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Feature

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Investing in an Appeal

The Dilemma Facing an Appellant of Confirmation Orders

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Following the entry of an order in any case, a potential appellant must weigh its chances of success on appeal before electing to proceed. This consideration is particularly critical in an appeal of a confirmation order because, as occurred recently in *In re Tribune Company*,[2] an appellant may be required to post a significant bond that is necessary to protect all other creditors as a condition of any stay of the confirmation order during the pendency of an appeal. The *Tribune* appellants were required to post a $1.5 billion bond, and when they sought review of the amount of the bond, the Third Circuit declined review for lack of jurisdiction because the stay order was not a final order or an injunction.[3]

The events in *Tribune* recalled the outcome of *In re Adelphia Communications* several years ago, in which the Second Circuit also declined, on jurisdictional grounds, to review the amount of the bond required by the district court for a stay of the confirmation order.[4] Because a stay of a confirmation order pending appeal may adversely affect all the other creditors of the debtor's estate, the courts have discretion to require the appellant to post a bond sufficient to protect the estate and its constituents against the risk of harm posed by a stay. The judge has full discretion regarding the amount of the bond, and as shown by *Tribune*, the amount may be virtually unreviewable by a court of appeals. Thus, an appellant must consider its own likelihood of success on appeal, the amount of its predicted recovery and whether the posting of a sizeable bond is a worthwhile investment before determining whether to pursue settlement options or go forward with an appeal of a confirmation order.

The Critical Need for a Stay

As a preliminary matter, a potential appellant should recognize that obtaining a stay of the confirmation order may be critical to the success of an appeal. Rule 3020 of the Federal Rules of Bankruptcy Procedure provides that an order confirming a plan in chapters 9 or 11 is stayed automatically for only 14 days, and plan proponents may receive, upon showing cause, a reduction of that time.[5] Absent a stay during the appeal, an appellant runs the risk that the plan will be "substantially consummated" under § 1102(2) of the Bankruptcy Code such that an appellate court would not be able to fashion effective relief, or if it did, that such relief would be inequitable to the other entities in the case.[6] In such a case, the appeal may be dismissed under the doctrine of "equitable mootness."[7] "Reviewing courts presume that it would be inequitable or impractical to grant relief after substantial consummation of a plan of reorganization."[8] An appellant may rebut the presumption of equitable mootness if the court can still order some effective relief that "will not affect the re-emergence of the debtor ... or unravel intricate transactions ... and create an unmanageable, uncontrollable situation for the Bankruptcy Court ... while providing notice to parties who would be adversely affected."[9] Additionally, an appellant must show that it "pursue[d] with diligence

1 This article contains only the author's opinions and conclusions and not those of her firm or its clients. The author's firm represented the appellants in the *Adelphia Communications* bankruptcy.
2 *In re Tribune Co.*, 477 B.R. 465 (Bankr. D. Del. 2012).
3 *Aurelius Capital Mgmt. v. Tribune Co. (In re Tribune Co.)*, No. 12-3437, Order (3d Cir. Sept. 5, 2012).
4 *ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, Nos. 07-0279, 07-0286, Order, at 3 (2d Cir. Feb. 9, 2007).
5 Fed. R. Bankr. P. 9006(c)(1).
6 *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993).
7 *ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 367 B.R. 84, 91 (S.D.N.Y. 2007).
8 *Id.* at 92 n.24 (citing *Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996)).
9 *Frito-Lay Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993).

all available remedies to obtain a stay of execution of the objectionable order."[10]

An appellant that wants to avoid the risk of equitable mootness must move for a stay before the bankruptcy court immediately upon entry of the confirmation order. In order to receive a stay, the movant must demonstrate (1) a likelihood of success on appeal, (2) that irreparable injury will result to the movant in absence of the stay, (3) that the stay will not substantially harm other parties in the litigation (*i.e.*, debtor and its other creditors) and (4) that a stay is in the public interest.[11] Importantly, "[a] stay is not a matter of right, even if irreparable injury might otherwise result."[12] Rather, appellants "bear ... the burden of showing that the circumstances justify an exercise of that discretion."[13]

Bond Required in the *Tribune* Appeal

In *Tribune*, the appellants, who were noteholders of senior and subordinated debt, objected to a settlement of fraudulent-transfer claims embodied in the reorganization plan. The noteholders' claims, of which the appellants held a substantial portion, amounted to $2 billion excluding interest and $2.3 billion if interest was considered. The appellants argued that the plan's provision of $369 million to senior noteholders and nothing to subordinated noteholders was inadequate. If greater value had been received for the fraudulent-transfer claims, the appellants argued, the senior noteholders would have received close to full recovery.

Following confirmation, the *Tribune* appellants immediately filed a notice of appeal and sought a stay of the order from the bankruptcy court during the pendency of their appeal. The bankruptcy court granted a stay under Fed. R. Bankr. P. 8005, but conditioned the stay on a $1.5 million bond.[14] In determining the bond amount, the *Tribune* court considered the potential harm not just to the debtors but also to all non-moving creditors. The bond must protect "against diminution in the value of the property pending appeal ... secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal ... [and] guarantee ... the costs of delay incident to appeal."[15]

The security required to protect every creditor of a debtor's case during the pendency of the appeal of a confirmation order is often exponentially larger than a bond that would be posted in a bilateral litigation under Rule 62(d) of the Federal Rules of Civil Procedure, which would be commensurate with the amount of the judgment.[16] The potential risk inherent in a two-party case may be the possibility of the judgment debtor's insolvency and inability to satisfy the judgment if sustained on appeal. The maximum loss to the appellee would thus be the amount of the judgment. In contrast, the potential risk to the estate and its creditors in an appeal of a confirmation order may be the entire value of recoveries to all creditors if the appeal puts that value at risk. In assessing the amount of the necessary bond, the *Tribune* court considered lost opportunity costs resulting from the delay of distributions, additional administrative expenses, harm caused by the delay in debt refinancing and the potential risk to non-moving creditors that would receive equity under the plan that would now be subject to market fluctuation.[17] The court noted that the movants did not propose an alternative amount for a bond, but rather argued that no bond should be required at all.[18] This failure of the movants resulted in the court requiring the movants to post full security. "It has been recognized 'if the movant seeks imposition of a stay without a bond, the applicant has the burden of demonstrating why a court should deviate from the ordinary full security requirement ... the Court declines to do Appellant's work for it.'"[19]

A future appellant facing similar circumstances ... should consider the likelihood that a large bond will be required to secure a stay of a confirmation order.

The *Tribune* appellants sought review by the district court of the amount of the bond required by the bankruptcy court. As before the bankruptcy court, the appellants did not argue for an alternate amount of the bond, or that they were unable to post the bond; rather, they argued that no bond was necessary because the alleged harms that could befall the other creditors were merely hypothetical.[20] District Judge Sleet denied the appellants' request to modify the bond, and the appellants then sought review by the Third Circuit. The appellants argued that the $1.5 billion bond was akin to an injunction and thus, the amount was reviewable under 28 U.S.C. § 1292(a)(1). The Third Circuit disagreed and denied review, holding that the order was neither final nor otherwise appealable as an injunction under 28 U.S.C. § 1292(a)(1).[21]

The *Tribune* appellants were initially fortunate with respect to the risk of equitable mootness of their appeal because even absent the stay, the debtors faced a delay of the plan while they sought approval from the Federal Communications Commission (FCC) to transfer licenses. Approval was received from the FCC, however, on Nov. 16, 2012.[22] On Jan. 18, 2013, the reorganized debtors moved to dismiss the appellants' appeal (and other appeals for which no stay was sought) on the grounds of equitable mootness.[23] No decision has been rendered yet.

Comparison to *Adelphia Communications*

Numerous comparisons can be drawn between the appeals in the *Tribune* case and in the *Adelphia Communications* case several years earlier.[24] In *Adelphia*, the bankruptcy court denied aggrieved bondholders a stay pending an appeal of the confirmation order, but upon an emergency application, the district court subsequently grant-

10 *Id.*
11 Fed. R. Bankr. P. 8005.
12 *See, e.g., Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961, (2009) (vacating stay) (internal citations omitted).
13 *Id.*
14 *In re Tribune*, 477 B.R. at 483.
15 *Id.* at 478 (citation omitted).
16 *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1559-60 (10th Cir. 1996).
17 *In re Tribune*, 477 B.R at 480-83.
18 *Id.* at 482 n.11.
19 *Id.* (quoting *In re W.R. Grace & Co.*, 475 B.R. 34 (D. Del. 2012)).
20 Appellant's Memorandum of Points and Authorities in Support of Emergency Motion, at 16-22, *Aurelius Capital Mgmt. LP v. Tribune Co. (In re Tribune Co.)*, 1:12-cv-01072, Aug. 24, 2012, ECF No. 4.
21 *Aurelius Capital Mgmt. v. Tribune Co. (In re Tribune Co.)*, No. 12-3437 (3d Cir. Sept. 5, 2012).
22 *In re Tribune*, Letter from W. Bowden to Hon. Sleet, Case 1:12-cv-01072 (Dec. 5, 2012), ECF No. 55.
23 *In re Tribune*, Motion to Dismiss Based upon Equitable Mootness, Case 1:12-cv-00128, Jan. 18, 2013, ECF No. 58.
24 *ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337 (S.D.N.Y. 2007)).

ed a stay, conditioned upon a $1.3 billion bond.[25] District Judge Scheindlin held that "if a stay pending appeal is likely to cause harm by diminishing the value of the estate or 'endanger the non-moving parties' interest in the ultimate recovery,'" then a bond is required.[26] The bond should be "at or near the full amount of the potential harm to the non-moving parties" or "commensurate with the threatened loss to the non-moving parties."[27] As in *Tribune*, the court noted that the movants had "the burden of providing specific reasons why the court should depart from the standard requirement of granting a stay only after posting of a supersedeas bond in the full amount of the judgment."[28]

Like the *Tribune* appellants, the *Adelphia* appellants sought review of the bond amount by the court of appeals. In doing so, they attempted to persuade the Second Circuit of its jurisdiction under two theories.[29] Their first argument was that conditioning of the stay on a $1.3 billion bond, when the appellants stood to gain much less than that from a successful appeal, had the practical effect of a denial of an injunction, a review of which was appropriate under 28 U.S.C. § 1292(a)(1).[30] Alternatively, the appellants argued that the court of appeals could evaluate the petition for a *writ of mandamus* under the All Writs Act, 28 U.S.C. § 1651(a), which empowers the court to issue "all writs necessary or appropriate in aid of their respective jurisdiction."[31]

The Second Circuit refused jurisdiction under 28 U.S.C. § 1292(a)(1) because there was "nothing in the record that supports the [appellant's] contention that it is unable to post a bond in the amount of $1.3 billion.... What the [appellant] is really arguing is that the bond amount so far exceeds the benefit to the [appellant] if it prevails on the appeal that no rational creditor would put $1.3 billion at risk."[32] That the bond was not a worthy investment for the appellants did not amount to an injunction. "We know of no authority that supports appellate jurisdiction over a bond requirement on the theory that ... posting the required bond is not an investment that the party pursuing the appeal would prudently make, and we decline to uphold jurisdiction on such a theory."[33] The court also denied the *writ of mandamus* because the appellants had not shown "a clear and indisputable right to the issuance of the writ, amounting to a clear abuse of discretion or usurpation of judicial power."[34] The temporary stay was vacated, and when the appeal of the confirmation order proceeded (absent a stay), Judge Scheindlin found that the appellants' refusal to post the bond that the court required as a condition to the stay amounted to "failure to seek a stay diligently" and weighed in favor of finding equitable mootness and dismissal of the appeal.[35]

Conclusion

A future appellant facing similar circumstances to those faced by the appellants in *Tribune* and *Adelphia* should consider the likelihood that a large bond will be required to secure a stay of a confirmation order. As burdensome as the bond may be, the amount likely will be unreviewable by the court of appeals, and absent a stay, review of the confirmation order may be unlikely due to the doctrine of equitable mootness. Thus, an appellant may be left with two options: (1) post a bond that exceeds any value that it may ultimately recover from its appeal in order to secure appellate review of the confirmation order, or (2) entertain settlement options in an effort to get some value on its initial investment. abi

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25 *In re Adelphia*, 361 B.R. at 368.
26 *Id.* (internal citations and quotation marks omitted).
27 *Id.*
28 *Id.* at 350.
29 *ACC Bondholder Grp. v. Adelphia Commc'ns Corp (In re Adelphia Commc'ns Corp.)*, Nos. 07-0279, 07-0286, Order, at 3-4 (2d Cir. Feb. 9, 2007).
30 *Id.* at 3.
31 *Id.* at 4.
32 *Id.* at 3.
33 *Id.*
34 *Id.* at 4 (internal citations omitted).
35 *In re Adelphia*, 367 B.R. at 98-99.