

LEGAL UPDATES

Bankruptcy Appellate Panel Confirms Authority To Annul Stay Retroactively

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With narrow exceptions, when a bankruptcy petition is filed, an “automatic stay” comes into effect which prevents the commencement or continuation of any litigation or proceeding against the debtor or property of the bankruptcy estate. Bankruptcy courts may grant “relief” from the automatic stay to allow a creditor to continue litigation filed against the debtor in a non-bankruptcy forum before the bankruptcy case was filed. In certain situations, courts have also annulled the stay retroactively to validate actions otherwise voidable as violations of the automatic stay, such as when a creditor initiates a lawsuit or enforces a lien after a bankruptcy is filed but is unaware of the filing. A recent ruling by the United States Supreme Court called into question whether bankruptcy courts still have the ability to retroactively annul the stay in such circumstances. However, the Ninth Circuit Bankruptcy Appellate Panel (BAP) has ruled that this Supreme Court precedent does not prevent the bankruptcy court from retroactively lifting the automatic stay.

In *Merriman v. Fattorini* (*In re Merriman*), plaintiffs filed a wrongful death lawsuit against former NFL star Shawn Merriman in state court after Merriman filed for bankruptcy. Upon learning of Merriman’s bankruptcy, plaintiffs asked the bankruptcy court to annul the automatic stay retroactively to validate the litigation they filed before learning about the bankruptcy case and permit them to liquidate their damages in the state court. The court found “cause” existed to lift the automatic stay retroactively.

On appeal, the BAP concluded the bankruptcy court had sufficient evidence to grant plaintiffs’ motion. The BAP also acknowledged that during the pendency of the appeal, the Supreme Court issued a decision holding that retroactive orders cannot create jurisdiction where none exists. After careful consideration of the scope and reach of the Supreme Court’s ruling, however, the BAP concluded that the ruling does not prohibit a bankruptcy court’s power to retroactively annul the automatic stay because “it is absolutely clear that Congress expressly gave such power, including the power retroactively to grant relief, to bankruptcy courts.”

How will this decision impact creditors? Many creditors seek relief from the automatic stay in bankruptcy to proceed with litigation or other remedies commenced in a non-bankruptcy forum after the debtor filed for bankruptcy. The

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BAP's ruling clarifies that the bankruptcy court's effective use of the relief from stay remedy must occasionally include the option of granting retroactive relief. As such, creditors may use this ruling as support for a request for retroactive relief from stay, notwithstanding the Supreme Court's prior decision.

Please contact our experienced team of creditors' rights attorneys to help with these and other bankruptcy issues.