Chapter 6 -
An Insurer's Standing

An insurer must have standing—or the right to appear and be heard—in a bankruptcy case. Before a bankruptcy court can even consider an insurer's arguments, it must resolve any standing objections. Standing in the bankruptcy context is particularly complex because bankruptcy operates not only to resolve individual disputes in isolation, but to balance the respective rights of parties in interest in the case as a whole as provided by the Bankruptcy Code.

Numerous Bankruptcy Code provisions extend the right to be heard to "parties in interest." *See, e.g.*, §§362(c)-(d) (the automatic stay), 502(a) (claim objections) and 706(b) (converting the bankruptcy case). Section 1109(a) specifically states that parties in interest "may raise and may appear and be heard on any issue in a case under this chapter." Whether an insurer qualifies as a party in interest comes up in a variety of bankruptcy settings.

A. Claim Objections

Section 502(a) of the Bankruptcy Code permits a "party in interest" to object to a claim. 11 U.S.C. §502(a). The phrase "party in interest" is not defined in the Bankruptcy Code. However, courts and commentators recognize that it applies to "those who have some interest in the assets being administered in the case." *In re Standard Insulations Inc.*, 138 B.R. 947, 950 (W.D. Mo. 1992).

The existing case law supports an expansive view of standing. For example, in *In re Standard Insulation Inc.*, the court held that insurers were parties in interest and had standing to seek summary judgment on the issue of their liability for claims against the debtor. 138 B.R. 947, 951 (Bankr. W.D. Mo. 1992). The bankruptcy court analogized the insurers to prospective or future personal injury claimants, who generally have standing to be heard despite the contingent nature of their claims, and found that the insurers were "parties in interest" within the meaning of §502(a).

B. Contesting the Debtor's Retention of Special Counsel

Debtors on occasion may seek to employ special counsel. In mass tort and environmental liability cases, debtors may even retain special insurance counsel to assist in solving insurance coverage issues pertaining to claims against a trust. Courts have held that insurers and their counsel have standing to object to retention of special counsel based on conflict of interest. The Third Circuit in *In re Congoleum Corp.* stated that insurers are entitled to standing, even under the more restrictive standard for standing to appeal, to contest a debtor's application to retain a law firm as special insurance counsel. *In re Congoleum Corp.*, 426 F.3d 675, 685 (3d Cir. 2005). The *Congoleum* court reasoned that "[i]t is an issue based on procedural due process concerns that implicate the integrity of the bankruptcy court proceeding as a whole." *Id.* Most important, the court reasoned that failure to resolve this matter now would mean that it would otherwise go unaddressed. *Id.*; *see also In re Pittsburgh Corning Corp.*, 308 B.R. 716 (W.D. Pa. 2004).

C. Objecting in Plan Confirmation Proceedings

An insurer's standing is critical at the plan confirmation stage, particularly in asbestos and other mass tort cases. Generally, the ability to utilize insurance assets is often the most significant aspect of an asbestos or mass tort bankruptcy case. Thus, the insurer should be able to object to a plan that prejudices its policy rights. Insurers who also have a claim against the debtor may object to any failure of the debtor to comply with requirements for confirmation. 11 U.S.C. §1129.

However, while creditors are parties in interest and clearly have standing to participate in the confirmation of a bankruptcy plan, the courts have not been so consistent with an insurer's interest. For example, one line of cases denies insurers standing. *In Hartford Accident and Indemnity Co. v. Global Industrial Technologies Inc.*, the insurers argued that they had standing to participate in the plan-confirmation process because the plan subjected the insurers to inflated and accelerated indemnification obligations. The district court, however, ruled that the insurers did not suffer an injury in fact because the plan preserved the insurer's coverage defenses and contractual rights. Thus, because the plan was "insurance neutral," the insurers lacked standing.

Conversely, though, other cases hold that the insurers do have standing. For instance, in *In re Quigley Co. Inc.*, 391 B.R. 695 (Bankr. S.D.N.Y. 2008), where the insurers argued that they had standing to participate in the plan confirmation process, the court agreed, and held they had standing as a "party in interest." The *Quigley* court adopted an issue-by-issue approach to standing inquiries. Thus, the *Quigley* court limited the insurer's standing to only those issues that directly affected the insurer's rights and interests. *See also Keck, Mahin & Cate*, 241 B.R. 583 (N.D. Ill. 1999). Additionally, if a reorganization plan is to be funded almost entirely from insurance proceeds, the insurer has standing to object. *In re Am. Capital Equip. LLC & Skinner Engine Co. Inc.*, No. 01-23988-MBM (Bankr. W.D. Pa. 2005).

D. Reopening a Bankruptcy Case

An insurer may even have standing to reopen a debtor's bankruptcy case. Where the debtor failed to disclose a potential cause of action, the insurer argued that judicial estoppel applied to the claim. The debtor returned to bankruptcy without notifying the insurer and reopened the case to vacate his discharge—as if the bankruptcy never happened. The bankruptcy court held that the insurer had standing to reopen the debtor's case a second time for clarification of the dismissal order. *In re Pryor*, 341 B.R. 571 (N.D. Miss. 2006).

E. An Insurer's Standing to Appeal a Bankruptcy Order

Contrary to traditional standing in the early phases of a bankruptcy case, to appeal a bankruptcy court's order, the federal courts require that the appellant be a "person aggrieved." *See, e.g., Lyndon Prop. Ins. Co. v. Katz*, 196 F.Appx 383, 387 (6th Cir. 2006). This is a more restrictive standing requirement. Under this test, standing to appeal a bankruptcy court's order is limited to those who are directly and adversely affected pecuniarily by a bankruptcy court's order. Only those with a financial stake in an order may appeal. This includes diminishing property, increasing burdens, or impairing rights. *Krebs Chrysler-Plymouth Inc. v. Valley Motors Inc.*, 141 F.3d 490, 495 (3d Cir. 1998). An insurer may not be an aggrieved person for appellate standing purposes when it has not yet been directly or adversely affected when its duty to defend and

indemnify may be triggered. *In re First Cincinnati Inc.*, 286 B.R. 49, 52, 53 (6th Cir. 2002) ("[A] bankruptcy court's order does not produce the direct and adverse pecuniary impact necessary to bestow standing on an appellant if the order's effect on the appellant is merely to expose it to risks of litigation."). If, however, a proceeding has an actual effect on a contractual relationship between the debtor and its insurer, the insurer will be an aggrieved person for appellate standing purposes. *Id.* at 52 (stating that bankruptcy court's order vacating automatic stay does not harm insurer because order has no effect on contractual relationship between insurer and insured).