IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 11
ELCOM TECHNOLOGIES CORPORATION	:
DEBTOR	: BANKRUPTCY NO. 98-13343 SR
KURT F. GWYNNE, AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS	:
PLAINTIFFS	:
V.	:
ROBERT A. VITO, MYRDDIN L. JONES, JOHN WADE SEEDOR, ROBERT KOUCH, ROBERT B. SANDO, STEPHEN B. PUDLES, C.B. PATEL, LOUIS PETRIELLO	: ADVS. NO. 98-435
DEFENDANTS	:

OPINION

BY: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE

American Dynasty Surplus Lines Insurance Company ("American Dynasty") moves to intervene in this adversary proceeding so that it may press to have dismissed those claims which have been separately advanced herein by one of the Plaintiffs; i.e., the Official Committee of Unsecured Creditors of Elcom Technologies Corporation (the "Committee"). The Motion is opposed by the Committee in both of its respects. As to intervention, the Committee argues that American Dynasty lacks standing. Even if permitted to intervene, the Committee argues that American Dynasty's Dismissal Motion lacks merit. Oral argument was heard on August 17, and August 23, 2000, and the matter has been fully briefed. For the reasons discussed herein, the Court concludes that

American Dynasty does lack standing to intervene in this lawsuit, and its request to do so must therefore be denied. This disposition obviates the need to adjudicate American Dynasty's Dismissal Motion on its merits.

Background.

An appreciation of the broad background to this lawsuit is hopefully to be gained from this Court's opinion in this action dated February 14, 2000, and its opinion dated March 2, 2000 in a related action captioned *James Wade Seedor, M.D. and Paul Kouch, vs. American Dynasty Surplus Lines Insurance Company, Zurich American Insurance Company, TIG Specialty Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, Stonewall Insurance Company, Kurt F. Gwynne, Trustee, and Official, Committee of Unsecured Creditors,* Adversary No 99-951 (the "Seedor Action"). History, accordingly, will be recounted here only as necessary. At this juncture, American Dynasty, as noted above, desires to intervene in the present adversary proceeding for the purpose of seeking dismissal of the four counts which have been brought herein by the Creditors Committee. This would leave remaining the 28 counts which have been separately brought against the Defendants by Plaintiff Kurt F. Gwynne, Esquire, (the "Trustee") as the representative of the Reorganized Debtor pursuant to 11 U.S.C. § 1123(b)(3). American Dynasty's Dismissal Motion is predicated on its own assertion that the Committee lacks standing to prosecute the four causes of action in question because the right to bring those claims belongs solely to the Trustee as Elcom's representative. American Dynasty explains its intrusion into this litigation as being necessary because none of the Defendants herein will bring the dismissal motion which American Dynasty believes is warranted.

Indeed, American Dynasty notes that the Plaintiffs in the Seedor Action (the "Seedor Plaintiffs") have at times actually argued in support of the Committee's standing to bring the four claims in question. American Dynasty describes this as a curious spectacle, but an understandable one given that the Seedor Plaintiffs assert the existence of these claims as a basis for their demand for insurance coverage, which coverage question, of course, forms the heart of the issue in the Seedor Action.

The Committee argues that it is American Dynasty's motive, in contrast, which is transparent and that American Dynasty has appeared here only in the hopes of improving its position in the Seedor Action by eliminating the Committee claims as a possible basis for the Seedor Plaintiffs to demand defense costs and indemnification. The Committee likewise has stressed the obvious irony of American Dynasty first denying coverage to the Seedor Plaintiffs, but then attempting to influence, if not dictate their litigation tactics by virtue of this motion. More to the point, however, the Committee argues that American Dynasty cannot, on these facts, demonstrate the requisite standing to intervene in this lawsuit under Federal Rule of Civil Procedure 24(a), (as incorporated under Federal Rule of Bankruptcy Procedure 7024) and 11 U.S.C. § 1109(b). The standing question is, of course, of threshold importance, and discussion of this issue at oral argument in fact produced a somewhat unusual twist. During the course of oral argument, the Seedor Plaintiffs expressed an interest in bringing their own dismissal motion as to the Committee claims, albeit on essentially the exact same grounds as American Dynasty, in the event that American Dynasty's request to intervene in this lawsuit were to be denied. Such a scenario might have largely eliminated the need to consider standing issues, since the Seedor plaintiffs as party defendants obviously have standing here. American Dynasty's

continued status in this contested matter was identified as an issue of lingering concern to the Committee, which foresaw the possibility of an appeal from any decision on the merits of the dismissal motion, but that discussion would not have stood in the way of considering the dismissal request on its merits. The Seedor Plaintiffs ultimately did, in fact, elect to press their own Motion to Dismiss the Committee's claims, although but for a brief separate written submission on their part, the form which the Seedor Plaintiffs dismissal motion took was basically their joinder to the papers and oral arguments presented by American Dynasty.

Such was the state of affairs when this matter was taken under advisement by the Court. Subsequent thereto, counsel for the Seedor plaintiffs and the Committee advised the Court of a tentative settlement of this litigation as between them. The matter was held briefly in abeyance pending clarification of that development. The parties have since confirmed that the underlying lawsuit has been settled as between the plaintiffs herein and the Messrs. Seedor and Kouch, although the terms of such settlement are not known to the Court. The Seedor Plaintiffs, in any event, no longer press any request for dismissal of the present action on their part. The question of the standing of American Dynasty to intervene and seek such relief consequently returns to the front and the center. Having considered the parties' competing positions, the Court concludes that the Committee has the better part of the standing argument.

Discussion.

Both parties focus correctly on the applicable statutory provisions. Federal Rule of Civil Procedure 24(a), as incorporated by Federal Rule of Bankruptcy Procedure 7024, provides that upon timely application anyone shall be permitted to intervene in an action

when a statute of the United States confers an unconditional right to intervene. In this case, American Dynasty relies on the intervention rights found at 11 U.S.C. § 1109(b). Section 1109(b) of the Bankruptcy Code provides, as follows:

> 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.

Both sides agree that, as construed by the Third Circuit Court of Appeals, Section 1109(b) gives any party in interest an absolute right to intervene in any adversary proceeding. *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1230-32, 1240-41 (3d Cir. 1994); *In re Amatex Corp.*, 755 F.2d 1034, 1042-44 (3d Cir. 1985); *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 447-57 (3d Cir. 1982), *cert. denied. sub nom, Michaels v. Official Unsecured Creditors Committee*, 459 U.S. 1206 (1983). Where the parties part company is in their answer to the question of whether American Dynasty is a "party in interest." American Dynasty contends that it is plainly a party in interest as that term is used in Section 1109(b) of the Bankruptcy Code. The Committee insists that it is not. Both sides again cite Third Circuit law in support of their position.

In *Amatex,* the Circuit Court stated that the term "party in interest" must be construed broadly to permit parties affected by a Chapter 11 proceeding to appear and be heard. A party in interest, said the Court, is any party who has a sufficient stake in the outcome of a proceeding so as to require representation. *Id.* American Dynasty maintains that it has a direct and substantial stake in obtaining dismissal of the Committee's claims because if those claims are dismissed, the only remaining claims that will be left will be the

Plaintiff Trustee's claims, which claims American Dynasty believes it will easily succeed in refuting as a sustainable basis for the Seedor Plaintiffs demand for insurance coverage in the Seedor Action. The Committee, on the other hand, points out that American Dynasty itself has no monetary claim against the Elcom Bankruptcy Estate. The Committee argues that American Dynasty's interest in this proceeding is contingent and indirect, emphasizing that American Dynasty has no economic interest whatever in the underlying lawsuit here, and stressing that before American Dynasty could ever be economically affected by the consequences of this lawsuit, the Seedor Plaintiffs must first be found liable herein, and the coverage issue in the Seedor Action must be resolved in favor of the Seedor Plaintiffs. The Court finds this argument to be sound.

The Third Circuit Court of Appeals has elaborated on the concept of standing in bankruptcy cases in the context of an appeal from an order of the Bankruptcy Court, as follows:

> Section 39(c) [1][2] Section 39(c) of the Bankruptcy Act of 1898, 11 U.S.C. § 67(c) (1976) limited appellate standing in bankruptcy cases to "person[s] aggrieved by an order of a referee." Although this provision was repealed in 1978, it has been maintained by the courts as an essentially prudential requirement that only those who have been directly and adversely affected pecuniarily by an order of a bankruptcy court may bring an appeal. *See In re Fondiller*, 707 F.2d 441, 443 (9th Cir.1983). Notably, the standing requirement in bankruptcy appeals is more restrictive than the "case or controversy" standing requirement of Article III, which "need not be financial and need only be 'fairly traceable' to the alleged illegal action." *Kane v. Johns-Manville Corp.,* 843 F.2d 636, 642 n. 2 (2d Cir.1988) (citations omitted). . . .

Travelers Ins. Co. v. H.K. Porter Co., Inc., 45 F.3d 747, 741 (3d Cir. 1995).

The *Travelers* court reaffirmed the definition of a "person aggrieved" articulated in

In re Dykes, 10 F.3d 184 (3d Cir. 1993). An entity is "aggrieved" by a bankruptcy order if the order "diminishes their property, increases their burdens, or impairs their rights." *Id*. at 188; *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 495 (3rd Cir. 1998); *Travelers Ins. Co. v. H.K. Porter Co., Inc.,* 45 F.3d at 742. The Committee argues, correctly in the Court's view, that the teachings of *Travelers* apply in this context if not expressly from its facts, then by necessary implication, since if an entity lacks standing to appeal a Bankruptcy Court Order it lacks standing to litigate the entry of such Order in the first place.

Measured against the "person aggrieved" test of *In re Dykes*, American Dynasty's claim to standing herein fails. The outcome of the present lawsuit will take no property from it, impose no obligations upon it, nor impair any right it possesses, for no such relief is even sought by the Plaintiffs. American Dynasty comes before the Court as precisely the sort of "marginal party" referred to in *Travelers* which lacks standing – that is to say, one involved in a Bankruptcy proceeding in the sense of facing some potential exposure incident to the Bankruptcy Court's ultimate Order, but nevertheless not "directly affected" in such a way as to confer standing to intervene.

It is, indeed, easy to imagine the havoc which might follow if every defendant's liability insurer could intervene as of right in an adversary proceeding on the basis of the rather simplistic rationale advanced here by American Dynasty. The Committee notes that this issue came before the First Circuit Court of Appeals in *Travelers Indem. Co. v. Dingwell,* 884 F.2d 629, 638-43 (1st Cir. 1989), and that the Court there essentially confirmed the proposition that a liability insurer's coverage exposure did not confer

standing to intervene simply because the outcome of the lawsuit would have an impact on coverage issues. American Dynasty cites no authority on this issue to the contrary. American Dynasty instead relies solely on the broad general expressions typically found in standing cases. These general propositions, however, operate as guidelines. The facts of each case must be evaluated. *Amatex, Phar-Mor, and Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1985-87 (5th Cir. 1985), the cases on which American Dynasty relies, all involved parties who are either specifically named in § 1109(b), or parties who at least held claims against the Bankruptcy estate. No such nexus exists here, which is one reason why the significance which American Dynasty attaches to the Trustee and Committee's earlier intervention in the Seedor Action is, for present purposes, misplaced. The Trustee and the Committee are specifically mentioned in § 1109(b), thus eliminating any need to belabor the question of their standing to intervene.

American Dynasty's dissatisfaction with the litigation strategies adopted by the Seedor Plaintiffs in this action does not create standing on American Dynasty's part. Having denied coverage to the Seedor Plaintiffs under the subject insurance policies, American Dynasty has left the Seedor Plaintiffs to their own devices in this proceeding. American Dynasty is not at liberty to appear here to advance the legal rights of others. The Court agrees with the Committee that it would be ironic, indeed, if American Dynasty's decision to absent itself from this proceeding were now to be successfully used by it affirmatively as reason to permit its participation in this proceeding.

In sum, the Court concludes that American Dynasty's status as a potential liability insurer of the Seedor Plaintiffs in their capacity as defendants in the present action does not confer upon American Dynasty standing to intervene into this proceeding as of right

under Section 1109(b) of the Bankruptcy Code. American Dynasty has asserted no other basis in furtherance of its request to intervene in this proceeding. Its request to intervene will therefore be denied. As noted at the outset hereof, this disposition renders it unnecessary to reach the merits of American Dynasty's dismissal motion, which motion will thus be denied as moot.

An appropriate Order follows:

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: February 13, 2001

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ORDER

AND NOW, this 6th day of November 2000, upon consideration the *Motion of American Dynasty Surplus Lines Insurance Company to Intervene and to Dismiss Claims of The Official Committee of Unsecured Creditors of Elcom Technologies Corporation*, the Plaintiffs response in opposition thereto, memoranda of law submitted by the parties, and after hearings held August 17 and August 23, 2000, it is hereby:

ORDERED, for the reasons contained in the accompanying Opinion, the Court finds that American Dynasty lacks standing to intervene in this lawsuit, and its request to do so shall be and hereby is Denied; said disposition obviates the need to adjudicate American Dynasty's Dismissal

Motion on its merits and such motion, therefore, shall be and hereby is denied as moot.

BY THE COURT:

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

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