AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
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On the Edge

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Questions Remain About When to Appeal an Order, Citing Debtor's Need for a Breathing Spell

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On Jan. 14, 2020, a unanimous U.S. Supreme Court held in *Ritzen Group Inc. v. Jackson Masonry LLC*[2] that "when the bankruptcy court unreservedly grants or denies relief" from the automatic stay, its order is final and therefore immediately appealable. Thus, a creditor's appeal of a denial of stay relief was untimely because it was filed within 14 days not of the stay relief denial but of plan confirmation, which occurred a significant time later.

Ritzen certainly provides a clear rule in instances where the bankruptcy court denies stay relief "unreservedly." However, the Supreme Court expressly did "not decide whether finality would attach to an order denying stay relief if the bankruptcy court enters it 'without prejudice' because further developments might change the stay calculus."[3] While orders denying stay relief heretofore frequently do not specify whether they are made with or without prejudice, it appears that bankruptcy judges and parties hereafter will pay close attention to this issue when orders are submitted and entered, given that the timing of an appeal now might well turn on the issue.

Moreover, it might well be that far more stay-relief orders will be entered without prejudice than with prejudice. If the standard is whether "further developments might change the calculus," many stay-relief orders routinely fall into that category. For example, early in a chapter 11 case, bankruptcy judges often deny motions by state court litigants to lift the stay to proceed with litigation because the court wants to maintain the debtor's "breathing spell." Several months later, all other factors being equal, the "calculus" might be viewed as having changed because the breathing spell might not be needed anymore.

As another example, stay relief to foreclose on collateral might be denied early in a case because the value of the collateral is perceived to provide the debtor with equity in the asset. However, since valuation is as of a moment in time, it might well be that a few months later the valuation has decreased to the point that the debtor no longer has equity in the collateral, thereby supporting stay relief. However, it appears that the issue that the Supreme Court left open in *Ritzen* might be an exception that swallows the rule.

Brief Summary of *Ritzen*

Ritzen involved a contract dispute over a potential land sale.[4] The sale never closed, and the purchaser sued for breach of contract in Tennessee state court.[5] However, just before the case went to trial, the seller filed a chapter 11 case in the U.S. Bankruptcy Court for the Middle District of Tennessee.[6] Consequently, the state court litigation was put on hold by the automatic stay,[7] so the purchaser filed a motion for relief from stay to allow the state court litigation to proceed,[8] which was denied by the bankruptcy court.[9]

The purchaser did not immediately appeal the bankruptcy court's order. Instead, it filed a proof of claim against the bankruptcy estate.[10] In an adversary

1 The views expressed in this article are those of the author and not necessarily of Richards, Layton & Finger, PA or its clients.
2 No. 18-938, 2020 WL 201023, at *2 (2020).
3 *Id.* at *7, n.4.
4 *Id.* at *3.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*

proceeding, the bankruptcy court found in the seller's favor and disallowed the purchaser's claim.[11] The seller's reorganization plan was confirmed without the purchaser's objection. The plan "permanently enjoined all creditors from the 'commencement or continuation of any ... proceeding against [the seller] ... on account of Claims against [the seller].'"[12]

Only then did the purchaser appeal the bankruptcy court's order denying relief from the automatic stay to the U.S. District Court for the Middle District of Tennessee.[13] The district court denied the appeal as untimely, citing § 158(c)(2) and Rule 8002(a) of the Federal Rules of Bankruptcy Procedure as mandating an appeal from an order denying relief from the automatic stay within 14 days.[14] The purchaser appealed, arguing that an order denying stay relief is not a final order and that therefore the time to appeal did not commence until plan confirmation.

The Court of Appeals for the Sixth Circuit affirmed the district court's ruling, stating that the order denying relief from the stay was a disposition "(1) entered in a proceeding and (2) final[ly] terminating that proceeding."[15] Accordingly, the 14-day appeal clock ran from the entry of the order.[16]

The Supreme Court granted *certiorari* and unanimously ruled that an order denying relief from a bankruptcy's automatic stay is "final [and] therefore immediately appealable."[17] Agreeing with the court of appeals, the Supreme Court found that the "adjudication of a stay-relief motion is a discrete 'proceeding' ... that disposes of a procedural unit anterior to, and separate from, claim-resolution proceedings."[18] Therefore, an order denying that relief is final because there is "nothing more for the Bankruptcy Court to do in that proceeding."[19]

However, in a footnote, the Court stated that the opinion did "not decide whether finality would attach to an order denying stay relief if the bankruptcy court enters it 'without prejudice' because further developments might change the stay calculus."[20] The Court noted that "nothing in the record before [it] suggests that this is such an order."[21]

The *Ritzen* Fact Pattern Is Not Typical

Ritzen provides ready guidance where the stay-relief motion essentially asks the court to decide, on a final basis, whether the case will be tried in state court or through the bankruptcy proof-of-claim process. However, at least in this author's experience, that rarely is what is actually decided.

More often than not, the issue is not *where* the litigation will proceed, but rather *when* it will proceed. Busy bankruptcy judges typically are not eager to try existing state court litigation through a claims-objection process. There are numerous reasons for this, including:

- If the claim is for personal injury or wrongful death, a bankruptcy court cannot hear and decide the claim;[22]
- Many bankruptcy courts are not authorized to conduct jury trials;[23]
- If the claim is covered by insurance, the bankruptcy estate might have minimal interest in the outcome of the dispute, whereas two nondebtor entities — the plaintiff and the insurance company — might be the real parties-in-interest, so using the bankruptcy process to adjudicate such a claim often is not an optimal use of judicial resources;
- While bankruptcy judges are used to applying state law, certain matters might be more appropriately decided by state court judges applying laws with which they are familiar; and
- Given the large caseloads of some bankruptcy courts, many bankruptcy courts believe that they should focus on adjudicating matters central to the bankruptcy process while permitting the state court where the case was filed to adjudicate claims.

Of course, all of this does not mean that bankruptcy judges routinely grant stay-relief motions; quite to the contrary, such motions are often denied. The focus, particularly at the beginning of a bankruptcy case, is this: Should this litigation claim proceed *now* in any forum, or should it continue to be stayed to await further developments? There typically are competing tensions. On the one hand, courts recognize that the "breathing spell" afforded by the automatic stay is one of the most fundamental protections that the Bankruptcy Code gives to debtors.[24] If the bankruptcy court lifts the stay early in a bankruptcy case, the breathing spell is eviscerated and the debtor is back to being forced to expend resources (both its personnel's time and financial resources to pay professionals) in defense of the claim. However, there are times when keeping the stay intact, even for a short time, can be prejudicial to the plaintiff. One extreme example is where the state court trial is set to start the next day, and if the jury is sent home, it could be many months before the case would get back on a trial calendar.

This is exactly why courts have developed a balancing test to decide stay-relief motions.[25] While stated differently in various courts, the test is frequently formulated as balancing the prejudice to the debtor or the debtor's estate in lifting the stay against the hardship to the movant by maintenance of the automatic stay (and also considering whether the movant has a reasonable chance of prevailing on the merits).[26]

However, this balance can change over time. Take what is, these days, a fairly typical chapter 11 case: The debtor files the case with plans to sell its operating business within, say, 90 days, and will propose and prosecute a liquidating plan after the sale closes. A motion for stay relief filed within those first 90 days is likely to be met with some hesitation, because unleashing pre-petition litigation on the debtor during the sale period will force the debtor to reallocate its resources at a time when focusing on the sale for the benefit of all estate stakeholders is crucial. On the other hand, if the court were to consider the same motion

11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at *4.
16 *Id.*
17 *Id.* at *6.
18 *Id.* at *5.
19 *Id.* at *7.
20 *Id.* at *7, n.4.
21 *Id.*
22 *See* 28 U.S.C. § 157(b)(2)(B) and (b)(5).
23 *See, e.g., Rafoth v. Nat'l Union Fire Ins. Co. (In re Baker & Getty Fin. Servs. Inc.)*, 954 F.2d 1169, 1173-74 (6th Cir. 1992); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 389 (10th Cir. 1990); *In re United Missouri Bank of Kansas City NA*, 901 F.2d 1449, 1451 (8th Cir. 1990).
24 *See, e.g., Lansaw v. Zokaites (In re Lansaw)*, 853 F.3d 657, 666 (3d Cir. 2017).
25 *See, e.g., In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 735 (7th Cir. 1991); *In re Rexene Prods. Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992).
26 *Id.*

one month after the sale closes, the balance might shift to granting stay relief because the breathing spell has become less important by then.

Issues After *Ritzen*

After the *Ritzen* decision, what happens procedurally if the plaintiff files a motion in the first week of the case and it is denied on the basis that the balance of hardships favors keeping the stay intact because the debtor needs a breathing spell? Does the plaintiff, under *Ritzen*, need to appeal immediately, or can the plaintiff simply proceed with a stay-relief motion again in bankruptcy court after the sale closes, arguing that the breathing spell is no longer needed, and appeal (if ever) after those later proceedings?

This scenario seems to fall squarely into the exception laid out in the Supreme Court's footnote 4, where "further developments might change the stay calculus." It seems far more expedient in that scenario to allow the plaintiff/movant another chance at convincing the bankruptcy judge to lift the stay after the sale closes, rather than to require an appeal. After all, an appeal could take a year to decide and arguably deprive the bankruptcy court of jurisdiction in the interim; even once the appeal is heard, denial of stay relief is unlikely to be reversed with instructions to lift the stay, rather than reversed and remanded for yet further proceedings. Thus, in all but the most rare of circumstances, the motion (and the new facts) could come to a resolution much more quickly if the plaintiff is not required to appeal immediately and instead is allowed to proceed again in bankruptcy court after some length of time.

To accomplish that result, *Ritzen* requires, at a minimum, that the order denying stay relief expressly state that the denial is "without prejudice." That will be somewhat of a departure from current practice: The author surveyed 15 orders denying stay relief entered in the Southern District of New York, the Northern District of New York and the District of Delaware over the last five years,[27] and two-thirds of them did not specify whether the denial was with or without prejudice. Thus, special care will heretofore need to be placed on including such language.

Of course, even if the order contains "without prejudice" language, that might not be enough comfort to a plaintiff/movant to forego an immediate appeal. After all, the Supreme Court did "not decide whether finality would attach to an order denying stay relief ... 'without prejudice.'"[28] The fact that such orders *might* (and arguably should) not be immediately appealable might not be enough for many litigants to bank on, under penalty of losing their right to appeal.

As a result, courts and litigants might consider another approach: Instead of "denying" a stay-relief motion, the court could hold that the motion is "continued" to a date certain. Appropriate savings language under § 362(e)(1) would need to be included so that the stay will not terminate on its own in the interim.

A similar approach could be utilized for nonlitigation stay-relief motions where facts could change after the initial hearing, such as motions for relief from stay based on a contention that the debtor has no equity in the collateral. If there is reason to believe that the valuation conducted by the court might change in a few months, the motion could be denied without prejudice or, to be safer, could be deemed continued.

Conclusion

Ritzen provides clarity, but only with respect to what might well be a minority of orders denying stay relief: those essentially deciding the issue once and for all, and where facts are unlikely to change later. In those situations, the Supreme Court has left open the possibility — but has not decided — that the denial of stay relief might not be immediately appealable if the denial is without prejudice. There will likely be confusion and/or the filing of immediate appeals out of an abundance of caution until that issue is ultimately decided. abi

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27 Citations to those orders are available upon request to the author.
28 *Ritzen*, 2020 WL at *7, n.4.