**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF IOWA**

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| IN THE MATTER OF: | : | |
| THOUSAND ADVENTURES, INC. | : | Case No. 97-03618-DJ |
| Debtor. | : | Chapter 7 |
| ERIC W. LAM, Chapter 7 Trustee for THOUSAND ADVENTURES, INC. | : | Adv. Pro. 99-99177 |
| Plaintiff, | : | |
| v. | : | |
| TRAVEL AMERICA, INC., RAYMOND NOVELLI, FIRST NATIONWIDE RESORTS MANAGEMENT, INC., ADVENTURE RESORTS OF AMERICA, PRINCETON CAPITAL FINANCE COMPANY L.L.C., ALLSTATE FINANCIAL CORPORATION, TRAVELERS DATA SERVICE, TRAVELERS ACCEPTANCE CORPORATION, and WESTERN AMERICAN NATIONAL BANK, | : | |
| Defendants, | : | |
| TONY ROSS, individually and on behalf of all other persons similarly situated, | : | |
| Intervener. | : | |

**RULING ON INTERVENTION**

On August 5, 1997 Tony Ross, individually and on behalf of all other persons similarly situated, Mid Kansas Propane, Inc. and Mid Kansas Sanitation filed an involuntary Chapter 11 petition in the Southern District of Iowa against Thousand Adventures, Inc., a Nebraska corporation in the campground resort business. On September 12, 1997 Thousand Adventures, Inc, commenced a voluntary Chapter 11 case in the Southern District of Texas.

On October 29, 1997 the Debtor filed a motion to convert that case to one under Chapter 7. On February 5, 1998, after the Debtor's Chapter 11 case had been transferred to the Southern District of Iowa, this Court directed that an order for relief be entered in the involuntary case, consolidated both Chapter 11 cases, ruled the August 5, 1997 petition date would control, and then converted the matter to a case under Chapter 7.

On September 10, 1999 the Chapter 7 Trustee filed the Complaint initiating this adversary proceeding. The Complaint alleges fraudulent transfers, conversion, trademark infringement, conspiracy to convey the Debtor's assets to avoid liability and breach of contract by various defendants in a series of nebulous transactions occurring both before and after the bankruptcy filings. All Defendants have filed answers.

On November 26, 1999 Tony Ross ("Applicant"), a consumer holding a campground membership with the Debtor, filed a motion for leave to join as a party plaintiff on behalf of himself and others similarly situated. With the exception of Western American Bank and Allstate Financial Corp., all existing parties opposed that motion. On February 1, 2000 the Court denied the motion without prejudice and allowed the Applicant the opportunity to file a motion to intervene. On February 25, 2000 the Applicant, individually and as a class representative, filed a motion to intervene as a party plaintiff pursuant to Federal Rule of Civil Procedure 24(a)(2) and (b)(2) ("Motion").[1] Accompanying the Motion was the Intervener's Complaint that Federal Rule of Civil Procedure 24(c) requires. See Stadin v. Union Electric Co., 309 F.2d 915 (8th Cir. 1962). The Intervener's Complaint seeks class intervention on behalf of all persons who have purchased a campground membership from the Debtor or any of

[1] Federal Rule of Bankruptcy Procedure 7024 makes Federal Rule of Civil Procedure 24 applicable to bankruptcy adversary proceedings.

its subsidiaries. Except for Allstate Financial Corp., all existing parties to the adversary proceeding oppose the intervention.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. section 1334 and the standing order of reference entered by the United States District Court for the Southern District of Iowa. For the reasons stated herein, the Court denies the Motion in part and grants it in part.

DISCUSSION

I. The Allegations.

For the purpose of determining an applicant's right to intervene, a court must accept as true the non-conclusory allegations of the motion and proposed complaint. See Stadin, 309 F.2d at 915. The Intervener's Complaint incorporates the "factual and material allegations set out in the Trustee's Complaint at paragraphs 14-52." (Motion ¶ 16.) Those allegations are summarized as follows:

In 1982 David Vopnford incorporated the Debtor under Nebraska law. The Debtor wholly owned twenty subsidiaries and was in the business of buying and operating a network of campgrounds. Consumers could buy memberships in the network from the subsidiary corporations entitling them to use of the campgrounds. By March 1997 the Debtor had 85,000 members located throughout the United States and Canada.

There were various forms of membership with prices ranging from $2,000.00 to $15,000.00. Consumers could finance membership by means of retail installment contracts ("RICs"). The subsidiaries assigned the RICs to the Debtor. In turn, the Debtor sold or hypothecated the RICs to lenders.

Defendants Princeton Capital Finance, Travelers Acceptance Corp., Allstate Financial and Western American Bank (collectively "Purchasing Lenders") were among those receiving RIC assignments. The Purchasing Lenders purchased pools of RICs for less than face value.

After the Purchasing Lenders received a "return on their investment," the residual value of the contracts reverted to the Debtor. The Purchasing Lenders primarily used Defendant Travelers Data Service[2] to collect the retail installment contracts through "lock box agreements." The members would send payments to the lock box and Travelers Data Service would send the collections directly to the Purchasing Lenders after deducting a service fee.

All members paid dues in addition to the membership purchase price. The "dues were assigned to" the Debtor.[3] The Debtor never granted a security interest in the dues.

By 1996 membership sales had declined and the Debtor became unable to service its mortgage debt on the campgrounds. The Debtor entered into an agreement with Defendant Princeton Capital Finance Company, L.L.C. ("Princap") whereby Princap effectively agreed to loan it sufficient funds to enable it to refinance the mortgages on the campgrounds. The attempt to refinance failed, however, when Princap unilaterally determined not to honor its commitment to advance funds under the agreement even though no default had occurred. As a result, the Debtor was unable to pay its mortgage debt and mortgagees commenced foreclosure actions on the campgrounds.

Faced with the loss of the campgrounds and the loss of revenues from the members who were paying dues and installments under the RICs, representatives of the Purchasing Lenders met at the ranch of Thomas Cloud, a principal of the Debtor's mortgage banker, to determine how they could protect their investments in the RICs and the Debtor. Also attending were Defendant Raymond Novelli and Robert Thompson, alleged principals of All Seasons

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[2] The Trustee's Complaint refers only to Travelers Data Service. In its answer, Trace Credit Services, Inc., doing business as Travelers Data Services, states that the Complaint erroneously names it Travelers Data Service. The Court adopts the Complaint's convention for the purpose of this ruling.

[3] Although the Trustee's Complaint is not completely clear, it seems to allege that members paid the subsidiaries dues and that the subsidiaries assigned them to the Debtor in the same way they assigned it the RICs.

Resorts, a competitor of the Debtor. At the meeting the Purchasing Lenders decided to transfer the assets of Thousand Adventures to a new corporation that Novelli would manage in conjunction with All Seasons Resorts.

On May 7, 1997 Cloud incorporated RV Holdings. The Debtor transferred stock and title to some of its campgrounds and those of its subsidiaries to RV Holdings. The Debtor received no consideration for the stock transfer.

On May 30, 1997 Cloud and Novelli incorporated Defendant Travel America. RV Holdings then transferred the campgrounds it briefly held along with many of the campgrounds held by the subsidiaries to Travel America.

Shortly thereafter, Novelli, allegedly acting on behalf of Travel America, took over the operations of the Debtor and its Nebraska offices. Members were told that Thousand Adventures was merging with All Seasons, The Presidents Club (another Novelli group of campgrounds) or both on July 1, 1997. Travel America closed the Debtor's office in Nebraska and transferred its membership records to Novelli's offices in California. On August 28, 1997 Travel America filed a registration of fictitious names with Orange County, CA indicating that Travel America was the owner of the Debtor and doing business as Thousand Adventures.

Travel America also sent letters to each of the members of Thousand Adventures informing them that they were automatically enrolled as members of Travel America as long as the dues and RIC payments, if any, were kept current. An invoice for payment of dues accompanied each letter. Thereafter, Travel America attempted to collect both current and delinquent maintenance dues from Thousand Adventures members both before and after the time it began operating Thousand Adventures' campgrounds. Travel America also sent written notice of default to members whose RICs were not current. The notice informed those members that Travel America was now the owner of the member's contract with Thousand Adventures

and offered them the choice of either refinancing the Thousand Adventures contract under Travel America by paying 50% of the balance and waiving back maintenance dues or paying the full amount owed to Thousand Adventures to Travel America. Travelers Data Service continued to collect and remit to the Purchasing Lenders the members' RIC payments that the Debtor had sold or hypothecated.

To the above allegations, the Applicant adds the following:

The memberships sold to the class members were accompanied by a "guaranteed Resale Agreement," whereby the Debtor guaranteed to sell the membership for at least what the member paid less a 15% administrative fee. About 75% of the consumers purchasing memberships financed them through the RICs. Pursuant to 16 C.F.R. section 443, the RICs contained language purporting to subject holders of the RICs to all claims and defenses, that the member could assert against the entity that sold the membership.

The Debtor's agents misrepresented the financial condition of the Debtor and made promises they knew or should have known the Debtor could not keep as part of an intentional scheme to defraud the class members. On July 10, 1997 the Applicant, individually and on behalf of all other persons similarly situated, obtained a default judgment against the Debtor in the Iowa District Court of Lee County for breach of contract and "violations of consumer fraud provisions." The judgment rescinded the contracts and awarded unspecified restitution damages.

Travel America's dues billings were sent in the name of "TAI," and the appearance of the statements and the use of "TAI" gave the impression that the billing was coming from Thousand Adventures instead of Travel America. Most members were not informed of the state court judgment rescinding the RICs. Travel America was notified of the judgment but

continued collection activities. Many members continue to pay the annual dues to Travel America.

II. The Trustee's Claims.

The Trustee's Complaint consists of the following relevant counts:[4]

Count One alleges the "Debtor voluntarily or involuntarily transferred to Travel America for the benefit of the Purchasing Lenders, Raymond Novelli and Novelli's other enterprises, including Adventure Resorts and First Nation wide (collectively the 'Novelli Enterprises'), the Debtor's membership list, the Debtor's right to receive maintenance dues, the Debtor's goodwill, the Debtor's trade name, the Debtor's trademark, the Debtor's campgrounds and the Debtor's right to receive the residual value of the retail installment contracts." The Trustee requests the Court enter an order avoiding the transfer of the Debtor's membership list, right to receive membership dues, goodwill, trade name, trademark, campgrounds and right to receive the residual value of the retail installment contracts pursuant to 11 U.S.C. section 548(a)(1) and enter judgment against Travel America, Raymond Novelli, the Novelli Enterprises and the Purchasing Lenders in an amount of not less than $1,000,000.00.

Count Two contains the Count One allegations and further alleges that the Debtor was insolvent at the time of the transfers, engaged in business for which any remaining property it controlled constituted unreasonably small capital and received less than reasonably equivalent value in exchange for the transfers. The Trustee asks the Court to enter an order avoiding the transfer of the assets named in Count One pursuant to 11 U.S.C. section 548(a)(2) and enter judgment for $1,000,000.00.

[4] The Court omits discussion of Counts Four through Nine because they do not directly impact the intervention analysis.

Count Three alleges that the Debtor's membership list, maintenance dues, trade name, trademark and the residual value of the retail installment contracts are property of the Debtor, that Travel America wrongfully exercised dominion and control over them and that the Trustee has an immediate right to possession of the same. The Trustee asserts it is entitled to damages from Travel America for conversion because Travel America has allegedly diluted the value of that property. The Trustee prays for an order finding that Travel America wrongfully converted the Debtor's property and for judgment against Travel America for the value of that property wrongfully converted.

III. The Applicant's Claims.

The Applicant seeks intervention of right under Federal Rule of Civil Procedure 24(a)(2) as to "those claims which class members have against the defendants and which overlap with the claims of the trustee." (Motion, ¶ 3.) He also seeks permissive intervention under Federal Rule of Civil Procedure 24(b)(2) "with regard to the class members [sic] claims that arise out of the same set of facts and involve common questions of law." (Motion, ¶ 4.) This Court applies the criteria of each part of Rule 24 to each count of the Intervener's Complaint in turn.

A. Intervention by Right.

Federal Rule of Civil Procedure 24(a)(2) provides in part:

> Upon timely application anyone shall be permitted 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 his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

Accordingly, the Applicant must establish that: "(1) he has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and

(3) the interest is not adequately protected by the existing parties to the litigation." Chiglo v. City of Preston, 104 F.3d 185 (8th Cir. 1997) (citing United States v. Union Elec. Co., 64 F.3d 1152, 1160 (8th Cir. 1995)). A motion to intervene as a matter of right should not be dismissed unless it appears to a certainty that the applicant is not entitled to relief under any set of facts which could be proved under the intervener's complaint. See United States v. 635.76 Acres of Land, 319 F.Supp. 763, 766 (W.D. Ark. 1970), aff'd, 447 F.2d 1405 (8th Cir. 1971). Intervention cases are highly fact specific and tend to resist comparison to prior cases. See Reich v. ABC/York-Estes Corp., 64 F.3d 316, 321 (7th Cir. 1995).

(1) Whether the Applicant has Any "Significantly Protectable Interest" Relating to the Property or Transaction that is the Subject of this Action.

"[T]here is no authoritative definition of precisely what kinds of interest satisfy the requirements of the rule." 6 James Moore, Moores's Federal Practice, § 24.03[2][a] (3d ed. 1997). In Donaldson v. United States, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971) the U.S. Supreme Court described the Rule as requiring a "significantly protectable interest." The Court of Appeals for the Eighth Circuit has stated that a mere economic interest is not enough. See Curry v. Regents of the University of California, 167 F.3d 420 (8th Cir. 1999) (citing Standard Heating & Air Conditioning Co. v. City of Minneapolis, 137 F.3d 567, 571 (8th Cir. 1998)). The interest must be "direct, substantial and legally protectable." Standard Heating, 137 F.3d at 571 (citations omitted). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." Id. (citing Washington Elec. v. Massachusetts Mun. Wholesale Elec., 922 F.2d 92, 97 (2d Cir. 1990)).

*Count One*

Count One of the Intervener's Complaint is a claim for recovery of contract payments under the Federal Trade Commission (FTC) Holder Rule provision. The FTC Holder Rule

requires consumer credit contracts to include language stating that "any holder" of the contract is "subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant" to the contract. 16 C.F.R. § 433. The contract debtor's recovery is limited to the amounts the debtor paid under the contract. Id. The rule is intended to protect consumers from the advantages that accrue to holders in due course by shifting the risk of a seller's nonperformance to sales contract holders. See Maberry v. Said, 911 F.Supp. 1393, 1402 (D. Kan. 1995).

In this case the Applicant has shown an interest in part of the subject matter of this litigation, namely the RICs.[5] Moreover the interest is direct and substantial. Although Defendants First Nationwide Resorts, Raymond Novelli, Travel America and Adventure Resorts of America contend that the Applicant has merely asserted an economic interest in recovering under the state court judgment, the fact is the Applicant seeks a new judgment against new defendants. The cases the Defendants cite involve facts in which the disposition of the claims would merely influence some source of economic well being of the applicant. See Curry v. Regents of the University of Minnesota, 167 F.3d 420 (8th Cir. 1999) (holding that student organizations' potential loss of funding if mandatory university fee system was not upheld did not rise to the level of interest necessary for intervention); Standard Heating and Air Conditioning Co. v. City of Minneapolis, 137 F.3d 567 (8th Cir. 1998) (holding that employers operating under mandatory apprenticeship program did not have an interest in maintaining the obligatory nature of the program significant enough for intervention even if they would be at a competitive disadvantage if the system were changed); Greene v. U.S., 996 F.2d 973 (9th Cir. 1993) (holding that the Tulalip tribe's argument that its fishing rights would be in danger of

[5] The Applicant does not address the effect, if any, of the alleged rescission on his and the class members' claims under the FTC Holder Rule.

dilution by federal recognition of the Samish tribe did not pass the interest criterion). The interest the Applicant in this case asserts, by contrast, is a specific legal claim not belonging to any existing party in the proceeding. Therefore it is an "interest" in the sense that term is used in Rule 24(a)(2).

*Count Two*

Count Two of the Intervener's Complaint is a claim against Travel America for wrongful and fraudulent collection of membership dues after the July 10, 1997 state court default judgment rescinding the contracts. In some parts of the Count the Applicant appears to be asking for damages, but he also asks that a constructive trust for the benefit of the class members be imposed on Travel America. Assuming he is claiming restitution as opposed to damages, there is no question that the "res" of the constructive trust the Applicant wishes to impose consists (at least in some part) of the dues the Trustee claims as estate property and for which the Trustee seeks to recover damages in tort in Count Three of the original Complaint. Thus the Applicant has established an interest in another part of the subject matter of the Trustee's action under Rule 24(a)(2).

2. Whether the Disposition of the Trustee's Action May Impede or Impair the Applicant's Interests.

Whether an action into which an applicant wishes to intervene will impair the applicant's interests is the most difficult part of the intervention analysis in cases such as this, where the interests consist of separate causes of action. The Court must analyze the legal issues involved in the existing pleadings as well as examine those raised in an intervener's complaint to determine what effect the former will have on the latter. The Court must consider the effect its eventual rulings may have in subsequent litigation in other fora. Rule 24(a)(2), however, does not require a determination that the existing litigation will have preclusive effect on the interests of the applicant but rather only that it will "as a practical matter impair or impede the applicant's

ability to protect that interest." For guidance, the Court turns to Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 128, 136, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967). In that case, the U.S. Supreme Court presented a workable first step by inquiring into the nature of the zone of interest that the causes of action an applicant invokes are meant to protect. In this case, the Applicant invokes the FTC Holder Rule in Count One and claims entitlement to a constructive trust in Count Two.

*Count One*

As discussed earlier, the FTC Holder Rule protects the claims and defenses of buyers of consumer goods and services by allowing them to maintain against the holder of the contract any claims or defenses they could assert against the seller. Recovery is limited to the amount the buyer has paid.[6] Thus, the Rule contemplates a situation exactly like that in which the class members find themselves as holders of an unsatisfied judgment against a seller.

The fact, however, that the seller (or his successor in interest, the Trustee) also asserts claims against the holders of the contracts in question does not in any legally cognizable manner impair or impede the Applicant's interest. The Trustee's action for recognition of his rights to

[6] The courts are split as to whether this means that assignees are liable for claims beyond the amount they have received under the contract. Compare LaBarre v. Credit Assistance Corp., 175 F.3d 640 (8th Cir. 1999) with Alduridi v. Community Trust Bank, 1999 WL 969644 (Tenn. Ct. App. 1999). Resolution of this question depends on what state law claims and defenses are available, LaBarre, 175 F.3d at 644, and is not necessary for analysis of the propriety of intervention since neither the Applicant nor any of its class members are allegedly parties to the contracts assigning the consumer contracts to the purchasing lenders. If the argument is that jurisdictions that do not allow recovery against holders in excess of the amount they have been paid may extend that reasoning to cases in which the holders have been paid but have received judgments requiring them to disgorge part of their payments, then the interest the Applicant seeks to protect is in the nature of the economic (as opposed to legally protectable) interests that the Curry, Standard Heating and Greene case disallow under the first element of the intervention analysis.

This also disposes of the Applicant's argument that denial of intervention may result in inconsistent and duplicative judgments against the Defendants. The courts that allow consumers to recover more from holders than they have received under the contracts assigned to them assert that result is consistent with the purpose of the FTC Holder Rule to force financiers to police unscrupulous sellers of consumer products and services because they are more able to do so than are consumers. As almost all of the Defendants in this case oppose intervention, this Court will defer to the state courts to deal with the effect of the language the Rule imposes on the contract law of the applicable state and with whether full recovery may be had despite any judgment this Court may make.

receive the residual value of the RICs does not challenge the assignment of the contracts to the purchasing lenders or their status as contract holders. This unchallenged status is the source of the interest the Applicant's first cause of action seeks to protect.

The Applicant's argument that his interest under the FTC Holder Rule will be impaired because a judgment favorable to the Trustee will hamper the class members' ability to collect on any judgment they may receive in another forum is not persuasive. While collectability may be hampered, it is not an interest that Rule 24(a)(2), standing alone, protects. "It is not sufficient to assert . . . that the original action, if successful, will reduce the 'collectability' of the defendants. This facet of the rule would be without meaning if that construction were adopted, for almost any lawsuit, if successful, will reduce the assets of the defendants." Warheit v. Osten, 57 F.R.D. 629, 630 (E.D. Mich. 1973). In fact, the collectability argument is really just another form of the purely "economic interest" that the Curry, Standard Heating and Greene cases define as outside the scope of the Rule. Therefore, there can be no intervention of right as to Count One.

*Count Two*

The Applicant also claims to be entitled to imposition of a constructive trust over the funds Travel America has collected as dues.[7] The Intervener's Complaint alleges that the "memberships from Thousand Adventures were not sold or transferred to Travel America." (Intervener's Complaint ¶ 53.) Therefore, according to the Applicant, "Travel America had no legal or equitable basis to collect maintenance dues collected from the class of members . . . ." (Intervener's Complaint ¶ 58.) The Trustee's Complaint claims that the same dues are "property of the Debtor" (Complaint ¶ 65) and asks for an order finding that Travel America

[7] The Applicant does not claim entitlement to a constructive trust over any residual payments under the RICs that Travel America holds.

"wrongfully converted Debtor's property." (Complaint ¶ 68.) These positions are not compatible.

However, the incompatibility of claims does not automatically lead to the conclusion that a decision in favor of the Trustee will impede or impair the rights of the class. As the Defendants point out, if intervention were denied, class members would not be precluded from bringing independent suits for relief against Travel America. Nevertheless, that fact would be of little help to the class members since the res of the constructive trust to which they claim to be entitled might well be in the hands of the Trustee by then. In contrast to the collectability argument discussed above, a constructive trust would make the class members beneficial owners of the fund or entitle them to reimbursement from a fund co-mingled. That interest would take priority over the claims of other creditors such as the Trustee as tort victim. See generally Restatement of Restitution §§ 160, 209 and 211(1) (1937). Thus in this case, the Applicant claims a beneficial interest in the very money that the Trustee claims as property of the estate.

Moreover, the Court cannot overlook the potential stare decisis or comity effect that disposition of the Trustee's claim may have on subsequent litigation. The Defendants point out that many courts hold that "a simple claim of stare decisis effect is not enough." National Union Fire Ins. Co. v Continental Illinois Corp., 113 F.R.D. 532, 536 (N.D. Ill. 1886). Rather, a potential intervener "must show the presence of additional factors that would give the decision . . . compelling persuasive force in [the movant's] later litigation." Id. In dicta, the Nation Union Fire court stated that a sufficient additional factor would be present if an applicant would be forced to present identical issues of law and fact to the same court in a later action. See id. Since future presentation in that case would have been before an Illinois court with questions of Illinois law, that court held intervention to be inappropriate. See id. If the Trustee's theory is

correct, the property in which the Applicant claims an interest is property of the estate. Any attempt to collect it would be subject to the automatic stay under 11 U.S.C. section 362(a)(3). The Defendants' implied argument that the Applicant will have an additional claim in tort for damages against Travel America is not an answer to the Applicant's argument that his entitlement to a beneficial interest in the fund will be impaired. The stare decisis effect of a decision by this Court that the "dues" are property of the estate may hamper class members' attempts to obtain relief from stay from this Court in order to seek imposition of a constructive trust elsewhere. Accordingly, the Court finds that the Applicant's interest in its alleged entitlement to a constructive trust may as a practical matter be impaired by the disposition of this action.

3. Whether the Applicant's Interest is Adequately Represented by Existing Parties.

The Applicant bears the burden of showing that his interest under Count Two is not adequately represented by existing parties. See Union Electric, 64 F.3d at 1168. This burden is ordinarily minimal. See id. However, if an existing party to the suit is charged with the responsibility of representing an applicant's interest, a presumption of adequate representation arises. See id. at 1168-69.

In this case, the Defendants point out that the Plaintiff is the bankruptcy Trustee, who is charged with maximizing the estate for the benefit of general creditors. That the charge may cover the members of the class does not, however, mandate a conclusion that the Trustee has the same interest as the class members. As discussed above, the interest of the Applicant in recovering money he and class members paid as dues in the hands of Travel America faces not only any defenses Defendants may have but also the claims of the Trustee. The ultimate benefits to the class members of recovery by the Trustee do not equate to a judgment in their favor in intervention. The usual dividend to unsecured creditors after the bankruptcy claims distribution

process is only a fraction (or less) of the value of their claims outside bankruptcy.[8] The fact that the Trustee's representation is inadequate is clear because the Applicant does not wish to intervene to protect the class members' interest as creditors of the Debtor, but as independent victims of the Defendants. Therefore the Court holds that the Applicant has adequately rebutted any presumption that he or class members are adequately represented by the Trustee.

B. Permissive Intervention.

Federal Rule of Civil Procedure 24(b)(2) provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The Applicant's claims under the FTC Holder Rule do not have questions of law or fact in common with the Trustee's suit. Except for Travel America, Inc., Novelli, and Adventure Resorts, none of the Defendants deny that the RICs were assigned. All of the Defendants to whom the Applicant claims RICs were assigned admit that they were assigned to them. The legal issue the Trustee's suit raises is about the Defendant assignees' obligations under agreements selling or hypothecating the RICs, not under the RICs themselves.

Moreover the Court's consideration of the impact of the intervention on the existing parties to this adversary proceeding as well as on the parties interested in this bankruptcy case does not favor intervention for purposes of pursuing the FTC Holder Rule claims. Doing so would embroil the Court in adjudicating the conflict of laws and contract law of over twenty states. Such an exercise would definitely delay the pending litigation. Moreover intervention would not necessarily resolve the FTC Holder Rule claims more quickly than if the class

[8] A bankruptcy trustee generally distributes the proceeds of a liquidation according to the scheme outlined in 11 U.S.C. section 507. Under that section, the class members may be partially entitled to sixth priority (for deposits) but are otherwise only entitled to a ratable share of any funds remaining for general unsecured

members pursued those claims in other fora. Therefore, the Court finds that the FTC Holder Rule claims would be best handled outside this adversary proceeding.

By contrast, the above analysis demonstrates that the Applicant's claim to entitlement to a constructive trust runs directly into the factual and legal issues found in Count Three of the Trustee's Complaint. The briefs of the parties opposing intervention do not suggest otherwise. Instead those parties raise the following arguments: (1) the Court should certify the class the Applicant would represent under Federal Rule of Civil Procedure 23 before it addresses the merits of Rule 24; (2) the Court then should conclude that any potential litigation over certification would be reason to find undue delay of the rights of the original parties and (3) the Court should conclude it does not have independent grounds for jurisdiction. The Court, however, finds those arguments to be without merit.

1. Certification under Rule 23 is Not a Prerequisite to Permissive Intervention.

Princeton Capital Finance Company, LLC ("Princap") cites no authority and gives no reason for the proposition that certification should precede intervention, and the Court knows of none. See generally 2 Herbert B. Newberg & Alba Conte Newberg on Class Actions § 7.15 (3d ed. 1992). Federal Rule of Civil Rule 23(c) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."[9] Given its decision today to grant intervention as to Count Two but to deny it as to Count One and the effect that decision will have on the composition of any class, the Court finds it impracticable to determine whether the intervention may be maintained as a class action at this juncture.

2. The Class Action Aspect of the Intervention Will Not Create Undue Delay.

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creditors.

[9] Federal Rule of Bankruptcy Procedure 7023 makes Federal Rule of Civil Procedure 23 applicable to bankruptcy adversary proceedings.

While a class should generally be certified prior to any dispositive motion, see Newberg & Alba, supra, the Court is not yet near a position to make any decision, however tentative, on the merits of this case. Given this Court's decision not to allow the Applicant to press the FTC Holder Rule claim, the class that the Iowa court already certified will probably be reduced to those members who did not receive word of the rescission and who allegedly paid dues to Travel America. If the Applicant's allegations are true, however, it is probable that at least one party to this litigation has the information necessary to notify those class members of this proceeding. Therefore the Court does not foresee undue delay in the adjudication of the rights of the original parties.

3. The Court Has Original Subject Matter Jurisdiction.

Applicants for permissive intervention must establish independent jurisdictional grounds for subject matter jurisdiction. Kozak v Wells, 278 F2d 104, 113 (8th Cir. 1960). Defendants assert jurisdiction does not exist because "breach of contract is purely a state law claim which does not fall under the bankruptcy code." (Novelli Memorandum at 7.) However, the Court has subject matter jurisdiction over civil proceedings related to cases under Title 11. See 28 U.S.C. § 1134(b). The Eighth Circuit has adopted a "conceivable effect" test for determining whether a civil proceeding is "related to" a bankruptcy case:

> [T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in the bankruptcy . . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankruptcy estate.

In re Dogpatch U.S.A., Inc., 810 F.2d 782, 786 (8th Cir. 1987) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)); see also Abramowitz v. Palmer, 999 F.2d 1274, 1278 (8th Cir. 1993) (interpretation of "related to" jurisdiction should promote judicial economy by facilitating resolution of all matters related to a bankruptcy case). As noted above, Count

Three of the Trustee's Complaint seeks recovery for the same dues for which the Applicant seeks imposition of a constructive trust. Imposition of the constructive trust could conceivably impact the Trustee's ability to recover funds for the estate. That possibility is particularly acute here, where it appears practically all Travel America's other assets are subject to independent claims of the Trustee. Therefore the Court concludes it has at least "related to" jurisdiction over the subject matter of Count Two of the Intervener's Complaint.

Therefore, since there are common questions of law and fact and no undue delay or prejudice to the adjudication of the rights of the original parties and original jurisdiction exists, the Court finds permissive intervention is warranted for Count Two of the Intervener's Complaint.

CONCLUSION

WHEREFORE, based on the foregoing discussion the Court finds that:

(1) The Motion must be denied as to Count One of the Intervener's Complaint;

(2) Pursuant to Federal Rule of Civil Procedure 24(a)(2), the Motion must be granted as to Count Two of the Intervener's Complaint; and

(3) Pursuant to Federal Rule of Civil Procedure 24(b)(2), the Motion may be granted as to Count Two of the Intervener's Complaint.

A separate Order shall be entered accordingly.

Dated this 21st day of June 2000.

LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE