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Lord, Bissell & Brook LLP Wins Priority For Insurers' Claims In Bankruptcy Cases

The Bankruptcy Group of Lord, Bissell & Brook LLP obtained an important victory for its client, Zurich American Insurance Company, and for all insurers, when the United States Court of Appeals for the Fourth Circuit held, on March 24, 2005, that amounts due with respect to workers' compensation insurance are entitled to priority under section 507(a)(4) of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), in *In re Howard Delivery Service, Inc. (Howard Delivery Service Inc. v. Zurich American Insurance Company)*, Case No. 04-1136. Section 507(a)(4) of the Bankruptcy Code provides fourth level priority for unsecured claims for "contributions to an employee benefit plan arising from services rendered within 180 days before the date of the filing of the petition." The three judge panel that heard the Howard Delivery case issued a short per curiam opinion announcing the decision, with two judges concurring in the result (for vastly different reasons) and one judge dissenting. Judge King said the statute was unambiguous and provided for priority. Judge Shedd thought the statute was ambiguous but that the legislative history showed priority should be granted. Judge Niemeyer, dissented, stating that the plain meaning of the statute was that there was no right to priority.

As a result of the Fourth Circuit ruling, Zurich will receive a significant recovery in this case. If Lord, Bissell & Brook had not prosecuted Zurich's claim for priority, Zurich would have received nothing, since there will be no distributions to unsecured creditors in the Howard Delivery case. This decision highlights the need for creditors aggressively to pursue their rights in bankruptcy cases. The decision, while specifically addressing only claims relating to workers' compensation insurance, helps to strengthen insurers' claims to priority for amounts due for health, life and disability insurance.

In rendering its ruling, the Fourth Circuit Court of Appeals, the most conservative federal appellate court in the nation, joined the Ninth Circuit Court of Appeals, the most liberal federal court of appeals in the United States, in granting priority to insurers. The Ninth Circuit Court of Appeals, which was the first Circuit Court to address this issue, relied on the plain meaning of the section, in ruling that the statute unambiguously entitled insurers to priority. See *Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). Three other Circuit Courts of Appeals, the Sixth, Eighth and Tenth Circuits, all subsequently rejected workers' compensation insurers' claims for priority under the statute, relegating such insurers' claims to general unsecured status. *Employers Ins. of Wausau, Inc. v. HLM Corp.*, 62 F.3d 224 (8th Cir. 1995) (legislative history of 507(a)(4) indicates that a workers' compensation plan does not constitute a wage substitute and is not an "employee benefit plan" because workers' compensation is statutorily mandated); *State Ins. Fund v. S. Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998); and *Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc.*, 224 F.3d 511 (6th Cir. 2000).

The Fourth Circuit decision widens the split between the Circuits on this issue and sets the stage for a possible final adjudication on the issue by the United States Supreme Court.

ABOUT THE AUTHORS

Partner Peg Anderson and Associate Timothy McFadden focus on the representation of creditors in bankruptcy cases. Partner Hugh Balsam is a member of the firm's appeals group.