted Congress' use of language from Rule 10-210(a) in § 1109(b)); D. H. Sharrer & Son, Inc. v. Sharrer Investment Trust (In re D. H. Sharrer & Son, Inc.), 44 Bankr. 976, 979 (Bankr. M.D. Pa. 1984) (same). See also supra note 28 (text of Chapter X Rule 10-210(a)(1)).

Chapter X Bankruptcy Rule 10-210(a)(1), in turn, was based upon Section 206 of the 1938 Bankruptcy Act. See Chapter X Bankruptcy Rule 10-210 advisory committee's note, reprinted in 13A COLIER, supra note 28, ¶ 10-210.01, at 10-210-2. See also supra note 27 (text of Chapter X Section 206).

83 See supra notes 27-28 (text of Chapter X § 206 and Rule 10-210(a)(1), respectively). Section 206 provided for a right to be heard "on all matters arising in a proceeding under this chapter." Bankruptcy Act of 1938, Pub. L. No. 75-575, § 206, 52 Stat. 840, 894 (1938). Furthermore, Chapter X Rule 10-210 provided for a "right to be heard on all matters arising in a Chapter X case." Chapter X Bankruptcy Rule 10-210(a)(1), reprinted in 13A COLIER, supra note 28, at 10-210-1. See Marin, 689 F.2d at 451 ("the slightly altered language does not affect [sic] any change in the statute.") (quoting 13A COLIER, supra note 28, ¶ 10-210-2; Sharrer, 44 Bankr. at 979 (same).

84 See Bankruptcy Act of 1938, Pub. L. No. 75-575, § 207, 52 Stat. 840, 894 (1938). Section 207 provided in pertinent part that "[t]he judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter." Id.

85 See 13A COLIER, supra note 28, at 10-210-1. The text of Chapter X Rule 10-210(b) provided: "(b) Intervention. The court may for cause shown permit any interested person to intervene generally or with respect to any specified matter in the Chapter X case." Id. See Chapter X Bankruptcy Rule 10-210 advisory committee's note, reprinted in 13A COLIER, supra note 28, ¶ 10-210.01, at 10-210-2. See generally 6 COLIER, Part 2, supra note 29, ¶ 9.25, at 1708-1715 (discussion of Chapter X § 207 and Chapter X Rule 10-210(b)).

86 See In re Penn-Dixie Indus., Inc., 9 Bankr. 936, 939 (S.D.N.Y. 1981) ("Chapter X is
"right to be heard" in a case translates to a "right to intervene" in an adversary proceeding is a matter on which the Third Circuit in Marin and the Fifth Circuit in Fuel Oil have reached conflicting results.\(^1\)

In addition to Federal Rule 24 and §1109(b), intervention is also addressed in Bankruptcy Rules 2018\(^8\) and 7024.\(^9\) Bankruptcy Rule 2018 provides for permissive intervention in a case by any interested entity upon a showing of cause.\(^4\) The advisory committee note to Rule 2018 states that the rule implements §1109(b) of the Code\(^4\) and refers to Rule 7024 for intervention in adversary proceedings.\(^4\) The advisory committee note to Rule 7024 provides that Rule 2018 governs intervention in a case, while Rule 7024 governs intervention in an adversary proceeding.\(^4\) Bankruptcy Rule 7024 makes Rule 24 of the Federal Rules

the predecessor to Chapter 11, and it is clear that Congress intended section 1109(b) to carry forward an absolute right to be heard on any issue arising in a chapter 11 reorganization." (citations omitted). See also Marin, 689 F.2d at 452 ("[C]ongress . . . understood that it was adopting the mandatory and not the permissive provision."); In re Ionosphere Clubs, Inc., 101 Bankr. 844, 849 (Bankr. S.D.N.Y. 1989) ("The legislative history indicates that Congress sought to encourage and promote greater participation in reorganization cases . . . As a result, § 1109(b) ought to be construed broadly; an individual has the absolute right to be heard and this ensures fair representation of all claimants." (citations omitted)).

\(^1\) Compare Marin, 689 F.2d at 446 (creditors' committee has absolute right to intervene under §1109(b)) with Fuel Oil, 762 F.2d at 1287 (creditors' committee has no absolute statutory right to intervene under §1109(b)). See generally notes 45-75 and accompanying text (discussion of Marin, notes 45-64, and Fuel Oil, notes 65-75).


\(^5\) See 11 U.S.C. BANKR. R. 2018 advisory committee's note (1988). "This rule . . . implements §1109 . . . of the Code." Id. "Pursuant to §1109 of the Code, parties in interest have a right to be heard . . . ." Id. But see, e.g., Allegheny, 107 Bankr. at 524. ("[T]he language in the Advisory Committee note stating that Rule 2018 implements §1109 is at best ambiguous, and does not seem sufficient basis for determining that §1109 is exclusively limited to proceedings for which Rule 2018 is applicable.").


\(^7\) See 11 U.S.C. BANKR. R. 7024 advisory committee's note (1988). The advisory committee's note provides:

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
Adversary Proceedings

of Civil Procedure applicable in adversary proceedings.\(^4\)

II. Case Law Interpreting the Right of Intervention

A. Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.) - An Absolute Right to Intervene in Adversary Proceedings

In Marin, the Court of Appeals for the Third Circuit held that a creditors’ committee in a Chapter 11 reorganization had an absolute right to intervene in adversary proceedings pursuant to § 1109(b).\(^48\)

Marin Motor Oil, Inc., filed a voluntary petition for reorganization under Chapter 11.\(^48\) Shortly thereafter, a creditors' committee was appointed to protect the interests of the company’s creditors.\(^47\) The committee filed a complaint seeking to include the assets of various related companies in the bankrupt estate.\(^48\) A trustee was subsequently appointed at the committee’s request and a stipulation was entered into wherein the assets of Marin and the related Marin companies would be frozen for 45 days.\(^49\) The trustee then commenced two adversary proceedings in order to include the other Marin companies in the bankrupt estate and thereby increase the assets available to the creditors.\(^50\) The credi-

is governed by Rule 2018 and intervention in an adversary proceedings is governed by this rule. Intervention in a case and intervention in an adversary proceeding must be sought separately.


\(^{45}\) Marin, 689 F.2d at 450-57.

\(^{46}\) Id. at 446.

\(^{47}\) Id.

\(^{48}\) Id. The related companies were owned and controlled by the sole shareholder of Marin Motor Oil and his wife. Id.

\(^{49}\) Id. The committee in Marin voluntarily withdrew its complaint on the agreement that the trustee file and “vigorously pursue” his own complaint. Id.

\(^{50}\) Marin, 689 F.2d at 446-47.
tors' committee ultimately sought to intervene in these proceedings, claiming primarily that § 1109(b) granted them an absolute right to do so.

The bankruptcy court denied the committee's motion to intervene but granted the committee amicus curiae status. The committee appealed to the district court which reversed, holding that the creditors' committee had an absolute right to intervene under § 1109(b). The Court of Appeals for the Third Circuit affirmed the district court's decision.

After initially determining that it had jurisdiction to hear the dispute, the court proceeded to discuss the merits of the controversy involving § 1109(b). It scrutinized the language of § 1109(b) and noted that the provision applied specifically to Chapter 11 reorganizations under which creditors' committees had extensive rights. The court asserted that the express language used in the statute, "on any issue in a case," included adversary proceedings. After analyzing the legislative history of § 1109(b), the

---

51 Id. The committee was concerned that the trustee had allowed the stipulation freezing the assets of the Marins and the Marin companies to lapse, and was dissatisfied with the trustee's performance overall. Id. at 447.

52 Id. The committee claimed that § 1109(b) conferred an absolute right of intervention irrespective of the trustee's performance. Id.

53 Id. The bankruptcy court interpreted the right to intervene under § 1109(b) as permissive not mandatory. Id. In granting the committee amicus curiae status, the bankruptcy court allowed the committee to submit briefs on issues already raised. Id.

54 Id. The district court considered § 1109(b) to be mandatory and as such the committee's participation as amicus curiae was insufficient to satisfy the statute. Id.

55 Marin, 689 F.2d at 446.

56 Id. at 447-49. Addressing the issue of jurisdiction, the court noted that while the bankruptcy court order denying intervention was final and therefore appealable, there was some question as to whether the district court order granting intervention was interlocutory or final in nature. Id. at 447-49. The court concluded that the district court order was indeed final and therefore the circuit court had jurisdiction to hear the dispute. Id. at 449.

57 Id.

58 Id. at 449-50. The court noted that "failure to recognize that Congress intended a creditors' committee to have more extensive rights in a reorganization than in a liquidation" had caused much confusion. Id. at 450.

59 Id. at 451. The court stated that it was "unlikely that Congress would have used such sweeping language if it had not meant 'case' to be a broadly inclusive term." Id. But see Fuel Oil, 762 F.2d at 1286-87 (examining Congressional distinctions made between "case" and "proceedings"); Kenan v. Federal Deposit Ins. Corp. (In re George Rodman, Inc.), 33 Bankr. 348, 350 (Bankr. W.D. Okla. 1983) ("when Congress speaks of a 'case' it does not include an adversary proceeding . . . .").

The Marin court noted that while neither "case" nor "adversary proceeding" was defined in the Bankruptcy Code, Bankruptcy Rule 701 (then in effect) classified several pro-
Adversary Proceedings

court concluded that the broad rights granted under Section 206 of Chapter X of the Bankruptcy Act of 1938 and Chapter X Bankruptcy Rule 10-210(a) were carried over to § 1109(b). The court emphasized that § 1109(b) was derived from a mandatory provision (Chapter X Section 206) rather than a permissive provision (Chapter X Section 207).

The court addressed, but did not analyze whether Rule 24 of the Federal Rules of Civil Procedure was applicable to adversary proceedings. Finally, the court stated that a broad interpretation of § 1109(b) advanced the principles of fairness. The court rejected the appellant’s policy argument that an increase or delay in litigation would result from giving interested parties an absolute

ceedings as adversary proceedings. Marin, 689 F.2d at 450. Today, adversary proceedings are classified in Bankruptcy Rule 7001. See supra note 9 (text of Bankruptcy Rule 7001). Additionally, the Marin court summarily dismissed the argument as to the difference between the commencement of an adversary proceeding (by the filing of a complaint under the then existing Bankruptcy Rule 709) and the commencement of a case (by the filing of a petition under 11 U.S.C. § 301). Marin, 689 F.2d at 450-51. See generally infra notes 92-101 and accompanying text (discussing distinctions between “case” and “proceedings”).

60 Marin, 689 F.2d at 451-52. The court noted that Chapter X Section 206 broadened the rights of creditors to participate in reorganization proceedings thereby eliminating the restrictions that had been placed on creditors by Section 206’s predecessor statute, Section 77B. Id. (citing In re Keystone Realty Holding Co., 117 F.2d 1003, 1005 (3d Cir. 1941)). See also supra notes 27-33 and accompanying text (tracing legislative history of § 1109(b)).

61 Marin, 689 F.2d at 452. The court stated that the “lack of a counterpart to Section 207 in the current [Bankruptcy] Code leads to an anomaly in the appellants’ position” since the appellants, in stating that § 1109(b) applied to only cases, did not point out any statute which allowed intervention in adversary proceedings. Id. Thus, the court suggested that following this line of reasoning, the bankruptcy court could not have allowed intervention in adversary proceedings even if it desired to do so. Id. But see Fuel Oil, 762 F.2d at 1287 (intervention in adversary proceeding permissible under Federal Rule 24(a)(2)); Rodman, 33 Bankr. at 350 (committee could intervene under Federal Rule 24(b)(2)); In re Citizens Loan & Thrift Co., 7 Bankr. 88, 90 (Bankr. N.D. Iowa 1980) (Chapter X Bankruptcy Rule 10-210(b), allowing for permissive intervention, applicable to proceedings under Chapter 11). See also supra notes 27-33 and accompanying text (discussing Chapter X Section 206); supra notes 34-35 and accompanying text (discussing intervention for cause under Chapter X Section 207).

62 Marin, 689 F.2d at 454. The court stated that Rule 24 of the Federal Rules of Civil Procedure was applicable to adversary proceedings under Bankruptcy Rule 724. Id. Substituting Section 206 with § 1109(b) in its analysis, the court determined that Federal Rule 24 was rendered inapplicable to a § 1109(b) situation since Section 206 “(and presumably section 1109(b))” automatically provided for intervenor status. Id. However, the court stated that it was not necessary to decide whether the creditors’ committee must formally request intervention pursuant to Federal Rule 24. Id.

63 Id. at 457. “[T]he broad and absolute construction of § 1109(b) comports with the usual expectation of parties in interest that they will have a right to be heard, as parties in interest, by the tribunal adjudicating their interests.” Id. The court further noted that “[t]his expectation has its roots in notions of due process and fair play . . . .” Id.
right of intervention under § 1109(b).\textsuperscript{64}

B. Fuel Oil Supply and Terminaling v. Gulf Oil Corporation - No Absolute Right to Intervene in Adversary Proceedings

The Court of Appeals for the Fifth Circuit in Fuel Oil held that a creditors' committee did not have an absolute statutory right to intervene under § 1109(b) in an adversary proceeding.\textsuperscript{65} In Fuel Oil, the creditors' committee filed a motion under Rule 24(a)(1) of the Federal Rules of Civil Procedure to intervene as of right in an adversary proceeding.\textsuperscript{66} The district court denied the motion.\textsuperscript{67} Subsequently, the committee appealed to the Fifth Circuit.\textsuperscript{68}

The court of appeals noted that the issue of whether § 1109(b) provided an absolute right to intervene in an adversary proceeding was one of first impression in the Fifth Circuit.\textsuperscript{69} The court first examined Federal Rule of Civil Procedure 24(a)(1) and stated that, as a general rule, courts were reluctant to find unconditional statutory rights of intervention.\textsuperscript{70} Based on various distinctions

\textsuperscript{64} Id. at 453. The court noted that an unqualified right of intervention had existed for nearly four decades without a flood of proceedings. Id. "[W]here intervention is sought by an official creditors' committee that hopes to speed up the proceedings and prevent dissipation of the estate, there is little danger that intervention will unnecessarily deplete the estate, delay the conclusion of the case, or prejudice any party." Id. But see infra note 122 and accompanying text (discussing policy reasons for not allowing absolute right of intervention under § 1109(b)).

\textsuperscript{65} Fuel Oil, 762 F.2d at 1287. See generally Graves, Intervention in Bankruptcy Adversary Proceedings: No Longer an Absolute Statutory Right, 74 ILL. B.J. 280 (Feb. 1986) (agreeing with Fuel Oil's holding).

\textsuperscript{66} Fuel Oil, 762 F.2d at 1284. Before the creditors' committee filed the motion to intervene however, it brought a suit to initiate an adversary proceeding which the court dismissed the suit for lack of standing. Id.

\textsuperscript{67} Id.

\textsuperscript{68} Id. On appeal, the creditors' committee argued that § 1109(b) was a "'statute confer[ring] an unconditional right to intervene' within the meaning of rule 24(a)(1), Fed.R.Civ.P." Id. (quoting Fed. R. Civ. P. 24(a)). See supra note 23 (statutory language of Federal Rule 24(a)); supra note 24 (examples of statutes granting absolute right of intervention).

\textsuperscript{69} Fuel Oil, 762 F.2d at 1285. The court noted that only a few other courts had addressed the issue of whether a creditors' committee had an absolute right of intervention in an adversary proceeding pursuant to § 1109(b). Id. (citations omitted).

\textsuperscript{70} Id. at 1286 (citations omitted). The court reasoned that "[t]he 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 rarely given an unconditional statutory right to intervene." Id. (citation omitted). See also supra note 24 (situations where courts have granted absolute right to intervene to United States).

Based on the foregoing, the Fuel Oil court asserted that § 1109(b) was not the kind of
Adversary Proceedings

made between "case" and "adversary proceedings" in Title 28 of the United States Code and the Bankruptcy Rules, the court then asserted that the term "case" in § 1109(b) did not include "adversary proceeding." Since the court found § 1109(b) inapplicable to adversary proceedings, the statute did not qualify as a statute conferring an absolute, unconditional right of intervention.

Next, the court compared the committee's right of intervention in adversary proceedings with the right to initiate such actions. The court reasoned that the right of initiation was not absolute and therefore there was no absolute right of intervention in adversary proceedings. Finally, the court noted that the absence of an absolute right to intervene in an adversary proceeding did not infringe upon the statute's broad and important right to appear and be heard since intervention as of right could still be sought under Rule 24(a)(2) of the Federal Rules of Civil Procedure.


In Allegheny, the bankrupt company and its subsidiaries filed for reorganization under Chapter 11. Prior to filing, the company had engaged in some allegedly preferential transfers to a group of creditors which normally granted an absolute right of intervention. Fuel Oil, 762 F.2d at 1286.

[A]n examination of the Code of Judiciary and Judicial Procedure (Title 28, United States Code) and of the Bankruptcy Rules reveals that Congress in many instances has drawn distinctions between bankruptcy "cases" and the proceedings related to them. Examples of the distinctions drawn under Title 28 include separate provisions dealing with jurisdiction, 28 U.S.C. § 1471(a) and (b); abstention, 28 U.S.C. § 1471(d) and 11 U.S.C. § 305....

Id. at 1286. See infra notes 92-101 and accompanying text (discussion of distinctions between "case" and "proceedings").

Fuel Oil, 762 F.2d at 1287. "We are convinced 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)." Id.

See id. The court concurred with recent decisions which held that under § 1109(b), a creditors' committee could initiate adversary proceedings "only if the bankruptcy trustee or debtor-in-possession has failed to act to protect the creditors' interests." Id. (citations omitted).

"Our conclusion with respect to this legislative intent in no way restricts the broad, legitimate right to appear and be heard that § 1109(b) grants to parties in interest." Id.

Allegheny, 107 Bankr. at 519.
banks.\textsuperscript{77} Since the debtor chose not to commence legal proceedings to recoup these assets, the creditors' committee, with the court's permission, brought an adversary proceeding against the banks on the bankrupt estate's behalf.\textsuperscript{78} The equity committee objected to the creditors' committee's choice of counsel to litigate the adversary proceeding and sought to intervene.\textsuperscript{79} The equity committee's motion for intervention was granted in part by the bankruptcy court.\textsuperscript{80} On appeal, the district court affirmed that portion of the bankruptcy court's decision allowing the equity committee to intervene and reversed the bankruptcy court as to its denial of the equity committee's motion.\textsuperscript{81}

After initially addressing jurisdictional issues,\textsuperscript{82} the court examined whether an equity committee possessed an unqualified right to intervene in an adversary proceeding.\textsuperscript{83} The district court criticized the bankruptcy court for deciding that \textit{Marin} was "no longer good law," attacking the lower court's reasoning that Bankruptcy Rules 2018 and 7024, enacted after \textit{Marin}, rendered § 1109(b) inapplicable to adversary proceedings.\textsuperscript{84} The \textit{Allegheny} court then criticized \textit{Fuel Oil} for not considering \textit{Marin}'s discussion of the difference between commencing a bankruptcy petition and commencing an adversary proceeding.\textsuperscript{85} 

\textsuperscript{77} \textit{Id.} at 520. The transfers in question involved over $440 million of Allegheny's assets to various banks. \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} The equity committee claimed that the attorney had a conflict of interest since he had represented some of the defendant banks in previous litigations. \textit{Id.} The bankruptcy court rejected the equity committee's claim and therefore, the equity committee, pursuant to Federal Rule of Civil Procedure 24(a)(1) and (a)(2), sought to intervene in the adversary proceeding commenced by the creditors' committee. \textit{Id.} See \textit{supra} notes 23-24 and accompanying text (discussing Federal Rule 24).
\textsuperscript{80} \textit{Allegheny}, 107 Bankr. at 520-21. The bankruptcy court ruled that the equity committee could intervene as to the causes of action involving equitable subordination and breach of the duties of good faith and fair dealing. \textit{Id.} The court opined that since these claims involved money owed only to equity holders and not to other creditors, the equity holders' committee would not be adequately represented in the adversary proceeding by the creditors' committee. \textit{Id.} The equity committee was not allowed to intervene as to the first nine counts of the complaint which involved fraudulent transfers. \textit{Id.} at 520. It was the opinion of the bankruptcy court that any recovery as to these nine causes of action would increase the recovery of all creditors. \textit{Id.}
\textsuperscript{81} \textit{Id.} at 525.
\textsuperscript{82} \textit{Id.} at 521-23.
\textsuperscript{83} \textit{Id.} at 523-25.
\textsuperscript{84} \textit{Id.} at 523-24.
\textsuperscript{85} \textit{Allegheny}, 107 Bankr. at 524. The court stated that, under 11 U.S.C. §301, a volun-
Adversary Proceedings

gheny applied this analysis to the advisory committee note for Bankruptcy Rule 7024 and interpreted the committee note as requiring intervention in adversary proceedings to be sought separately. Additionally, Allegheny interpreted Rule 2018 as applying to parties not governed by § 1109(b). The court then compared the substantive right to intervene, which Marin construed § 1109(b) as providing, with procedural rights under the bankruptcy rules. In conclusion, Allegheny noted that although Fuel Oil's arguments were persuasive, only the Third Circuit could decide to ignore Marin.

III. NO ABSOLUTE RIGHT OF INTERVENTION IN ADVERSARY PROCEEDINGS UNDER § 1109(b)

As previously noted, the only circuit courts of appeals which have addressed the question of whether a creditors' committee has an absolute statutory right of intervention in an adversary proceeding are the Third and Fifth Circuits. The discussion which follows suggests that Marin incorrectly interpreted § 1109(b) as conferring an absolute right of intervention in an adversary proceeding and that Fuel Oil properly asserted that there is no unconditional right of intervention in such a proceeding.
A. Distinctions Between "Case" and "Adversary Proceedings"

Marin interpreted the term "case" in § 1109(b) to encompass adversary proceedings when it asserted that the statute conferred an absolute right of intervention. However, it is submitted that "case" does not include "proceedings" based on distinctions made between the two terms in Title 28 of the Code of Judiciary and Judicial Procedure, Title 11 of the Bankruptcy Code, and the Bankruptcy Rules.

In Title 28 Section 157, Congress made separate reference to "case" and "proceedings" when it granted district courts the power to refer "cases under title 11 and . . . proceedings . . . related to a case under title 11." Title 11 of the Bankruptcy Code addresses "case" and "proceedings" separately in Section 305 dealing with abstention. Under Title 11, "case" has been de-
Adversary Proceedings

defined as "the original bankruptcy petition itself from which all other proceedings spring." The bankruptcy context, "proceeding" is a broad and general term while "case" is more specific. Therefore, it is submitted that "case" in § 1109(b) does not include "adversary proceeding."

Although "adversary proceeding" is not defined anywhere in the Code, it is classified by the Bankruptcy Rules. The present Bankruptcy Rules draw many distinctions between "case" and "proceedings." Bankruptcy Rule 1001 differentiates between the two terms and provides that the bankruptcy rules apply under Title 11. Additionally, Part VII of the Bankruptcy Rules specifically addresses the procedure used in adversary proceedings.

of state court action); In re G-N Partners, 48 Bankr. 459, 461-62 (Bankr. D. Minn. 1985) (creditors' motion for dismissal of bankruptcy case under § 305 denied; no showing that dismissal was in debtor's or creditors' best interests). See also In re O'Neil Village Personal Care Corp., 88 Bankr. 76, 79 (Bankr. W.D. Pa. 1988) (key issue in determining § 305 dismissal is whether it will serve best interests of both debtor and creditor).

American Energy, 50 Bankr. at 178. See Hanover, 61 Bankr. at 553. "An adversary action is essentially a civil action nested within a bankruptcy case." Id.; Weinstaub & Resnick, supra note 1, ¶ 6.05[2], at 6-22. "The typical bankruptcy case, although itself an uncontested matter, may be characterized as an umbrella under which numerous related lawsuits may be litigated." Id. "The Bankruptcy Rules require that any party who desires to obtain any one of ten specific forms of relief in a bankruptcy case must proceed by initiating an adversary proceeding." Id. (emphasis in original).

See In re S. E. Hornsby & Sons Sand & Gravel Co., Inc., 45 Bankr. 988, 994 (Bankr. M.D. La. 1985). The Hornsby court, in referring to the jurisdictional scheme under 28 U.S.C. § 157, qualified a "case under Title 11" as "the bankruptcy case per se." Id.; Segarra, 14 Bankr. at 878. The Segarra court described case as "the meat and potatoes of a Chapter 11;" the time when plans are negotiated, a debtor's conduct investigated, and the need for a trustee considered. Id.


See infra notes 98-101 and accompanying text (addressing distinctions between two terms).


The Bankruptcy Rules define the process by which Bankruptcy Code privileges are effected. Hanover, 61 Bankr. at 552.

Rule 7001 describes an adversary proceeding as a proceeding in a bankruptcy court and classifies various actions as adversary proceedings. A distinction is also made between “case” and “adversary proceedings” in Bankruptcy Rules 2018 and 7024.

Based on the distinctions made between “case” and “proceedings” throughout the relevant statutes, it is submitted that “case” as used in § 1109(b) does not include “adversary proceedings.”

B. § 1109(b) - Substantive Right v. Procedural Rule

The Fifth Circuit in Fuel Oil determined that, because of the distinctions made between “case” and “proceedings,” particularly the differences drawn by the advisory committee note to Bankruptcy Rule 7024 regarding intervention, § 1109(b) did not confer an absolute right of intervention in adversary proceedings. However, if Marin is correct that § 1109(b) grants an absolute statutory right of intervention in adversary proceedings, “it would
be a substantive right that could not be nullified by procedural rules."\footnote{Allegheny, 107 Bankr. at 524. See Gross & DeNatale, The Right of the Creditors' Committee to be Heard Under § 1109(b): An Update, Norton Bankr. L. Adviser 1985-11, at 6 (absolute right of intervention granted under § 1109(b) is substantive). But see Neuman, 103 Bankr. at 497. The Neuman court rejected Marin's position that § 1109(b) conferred an unconditional right to intervene and concluded that no substantive right was affected. Id.}

Bankruptcy rules, which are promulgated by the Supreme Court, are inherently procedural.\footnote{Neuman, 103 Bankr. at 496. See Hanover, 61 Bankr. at 553. Section 2075 of Title 28 is "[t]he enabling statute authorizing the creation of Bankruptcy Rules . . . ." Id.; 28 U.S.C. § 2075 (1988). The rule provides in pertinent part: "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11." Id.; see also United New Mexico Bank v. Wilferth (In re Wilferth), 57 Bankr. 693, 695 (Bankr. D.N.M. 1986) (inconsistent procedural rule controlled by bankruptcy statute).} Congress restricted the reach of the rules when it provided that they could not "abridge, enlarge, or modify any substantive right."\footnote{See 28 U.S.C. § 2075 (1988).}

It is submitted, however, that § 1109(b) does not confer a substantive right of intervention in adversary proceedings because it is suggested that § 1109(b) does not apply to adversary proceedings.\footnote{The opponent of a bankruptcy rule has a "'heavy burden' of showing that [the rule] deals with matters of substance rather than procedure." Wolff v. Wells Fargo Bank (In re Moralez), 618 F.2d 76, 78 (9th Cir. 1980). Congress deferred to the Supreme Court's expertise in formulating rules of practice and procedure and a thorough process of review was undertaken before the rules became effective. Id. See also Ford Motor Credit Co. v. Wall (In re Wall), 403 F. Supp. 357, 360 (E.D. Ark. 1975). "There is a strong presumption that the Supreme Court did not abridge or modify any substantive right" when it adopted the bankruptcy rules. Id. If the Supreme Court had overstepped its authority in promulgating rules pursuant to § 2075, "such transgression would have been noted and the offending rule modified or deleted upon review." Id. See, e.g., In re National Store Fixture Co., 37 Bankr. 481, 489 (Bankr. W.D. Mo. 1984) (denial of right of association and right to engage in particular profession frustrated by extension of Rule 5002 to bar appointment as trustee of person who associated with relative of judge making appointment). Cf. HFG Co. v. Pioneer Pub. Co., 162 F.2d 536, 539 (7th Cir. 1947) (Federal Rules of Civil Procedure enjoy strong presumption of procedural character due to process accompanying enactment).}

It is further proposed that Marin improperly expanded the substantive right to be heard "in any issue in a case" to include the right to intervene in "adversary proceedings." While a substantive, absolute right is granted in § 1109(b), it is suggested that this right applies only to the main bankruptcy case and not to adversary proceedings.\footnote{See supra notes 92-101 and accompanying text (discussing distinctions between "case" and "proceedings").}
The proposed interpretation of § 1109(b) still comports with the statute's legislative history of expanding creditors' rights.109 While Section 77B, the predecessor statute to § 1109(b), merely permitted creditors an absolute right to be heard on two occasions,110 a creditors' committee today is given additional powers under the Bankruptcy Code.111

C. Creditors' Committee's Right to Initiate Adversary Proceedings

The court in Fuel Oil found further support for its interpretation of § 1109(b) in bankruptcy cases which addressed a creditors' committee's right to initiate adversary proceedings.112

The authority for a creditors' committee to initiate adversary proceedings, although not expressly stated in the Bankruptcy Code,118 has been found under § 1109(b)114 and under Section 1103(c)(5) of Title 11 of the Bankruptcy Code.116 Under both

109 See supra notes 27-36 and accompanying text (legislative history of § 1109(b)).
110 Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 911, 917 (1934). In reorganizations, creditors could only be heard on the permanent appointment of a trustee and on the approval of any reorganization plan. Id. See supra notes 29-30 and accompanying text (discussion of § 77B, predecessor to § 1109(b) and Chapter X Section 206).
118 See Fuel Oil, 762 F.2d at 1287.
114 See Fuel Oil, 762 F.2d at 1287 (court agreed that § 1109(b) permitted creditors' committee to initiate adversary proceeding but only if trustee did not adequately represent committee); Creditors' Comm. for Jermoo's Inc. v. Jermoo's, Inc., (In re Jermoo's, Inc.), 58 Bankr. 197, 199-200 (Bankr. W.D. Wis. 1984) (creditors' committee may initiate proceeding under § 1109(b) when trustee or debtor-in-possession breaches statutory duties); Chemical Separations Corp. v. Foster Wheeler Corp. (In re Chemical Separations Corp.), 32 Bankr. 816, 819 (Bankr. E.D. Tenn. 1983) (§ 1109(b) permitted creditors' committee to commence adversary proceeding against insider of bankrupt estate when debtor-in-possession unjustifiably declined bringing claim it might have against insider); Joyanna Holitogs, 21 Bankr. at 326 (creditors' committee had right to sue where trustee or debtor-in-possession unjustifiably would not). But see Segarra v. Banco Central y Economias (In re Segarra), 14 Bankr. 870, 878 (Bankr. D.P.R. 1981) (creditors' committee cannot initiate adversary proceedings pursuant to § 1109(b)).
116 See In re Evergreen Valley Resort, Inc., 27 Bankr. 75, 75-76 (Bankr. D. Me. 1983). The court stated that under § 1103(c)(5), a creditors' committee was authorized to initiate
provisions, standing for a creditors' committee to commence such proceedings has been found where the court determined that the trustee or debtor-in-possession of the bankrupt estate did not adequately protect the interests of the creditors' committee.\textsuperscript{116} This analysis of initiating adversary proceedings is similar to the analysis used in implementing Federal Rule of Civil Procedure 24(a)(2), which deals with intervention as of right when the intervenor's interests are not sufficiently represented.\textsuperscript{117} Consequently, it is submitted that a creditors' committee should only be allowed to intervene as of right if its interests are not being protected.\textsuperscript{118}

**D. Policy Reasons for Not Allowing Absolute Right of Intervention Under § 1109(b)**

It is submitted that § 1109(b) should not confer an absolute right of intervention in adversary proceedings for various policy reasons.

an adversary proceeding against the sole stockholder of a debtor where the debtor failed to act upon a claim which would benefit the bankrupt estate. \textit{Id.}; Official Creditors' Comm. of Wesco Prods. Co. v. Alloy Automotive Co. (\textit{In re Wesco Prods. Co.}, 22 Bankr. 107, 109 (Bankr. N.D. Ill., 1982). Section 1103(c)(5) grants implied authority for a creditors' committee to initiate adversary proceedings when the trustee acts improperly. \textit{Id.} While the court in \textit{Wesco} recognized Section 1103(c)(5)'s implied right for a creditors' committee to initiate adversary proceedings, it did not permit the creditors' committee to do so since the debtor-in-possession acted in good faith and initiated an adversary proceeding itself. \textit{Id. See also Monsour Medical Center}, 5 Bankr. at 718-19 (§ 1103(c)(5) restricted creditors' right to initiate suit on behalf of bankrupt estate).

\textsuperscript{116} See supra notes 114-15 (citing cases where creditors' committees were not allowed to initiate proceedings unless their interests were unprotected). See generally Blain & Erne, \textit{Creditors' Committees Under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers and Duties}, 67 MARQ. L. REV. 491, 505-09 (1984) (discussing creditors' committee standing to initiate adversary proceedings).

Some courts have allowed a creditors' committee to initiate proceedings only on behalf of the bankrupt estate, while other courts have allowed the committee to maintain an action in its own name. \textit{Compare} Hansen v. Finn (\textit{In re Curry and Sorenson, Inc.}), 57 Bankr. 824, 828-29 (Bankr. 9th Cir. 1986) (“action to set aside a fraudulent transfer must be brought in the name of the bankruptcy estate as the real party in interest”) \textit{with In re Nicolet, Inc.}, 80 Bankr. 733, 739 (Bankr. E.D. Pa. 1987) (committee can bring suit in its own name).

\textsuperscript{117} See \textit{Fuel Oil}, 762 F.2d at 1287. The court in \textit{Fuel Oil} stated that the bankruptcy courts which gave a creditors' committee a qualified and non-absolute right to initiate adversary proceedings used the same analysis for intervention in adversary proceedings under Rule 24(a)(2) of the Federal Rules of Civil Procedure. \textit{Id. Accord} CVC, Inc. v. Conway, Patton & Bowhall, HR 10 Bank One, Akron, N.A. (\textit{In re CVC, Inc.}), 106 Bankr. 478, 479 (Bankr. N.D. Ohio 1989) (finding \textit{Fuel Oil}'s reasoning “limiting intervention of right to the standards in R.24(a)(2) to be more persuasive” than \textit{Marin}'s). \textit{See also supra} note 23 (text and discussion of Federal Rule 24(a)(2)).

\textsuperscript{118} See \textit{Fuel Oil}, 762 F.2d at 1287.
reasons. While both the Chapter 11 debtor-in-possession and the trustee are fiduciaries responsible for protecting the bankrupt estate's assets,\textsuperscript{119} the creditors' committee is entitled to review and participate in a bankruptcy case in limited situations.\textsuperscript{120} It is submitted that an interpretation of § 1109(b) which allows a creditors' committee the absolute right to intervene in adversary proceedings would hinder the debtor-in-possession and the trustee in the performance of their obligations. The courts should reinforce the powers and fiduciary responsibilities of the debtor-in-possession and the trustee rather than undermine them by granting an absolute statutory right of intervention.\textsuperscript{121} It is suggested that in order to foster the delicate balance of designated duties of the debtor-in-possession and the trustee with those of the creditors' committee, Rule 24(a)(2) of the Federal Rules of Civil Procedure is the proper conduit for intervention in adversary proceedings.

Intervention by creditors' committees interferes with expediency and simplicity which are crucial in bankruptcy cases in order to keep administrative expenses at a minimum and to strive for prompt distribution of creditors' claims.\textsuperscript{122} The authors believe

\begin{flushright}
\textsuperscript{119} See Northwestern Nat'l Bank of St. Paul v. Halux, Inc. (\textit{In re} Halux, Inc.), 665 F.2d 213, 216 (8th Cir. 1981). \textquote{A debtor-in-possession or a trustee, not the creditor, has the duty to protect and conserve the property in his possession for the benefit of creditors.}\textit{ Id. (citations omitted); Sarah R. Neuman Found., Inc. v. Garrity (\textit{In re} Neuman), 103 Bankr. 491, 500 (Bankr. S.D.N.Y. 1989). The court in \textit{Neuman} asserted that a Chapter 11 debtor-in-possession or trustee is a designated fiduciary per the Bankruptcy Code. \textit{Id.; First Wisconsin Nat'l Bank of Milwaukee v. Terex Corp. (\textit{In re} Terex Corp.), 53 Bankr. 616, 620 (Bankr. N.D. Ohio 1985). To fulfill fiduciary obligations, the debtor-in-possession and the trustee \textquotemust conduct its affairs in the best interests of the estate which includes the collection of assets for the estate.}\textit{ Id.; 11 U.S.C. §§ 1106, 1107 (1988) (duties of trustee and debtor-in-possession). See also Sowerwine v. Air Canada (\textit{In re} REA Holding Corp.), 8 Bankr. 75, 81 (Bankr. S.D.N.Y. 1980). \textquotetHERE is a broad sense of equity and fiduciary duty pervading the entire bankruptcy administration.}\textit{ Id.}
\end{flushright}

\begin{flushright}
\textsuperscript{120} See \textit{Neuman}, 103 Bankr. at 500. \textquote{The creditors' committee \ldots has\ldots rights of participation and oversight in a bankruptcy case which are spelled out in the Bankruptcy Code and Rules.}\textit{ Id.; Terex, 53 Bankr. at 621. A creditors' committee's role in an adversary proceeding is to monitor and to keep informed of all major developments in the proceeding. \textit{Id.; REA Holding, 8 Bankr. at 81. A creditors' committee advises creditors of their rights and of the proper course of action to be taken. \textit{Id.}}
\end{flushright}

Section 1103 of Title 11 of the United States Code lists the powers and duties of creditors' committees. See 11 U.S.C. § 1103 (1988); \textit{supra} note 8 (text of § 1103).

\begin{flushright}
\textsuperscript{121} See \textit{Neuman}, 103 Bankr. at 501. \textquote{It should be the court's role to reinforce the trustee's Bankruptcy Code-granted authority and fiduciary responsibility for the management of the estate and not to weaken it through multiple interventions.}\textit{ Id.}
\end{flushright}

\begin{flushright}
\textsuperscript{122} See \textit{Terex}, 53 Bankr. at 621. Intervention by creditors' committees \textquote{would necessitate renewed discovery demands and result in duplicitous effort, larger attorney fees, and

372
that these policy considerations are better achieved by not allowing creditors' committees an absolute right of intervention pursuant to § 1109(b).

CONCLUSION

A creditors' committee does not have an absolute right of intervention in adversary proceedings pursuant to § 1109(b) of Title 11 to the United States Code. Rather, § 1109(b) grants an absolute right to be heard in the main bankruptcy case.

The entire Bankruptcy Code is silent with respect to adversary proceedings whereas the Bankruptcy Rules do address intervention in adversary proceedings. The Bankruptcy Rules specifically implement Rule 24 of the Federal Rules of Civil Procedure to afford a creditors' committee with an opportunity to intervene if the circumstances require. Thus, the creditors' committees' interests are protected while interference in the bankruptcy case and any adversary proceeding is minimized.

Stacey A. Fabrizio & Maria T. Rivero

higher consequent cost to the estate, thereby depleting the reserve for the unsecured creditors." Id.; H.R. REP. No. 595, 95th Cong., 2nd Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5975. "Speed and efficiency in bankruptcy is . . . essential, because delay only operates to devalue assets, hinder financial rehabilitation, and prevent exercise of right." Id. See also Neuman, 103 Bankr. at 500 (intervention in adversary proceeding by creditors' committee imposes added expense on bankrupt estate and interferes with compromise and settlement of litigation); Official Creditors' Comm. of Wesco Prods. Co. v. Alloy Automotive Co. (In re Wesco Prods. Co.), 22 Bankr. 107, 110 (Bankr. N.D. Ill. 1982) ("unnecessary duplication in litigation must and will be avoided . . . ").