UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DOROTHY ANN CONLON — CASE NO. 95-64406

Debtor — Chapter 7

THE CONTINENTAL INSURANCE COMPANY

Plaintiff

vs. — ADV. PRO. NO. 99-80115A

L. DAVID ZUBE, as Trustee in Bankruptcy of Dorothy Ann Conlon and as Assignee of William A. Canny, and Edward F. Crumb

Defendants

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion for summary judgment filed by L. David Zube as Trustee ("Chapter 7 Trustee") in the bankruptcy case of Dorothy Conlon ("Debtor") and as assignee of the claim of William A. Canny ("Canny"), in connection with an adversary

proceeding commenced by Continental Insurance Company ("Plaintiff") or ("Continental") on April 27, 1999. The Chapter 7 Trustee seeks a determination, as a matter of law, of the limitations of the liability coverage under Continental Insurance Company NY Lawyers Professional Liability Ins. Policy No. LLS 0415641 ("Policy") issued to Edward F. Crumb, Esq. ("Crumb").

On July 8, 1999, the Court heard arguments with regard to the Chapter 7 Trustee's instant motion for summary judgment. The Court requested that memoranda be filed with the Court by August 17, 1999, after which the Court took on this motion as a submitted matter.

JURISDICTIONAL STATEMENT

For the reasons hereafter set forth, the Court concludes that it has no subject matter jurisdiction over the instant adversary proceeding. The Court does, however, have sufficient jurisdiction to make that determination by virtue of 28 U.S.C. § 157 (a) and (b)(3). *See Publicker Industries, Inc. v. United States (In re Cuyahoga Equipment Corp.),* 980 F.2d 110, 114 (2d Cir.1992); *Turner v. Erminger (In re Turner),* 724 F.2d 338, 340 (2d Cir. 1983); s*ee also Kieslich v. United States (In re Kieslich)*, 216 B.R. 643 (D. Nev. 1998) (ordering the adversary proceeding back to the bankruptcy court to determine its own jurisdiction).

FINDINGS OF FACT

On September 3, 1996, the Debtor commenced an adversary proceeding alleging legal

malpractice against Crumb. Pursuant to an Order of this Court dated January 15, 1998, the Chapter 7 Trustee was substituted as plaintiff in that adversary proceeding. As the Court assumes that the parties in this proceeding are familiar with the facts of the underlying malpractice adversary proceeding, the Court will not review them here.[1]

Both Debtor and Canny allegedly retained the services of Crumb for the purposes of representing them in a withdrawal liability action before the United States District Court for the Northern District of New York in April 1994. On or about October 8, 1998, Canny executed an assignment ("Canny Assignment") which assigned his malpractice claim against Crumb to the Debtor estate in exchange for the Debtor estate's release of any claim it had or might have had against Canny for contribution and/or indemnification in the withdrawal liability proceeding. *See* Affidavit of Harvey S. Mars, Esq., filed June 9, 1999, (Mars Aff.) at Exhibit C. On November 13, 1998, the Chapter 7 Trustee commenced a second adversary proceeding against Crumb, based on the Canny Assignment. Following the commencement of these two adversary proceedings by the Chapter 7 Trustee, Crumb allegedly sought coverage under the Policy.

Section IV(D) of the Policy states:

> The inclusion herein of more than one Insured or the making of Claims or the bringing of suits by more than one person or entity shall not operate to increase the Company's limits of liability under this Policy. If additional Claims are subsequently made against the Insured, and arise out of the same, related or continuing Acts as the Claim already made, all such Claims, whenever made, shall be considered first made within the Policy Period or Extended Reporting Period in which written notice of the Claim was first received by the Company, and shall be subject

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[1] For a complete discussion of the facts in the underlying malpractice adversary proceeding against Crumb, see *Zube v. Crumb (In re Conlon)*, Adv. Pro. No. 96-70235A (Bankr. N.D.N.Y. Sept. 30, 1999).

> to the same Limit of Liability - Each Claim set forth in Item 5 of the Declarations.

See Mars Aff. at Exhibit A. Item 5 of the Policy's Declarations states that the limit of liability is $500,000 for each claim covered under the Policy. The aggregate limit of liability is $1,000,000. *See id.*

After initiating the adversary proceeding on behalf of Canny, special counsel to the Chapter 7 Trustee advised Crumb's counsel he believed that liability, as a result of the two malpractice claims, would approach the $1,000,000 aggregate limit. *See* Mars Aff. at ¶ 10-11. On March 3, 1999, counsel for Plaintiff sent an opinion letter ("Opinion Letter") to special counsel to the Chapter 7 Trustee contending Crumb's aggregate coverage was only $500,000, pursuant to Section IV(D) of the Policy. *See* Mars Aff. at Exhibit E. After continuing this dispute via correspondence, Plaintiff initiated this adversary proceeding for a declaratory judgment to determine the limit of coverage under the Policy.

DISCUSSION

The Court must first determine whether this adversary proceeding falls within its subject matter jurisdiction. Subject matter jurisdiction of a bankruptcy court is governed by 28 U.S.C. § 157. 28 U.S.C. § 157(b)(1) provides: "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(c)(1) allows a bankruptcy judge to hear a proceeding that is not a core proceeding; however, that proceeding must be related

to a case under title 11. Thus, there are basically four situations where subject matter jurisdiction is vested in the bankruptcy court: (1) cases under title 11; (2) civil proceedings arising under title 11; (3) civil proceedings arising in a case under title 11; and (4) civil proceedings "related to" a case under title 11. *See Plaza at Latham Assoc. v. Citicorp N.A., Inc.*, 150 B.R. 507, 510-511 (N.D.N.Y. 1993). Those proceedings which "arise under" or "arise in" title 11 are considered "core proceedings." Those proceedings which are "related to" a case under title 11 are deemed to be "non-core." Regardless of whether a proceeding is core or non-core related to, the bankruptcy court has subject matter jurisdiction to address any disputes that might arise therein. However, bankruptcy courts may only enter final orders and judgments in "core proceedings." 28 U.S.C. §157(b).

The Court cannot finally adjudicate the dispute or even submit proposed findings of fact and conclusions of law to the district court if the matter is neither core nor non-core related to. The bankruptcy court is divested of jurisdiction when the following three elements are satisfied: "(1) the proceeding must involve non-debtor, third parties; (2) the proceeding must not involve the property of the debtor, and (3) the proceeding must not involve a necessary administrative function [of the bankruptcy estate]." *Latham Assoc.,* 150 B.R. at 512 (*citing In re General American Communications Corp.,* 130 B.R. 136, 157 (S.D.N.Y. 1991)).

The adversary proceeding under consideration really involves an issue that will impact only on the relationship between Crumb and Plaintiff as to how much insurance coverage is available if Crumb is found to have committed malpractice in the pending adversary proceedings commenced by the Chapter 7 Trustee. Both Continental and Crumb are non-debtors. The Debtor is not insured under the Policy nor is the Policy property of the estate. Likewise, this proceeding

does not involve an administrative function of the estate. Depending on the amount of coverage Crumb may or may not have, his personal assets may or may not be subjected to the satisfaction of a judgment in favor the Chapter 7 Trustee.[2] However, any determination made in the present adversary proceeding will result in no direct monetary recovery that would benefit the estate. Therefore, the Court finds that it has no subject matter jurisdiction and is without authority to address the issue of interpretation of the language of the Policy which is at the heart of this adversary proceeding. Accordingly, the Court concludes that it must dismiss the adversary proceeding herein *sua sponte.*[3]

Furthermore, even assuming, *arguendo,* that this Court had subject matter jurisdiction, the Court does not believe that a justiciable controversy is presented in the instant adversary proceeding. Declaratory judgments are governed by The Declaratory Judgment Act codified at 28 U.S.C. § 2201 (1994) (Declaratory Judgement Act). The Declaratory Judgment Act provides: "(a) In a case of actual controversy within its jurisdiction...any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *See* 28 U.S.C. § 2201. Thus, as long as there is an actual controversy, federal courts may grant declaratory judgments. However, because the U.S. Constitution forbids federal courts from granting advisory

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[2] The fact that the resolution of that issue may impact on any decision to settle the pending adversary proceedings against Crumb or proceed to trial does not provide this Court with a jurisdictional *basis. See Cuyahoga*, 980 F.2d at 114 (citing *Turner*, 724 F.2d at 340-41).

[3] Rule 12(h)(3) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") as incorporated by reference in Rule 7012(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") states , "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added) *In re Boyer,* 93 B.R. 313, 315 (Bankr. N.D.N.Y. 1988).

opinions, there is a requirement that there exist an actual case or controversy. U.S. Const. Art. III § 2. "A justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot." *Aetna Life Ins. Co. of Hartford Conn. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 464 (1937), *citing United States v. Alaska S.S. Co*, 253 U.S. 113, 116, 40 S.Ct. 448, 449 (1920). "A 'controversy' must be one that is appropriate for judicial determination." *Aetna Life Ins*., 300 U.S. at 241, 57 S.Ct. at 464, citing *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 22 U.S. 738, 819 (1824). The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins.,* 300 U.S. at 241, 57 S.Ct. at 481(citations omitted).

In the instant adversary proceeding, the Court is uncertain if Crumb has made a claim against the Policy. However, the Court is certain that neither liability nor damages have been ascertained in the underlying malpractice adversary proceedings. The parties in this proceeding appear to seek an advisory opinion regarding the limits of coverage to assist them in their efforts to negotiate a settlement of the malpractice adversary proceedings. *See* Mars Aff. at ¶ 10. This Court has recommended to the District Court that a trial be held to determine liability as well as the amount of damages, if any, in one of the pending adversary proceedings. *See Conlon, supra,* at 19. Thus, at present there has been no assessment of liability or damages which would invoke coverage limitations under the Policy. Moreover, the Court does not know if there will ever be any claim made against the Policy. Thus, because the extent of any claim against the Policy is unknown, there is no justiciable controversy for the Court to decide.

Based on the foregoing it is,

ORDERED that the within adversary proceeding is hereby dismissed.[4]

Dated at Utica, New York

this 22nd day of October 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[4] Having determined that the adversary proceeding should be dismissed based on a lack of subject matter jurisdiction, the Court need not address the Chapter 7 Trustee's motion for summary judgment therein.