AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

Appellate Practice for the Rest of Us

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Hon. Cynthia A. Norton
U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

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American Bankruptcy Institute
Annual Spring Meeting—April 25, 2025
Appellate Practice for the Rest of Us

Honorable Cynthia A. Norton, U.S. Bankruptcy Court (W.D. Mo.)

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Many thanks to Judge Norton and

her law clerks for the written materials

Stay Pending Appeal[1]

After a bankruptcy court enters an appealable order, judgment, or decree, and subject to the stay of enforcement proceedings in Federal Rule of Bankruptcy Procedure 7062,[2] the prevailing party may generally execute upon or otherwise seek to enforce the order, judgment, or decree. However, Federal Rule of Bankruptcy Procedure 8007[3] permits the losing party to seek a stay of the order, judgment, or decree in order to maintain the status quo while the party pursues an appeal.

Although Rule 8007(b) allows a party to file a motion for stay pending appeal in the court where the appeal is pending (if the party satisfies certain requirements), "[o]rdinarily, a party must move first in the bankruptcy court for . . . a stay of a judgment, order, or decree of the bankruptcy court pending appeal . . . ." Fed. R. Bankr. P. 8007(a)(1)(A).

A motion for stay pending appeal may be filed with the bankruptcy court either before or after a notice of an appeal is filed. Thus, the bankruptcy court retains jurisdiction over a stay pending appeal even if a notice of appeal has been filed. (This is an exception to the "divestiture rule" discussed elsewhere in these materials.)

Rule 8007(a) allows the bankruptcy court to order the following relief:

> (A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;
>
> (B) the approval of a supersedeas bond;
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> (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

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[1] Materials Prepared by Erica Garrett, Law Clerk to Chief Judge Cynthia A. Norton, United States Bankruptcy Court for the Western District of Missouri.

[2] The relationship between Rule 8007 and Rule 7062, and the procedure for properly requesting a stay pending appeal, are not the subject of these materials. For a discussion of those subjects, *see* 10 Collier on Bankruptcy ¶¶ 8007.03, 8007.04, and 8007.05[2] (Richard Levin & Henry J. Sommer eds., 16th ed.).

[3] Prior to 2014, this rule was found in Fed. R. Bankr. P. 8005.

> (D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

Fed. R. Bankr. P. 8007(a)(1). Subdivision (e) provides:

> Despite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may:
>
> > (1) suspend or order the continuation of other proceedings in the case; or
> >
> > (2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest.

Fed. R. Bankr. P. 8007(e).

In determining whether to grant a stay under Rule 8007, courts have adopted the standard used in determining whether to grant a preliminary injunction, namely:

> (1) the likelihood that the party seeking the stay will prevail on the merits;
>
> (2) whether the movant would suffer irreparable harm if the stay is not granted;
>
> (3) whether other parties would suffer substantial harm if the stay is granted; and
>
> (4) whether the public interest would be harmed if the stay is granted.

Nken v. Holder, 556 U.S. 418, 434, 129 S.Ct. 1749 (2009. *See also* 10 Collier on Bankruptcy ¶ 8007.7 (Richard Levin & Henry J. Sommer eds., 16th ed.)). "There is substantial overlap between [the factors governing stay pending appeal] and the factors governing preliminary injunctions. . . not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. at 434, 129 S.Ct. at 1761 (citing *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 24, 129 S.Ct. 365, 376–77 (2008)).

However, while the factors to be considered are the same for both a preliminary injunction and a stay pending appeal, courts have held that the balancing process is not identical due to the different procedural posture in which each judicial determination arises. *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). That is because, with a preliminary injunction, the court must make a decision based upon "incomplete factual findings and legal research," whereas a motion for a stay

pending appeal is generally made after the trial court has fully considered the merits of the underlying action and issued judgment. *Id.* As a result, a movant seeking a stay pending review on the merits of a trial court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits than would a movant seeking a preliminary injunction. *Id.*

On appeal, the denial of a stay pending appeal is reviewed for an abuse of discretion, but the decision on the likelihood of success on the merits is a purely legal determination reviewed *de novo*. *In re Revel AC*, 802 F.3d 558, 567 (3d Cir. 2015).

Application of the Factors

Although courts are quite uniform in invoking the preliminary injunction factors in deciding whether to issue a stay pending appeal, "the application of those factors is far from uniform." *See* Richard S. Kanowiz and Michael A. Klein, *The Divergent Interpretations of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders*, 17 J. Bankr. L & Prac. 4 Art. 3 (July 2008). Particularly, "there is significant difference of opinion among judges as to (i) what must be shown by a movant to demonstrate potential for success on the merits; and (ii) whether the potential for an appeal to become equitably moot in the absence of a stay constitutes irreparable harm to support granting a stay under Bankruptcy Rule [8007]." *Id*.[4]

"In order not to ignore the many gray shadings stay requests present, courts 'balance them all' and 'consider the relative strength of the four factors.'" *In re Revel AC*, 802 F.3d at 568 (citations omitted). "[T]he most critical" factors are the first two: "whether the stay movant has demonstrated (1) a strong showing of the likelihood of success and (2) that it will suffer irreparable harm – the latter referring to 'harm that cannot be prevented or fully rectified' by a successful appeal." *Nken,* 556 U.S. at 434, 129 S.Ct. 1749; *In re Revel AC*, 802 F.3d at 568.

According to the Third Circuit, although both of the first two elements are necessary in order to issue a stay, the former – likelihood of success – "is arguably the more important piece" of the analysis because "equity jurisdiction exists only to remedy legal wrongs; thus, without some showing of a probable right, there is no basis for invoking it." *Id*. (citation and brackets omitted).

[4] Because of the many varying approaches to this analysis used by the courts, one word of caution: A comprehensive, every-jurisdiction summary is beyond the scope of these materials. Be sure to check the law in your jurisdiction.

Likelihood of Success on the Merits

Although likelihood of success on the merits is a required element for the granting of a stay, and is "arguably the most important piece," "the formulations used to describe the *degree* of likelihood of success that must be shown vary widely." *Id*. (citation and internal quotation marks omitted; emphasis in original).

> To give but a sampling of the range that exists, some require a showing that the underlying appeal is "more likely to succeed than fail." *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1026 (2d Cir.1985) *overruled on other grounds by O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987). Others call for a "substantial possibility, although less than a likelihood, of success." *Dubose v. Pierce,* 761 F.2d 913, 920 (2d Cir.1985) (quoting *Hayes v. City Univ. of N.Y.,* 503 F.Supp. 946, 963 (S.D.N.Y.1980)) *vacated on other grounds* 487 U.S. 1229, 108 S.Ct. 2890, 101 L.Ed.2d 924 (1988); *see also generally* John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays,* 45 Baylor L.Rev. 809, 813–15 (1993). For [the Third Circuit], a sufficient degree of success for a strong showing exists if there is "a reasonable chance, or probability, of winning." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011 (en banc). Thus, while it "is not enough that the chance of success on the merits be 'better than negligible,'" *Nken*, 556 U.S. at 434, 129 S.Ct. 1749 (citation omitted), the likelihood of winning on appeal need not be "more likely than not," *Singer Mgmt. Consultants,* 650 F.3d at 229; *see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C.Cir.1977) (noting that the trouble with a "strict 'probability' requirement is [ ] it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation").

In re Revel AC, Inc., 802 F.3d at 568-69 (footnote omitted). In *In re Revel AC*, the Third Circuit then settled on a standard of "significantly better than negligible but not greater than 50%." *Id.*

In the Sixth Circuit, "a movant need not always establish a high probability of success on the merits," but the movant must show, "at a minimum, serious questions going to the merits." *Griepentrog*, 945 F.2d at 153.

Irreparable Injury

In a preliminary injunction case frequently cited in stay-pending-appeal cases, the Supreme Court held that the moving party must demonstrate that "irreparable injury is *likely* [not merely possible] in the absence of [a stay]." *Winter v. Nat. Resources, Defense Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 376 (2008) (emphasis in original).

As with likelihood of success discussed above, however, courts have employed more than one definition of "likely" in the context of irreparable injury. The Third Circuit interprets *Winter* to mean "more apt to occur than not," and that the movant "must demonstrate an injury that is neither remote nor speculative, but actual and imminent." *In re Revel AC*, 802 F.3d at 569 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). According to some courts, *Winter* means that the movant must make a "clear showing" that he is likely to suffer irreparable harm. *In re Garcia*, 436 B.R. 825, 829 (Bankr. W.D. Va. 2010). Moreover, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937 (1974); *In re Revel AC*, 802 F.3d at 571.

Whether Other Parties (Including the Stay Opponent) Will be Harmed

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435, 129 S.Ct. 1749.

The Seventh Circuit applies a sliding scale approach: "[T]he greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh its favor, and vice versa." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). *See also In re West End Realty Corp.*, 507 B.R. 496, 508 (Bankr. S.D. N.Y. 2014) (requiring the moving party to show that "the balance of harms tips in favor of granting the stay.").

The Third Circuit applies what it refers to as a "balancing of harms" or "sliding-scale" approach where it weighs the likely harm to the movant absent a stay (factor two) against the likely irreparable harm to the stay opponent if the stay is granted (factor three) and the public interest (factor four). *In re Revel AC*, 802 F.3d at 569 - 70.

> To sum it up, all four stay factors are interconnected, and thus the analysis should proceed as follows. Did the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater

> than 50%) *and* (b) will suffer irreparable harm absent a stay? If it has, we balance the relative harms considering all four factors using a "sliding scale" approach. However, if the movant does not make the requisite showings on either of these first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis. But depending on how strong a case the stay movant has on the merits, a stay is permissible even if the balance of harms and public interest weigh against holding a ruling in abeyance pending appeal.

In re Revel AC, 802 F.3d at 571 (internal citation, quotation marks, and brackets omitted). Note that there was a dissent in *Revel*, which criticized the sliding scale approach, positing that, to merit a stay pending appeal, the applicant must "demonstrate" that it will "satisfy" each of the four stay factors. *Id.* at 575. If it does not, "then even if the stay applicant's chances of success on appeal are assured (let alone more probable than not) and the applicant will likely suffer an irreparable injury, a stay must be denied if, for example it isn't in the public interest." *Id.* at 570.

Cases of Interest

Seventh Circuit Reverses Decision Denying Stay Pending Appeal, Holding the Likelihood of Success and the Balance of Probable Harms Weighed in Movant's Favor. *In re A & F Enterprises, Inc. II,* 742 F.3d 763 (7th Cir. 2014)

The related Chapter 11 debtors' primary assets consisted of seventeen IHOP franchise agreements and the corresponding building and equipment leases. Section 365(d)(2) provides that a Chapter 11 debtor may assume or reject executory contracts at any time before plan confirmation. However, with respect to unexpired leases of nonresidential real property, § 365(d)(4) requires the leases to be assumed or rejected within 120 days after the order for relief (unless the court grants an extension), or the lease shall be deemed rejected. The debtor neither assumed the building leases within 120 days nor sought an extension of time to do so. IHOP asserted that the building leases were rejected and, because the contracts all had cross-default provisions, the franchise agreements expired as a result. The debtor asserted that because the building leases were only one part of the larger franchise arrangement with IHOP, § 365(d)(2) applied, and so it could assume or reject the leases at any time before plan confirmation. The bankruptcy court ruled in favor of IHOP. Both the bankruptcy court and the district court denied the debtors' motions for stay pending appeal. The debtors appealed that stay denial to the Seventh Circuit, while the merits of the § 362(d)(2) decision remained with the district court.

The Seventh Circuit reversed the stay denial, holding that the Code was not clear. While it was "undeniable" that § 365(d)(4)'s 120-day time limit controlled stand-alone leases, it was "equally undeniable" that § 365(d)(2)'s longer time limit controlled stand-alone franchise agreements. And, "[w]hen a franchise agreement and a lease are inseparable, one time limit or the other will control both." Noting that two other bankruptcy courts had agreed with the debtors' position, the Seventh Circuit said that position had "substantial merit." Since there was no clear answer to the legal question of which provision controlled, the Seventh Circuit "rest[ed]" its decision on the balance of potential harms. Since both parties agreed that the debtors would have no way to recover the franchises if IHOP were able to find new franchisees to take over the debtors' franchises, the debtors would be irreparably harmed. Moreover, even though money damages would be available to the debtors if the franchises were sold, in the Chapter 11 reorganization context, valuation can be difficult: "a primary assumption behind Chapter 11 is that reorganization preserves value better than liquidation, and leaving [the debtors] with nothing but a damages remedy is the equivalent of converting the reorganization into a liquidation." In addition, "[v]aluation problems aside, damages [were] also insufficient to protect [the debtors' principal] in continuing to operate his business of choice." IHOP's claim that its trademark would be damaged if the debtors continued to operate the franchises was "much less severe than the more immediate injury of cutting off [the debtors'] reorganization efforts entirely."

Balance of Hardships Regarding Payment of Attorney Administrative Expense Claims Warranted Stay Pending Appeal, Despite Little Chance of Success on the Merits. ***In re Ward*****, 511 B.R. 909 (Bankr. E.D. Wis. 2014).**

A law firm represented debtors in two unrelated Chapter 13 cases. Although the debtors had made some preconfirmation plan payments, the trustee in both cases filed motions to dismiss for default in payment of the preconfirmation plan payments. Shortly before the objection period to the dismissal motions expired, the firm filed applications requesting that the court allow it to recover its attorney fees as administrative expenses to be paid out of the funds the Chapter 13 trustee was holding. However, because the firm had waited to file its applications until shortly before the deadline to respond the motions to dismiss, they were not ripe for ruling when the cases got dismissed. The bankruptcy court then denied the applications, concluding that §§ 1326(a)(2) and 349(b)(3) required that the funds be returned "to the debtor." The firm filed motions to reconsider, citing for the first time to law supporting its position. The court denied the motions to reconsider for several reasons, including that the firm had not shown "manifest error," given the lack of uniformity among trial court decisions and the circumstances. The firm appealed and filed motions for to stay the trustee from disbursing the funds to the debtors.

In granting the stay, the bankruptcy court said that the likelihood of success would depend on whether the reviewing court ruled that the notices of appeal encompassed only the orders denying reconsideration, or if they included the original orders denying the fee applications. If it were the former, there was very little likelihood of success, the court held. But if it included the original fee denial orders, there was at least some likelihood of success because the district court would review the denials *de novo* in the absence of controlling authority. Therefore, "the decision on whether to grant a stay should be based primarily on the balance of the potential harms." Disbursing the funds to the debtors would require counsel to go after the debtors under state law, which would be "far more difficult" than being paid by the trustee. And, the debtors presumptively owed the money to the firm. Finally, granting the stay imposed little harm on the trustee and had little impact on public policy or other parties. Therefore, although the firm only had "a minute chance of succeeding on appeal" it satisfied the "extremely low" standard for a stay pending appeal when that minute chance was balanced against the relative harms warranted. Based on that balancing, the court granted the stay.

A Stay Pending Appeal is Not Open-Ended. ***In re Kendall*****, 510 B.R. 356 (Bankr. D. Colo. 2014)**

The bankruptcy court ruled in favor of the Chapter 7 trustee in a fraudulent conveyance action. The defendant-transferees appealed to the BAP, asserting that the court erred in valuing assets in concluding that the debtor was insolvent when the transfers were made. The defendants filed a motion to stay pending appeal, which the court granted with certain conditions. The BAP affirmed the judgments avoiding the transfers, and the defendants appealed to the Tenth Circuit. About three months into the Tenth Circuit appeal, and while that appeal remained pending, the trustee conferred with the defendants regarding a sale of the transferred property. The defendants argued to the bankruptcy court that the stay continued throughout the appeal process. Addressing an issue of first impression, the bankruptcy court disagreed. Rather, once the BAP issued its mandate, Rule 8025 (previously Rule 8017), dealing with stays of district court or BAP judgments while an appeal is pending with the circuit, was invoked. It was "axiomatic," based on the express language of Rule 8025, that a party must seek a stay under that rule once the mandate is issued. Failing to do so terminates the stay.

Trustee Entitled to Stay Pending Appeal on Disputed Fee Ruling. ***In re Rowe*****, 484 B.R. 667 (Bankr. E.D. Va. 2012)**

The Chapter 7 trustee filed an application for fees totaling over $17,000. The court allowed a reduced fee of $8,200, finding that the trustee did not properly or timely complete his duties as trustee under § 704(a)(1). The trustee appealed to the district court, arguing that a trustee's fee is a fixed commission under §§ 330(a)(7) and 326(a). He sought a stay pending appeal to allow him to withhold the disputed funds from distribution to creditors. The bankruptcy court held that his prospects for success on the merits was "poor" because the Code and caselaw required that trustee fees be reasonable, and he did not properly discharge his duties and creditors were injured by the trustee's delay. Nevertheless, the court held that, while the trustee could "theoretically" recover any overpayment to creditors if he were successful on appeal, "the cost to do so could effectively deny his right to appeal." Moreover, while creditors are always injured by a delay in distribution, any harm could be remedied by a bond. And, there was no significant public interest, except to assure that the compensation was correctly computed and that the bankruptcy system is transparent in its operation. Therefore, the stay was granted with the condition that the trustee post a $750 bond. Note that the court held that the trustee's blanket bond did not cover this situation.

A Split of Authority on the Question of Whether a Chapter 13 Debtor has an Absolute Right to Dismiss Warranted Stay Pending Appeal. ***In re Abebe*****, 466 B.R. 63 (Bankr. E.D. Va. 2012)**

The bankruptcy court approved the sale of the debtor's house. After paying off the mortgage, $19,000 was to go to the Chapter 13 trustee for payment to creditors, and $6,000 was to go to the debtor. Shortly after the sale, the debtor moved to voluntarily dismiss her case. Two days later, the bankruptcy court granted that motion. Subsequently, the trustee received the $19,000 check from the sale, and he moved to vacate the order of dismissal so that the money could be distributed to creditors. He also asserted that the debtor had acted in bad faith in connection with the sale. The bankruptcy court denied the motion, holding that § 1307(b) provides a Chapter 13 debtor with an absolute right to dismiss a case that had not previously been converted. It also granted a stay pending appeal, though, because there was a notable split of authority on the question, and the Supreme Court's *Marrama* decision increased the likelihood of a ruling favorable to the trustee and there was no *controlling* authority in the Fourth Circuit. Therefore, there was a "sufficiently strong" likelihood of success on the merits. Moreover, if the funds were turned over to the debtor,

who stated she planned to use some of the money, the trustee's appeal would become equitably moot. And since she had already received her $6,000, the harm to the trustee outweighed the harm to the debtor, despite her representation that she needed the money. Finally, there was no showing that the issue would violate the public interest in any way. Stay pending appeal was therefore granted.

The "Divestiture Rule": Which Parts of a Bankruptcy Case Can You Still Decide When a Particular Order is on Appeal?[5]

"The divestiture rule" provides that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). However, at least some courts hold that it is discretionary: "While this rule is not a creature of statute and is not absolute in character, . . . it is judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time." *United States v. Thorp* (*In re Thorp*), 655 F.2d 997, 998 (9th Cir. 1981). The divestiture rules apply with equal weight to bankruptcy court orders, but courts have recognized that "due to the inherent nature of bankruptcy cases, 'discrete controversies within the overall case framework may often deserve separate appellate consideration,' and have cautioned against a 'broad rule that a bankruptcy court may not consider any request which either directly or indirectly touches upon the issues involved in a pending appeal and may not do anything which has any impact on the order on appeal.'" *In re G-I Holdings, Inc.*, 568 B.R. 731, 764 (Bankr. D. N.J. 2017) (quoting *In re Scopac*, 624 F.3d 274, 280 (5th Cir. 2010)). "[A]n appeal of a bankruptcy order will not only divest the bankruptcy court of jurisdiction if the issues on appeal are identical to the issues presently before the bankruptcy court, but also if the bankruptcy court's determination of the issues before it would interfere with or undermine the appellate process." *In re G-I Holdings, Inc.*, 568 B.R. at 764.

Although the divestiture rule vests exclusive jurisdiction in the appellate court, the lower court retains jurisdiction to implement or enforce the order being appealed. *Cibro Petroleum Prods, Inc. v. City of Albany* (*In re Winimo Realty Corp.*), 270 B.R. 99, 105 (S.D. N.Y. 2001). "This is true because in implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review. Accordingly, courts have recognized a distinction between actions that 'enforce' or 'implement' an order, which are permissible, and acts that 'expand' or 'alter'

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[5] Prepared by Erica Garrett, Law Clerk to Chief Judge Cynthia A. Norton, United States Bankruptcy Court for the Western District of Missouri.

that order, which are prohibited." *Id.* at 105-06 (citation and internal quotation marks omitted). "In the event a party seeks modification of an order that is pending on appeal, . . .the lower court should first determine whether it would grant the motion for a modification of the order, and if it decides that it would grant such a motion, then a motion should be made to the appellate court for a remand to permit the lower court which issued the order to entertain a motion for such modification." 1 William L. Norton Jr. & William L. Norton III, *Bankruptcy Law and Practice* § 4.135 (3d ed. 2017).

Case Summaries

Bankruptcy Court had Jurisdiction to Determine Whether Plaintiffs Were "Creditors" with Standing to Object to Discharge, Even Though the Order Allowing their Claims Was Pending on Appeal. *Sears v. Sears*, 863 F.3d 980 (8th Cir. 2017)

Several members of the Sears family sold their shares of a company called AFY, Inc., to another family member, debtor Korley Sears, in exchange for a promissory note by Korley to the Searses. After Korley filed Chapter 11, a "principal issue" in the case was whether the claims filed by the Searses, which totaled over $5.2 million, should be allowed. The bankruptcy court allowed the claims, and Korley appealed. Meanwhile, the Searses filed an adversary proceeding claiming that Korley's discharge should be denied under § 727(a)(2) and (a)(4) for failing to disclose a possessory and beneficial interest in a boat and trailer in his schedules. While the appeal of the order allowing the Searses' claim was pending, the bankruptcy court denied Korley's discharge in the Searses' adversary proceeding.

On appeal of that decision to the Eighth Circuit, Korley argued that the bankruptcy court did not have jurisdiction to determine that the Searses were "creditors" with statutory standing to object to the discharge, under the theory that when he appealed the order allowing the Searses' claims in the main case, the bankruptcy court was divested of jurisdiction to decide in the adversary proceeding that the Searses were creditors. The Eighth Circuit rejected that argument, stating that an appeal only divests the bankruptcy court "of its control over those aspects of the case involved in the appeal." Inasmuch as "[a] creditor is an entity that has a claim, and a disputed claim is still a claim," the Eighth Circuit held, the question of whether the Searses' claims should have been allowed was distinct from the question of whether the Searses were creditors. Therefore, they had standing to pursue their denial of discharge action.

Filing an Appeal Attacking the Bankruptcy Court's Jurisdiction Does Not Result in Stay of all Proceedings in the Case. ***In re Imaging3, Inc.*****, 634 Fed. Appx. 172 (9th Cir. 2015)**

Imaging3, Inc. filed a Chapter 11 bankruptcy case. One of its shareholders challenged the filing, arguing that the debtor's board of directors lacked authority to file the petition and, therefore, the bankruptcy court lacked jurisdiction over the case. The bankruptcy court ruled against the shareholder and the shareholder appealed. However, the shareholder did not obtain a stay pending appeal. The Ninth Circuit held that the notices of appeal did not divest the bankruptcy court of jurisdiction over the ongoing proceedings, which included, among several other things, the disallowance of the shareholder's claims and confirmation of the debtor's plan. "A litigant cannot automatically stay bankruptcy proceedings by filing an attack on the bankruptcy court's jurisdiction and appealing the denial of that motion," the Ninth Circuit held. Rather, "[i]f a party wants to stay all of the proceedings in bankruptcy court while an appeal is pending, it must file a motion for a stay." (Citation omitted.)

Dismissing the Bankruptcy Case While an Appeal of a Stay Relief Order is Pending Does Not Violate the Divestiture Rule. ***In re Castaic Partners II, LLC*****, 823 F.3d 966 (9th Cir. 2016)**

In this relatively-common scenario, the debtor filed a Chapter 11 case to halt the foreclosure of its real estate. The bankruptcy court granted the mortgage-holder's motion for relief from stay. The debtor appealed, arguing that the mortgage-holder lacked a valid interest in the property and thus lacked standing to move for relief, but failed to obtain a stay pending appeal. The lender foreclosed. Because the property had been the debtor's only significant asset, the bankruptcy court then dismissed the Chapter 11 case while the appeal of the stay relief order was pending. The debtor did not appeal from the dismissal order. The Ninth Circuit held that the dismissal did not violate the divestiture rule because the filing of a notice of appeal does not divest the trial court of jurisdiction over matters or issues not appealed, and the only matter on appeal was the stay relief. Relying on the Eighth Circuit's decision in *Olive St. Inv. v. Howard Sav. Bank*, 972 F.2d 214 (8th Cir. 1992), the Ninth Circuit held that since the case had been dismissed, neither the goal of a successful reorganization nor the debtor's right to the automatic stay continues to exist. Therefore, the appeal had become constitutionally moot. The Ninth Circuit commented, however, that if the debtor had appealed from the dismissal order, it "might have had some power to grant effective relief."

Creditor's Appeal from Judgment in Favor of Debtor on Nondischargeability Action did not Deprive Bankruptcy Court of Jurisdiction to Confirm Plan Providing that the Creditor's Claim was Fully Satisfied. ***Bank of Commerce & Trust Co. v. Schupbach*** **(*In re Schupbach*), 607 Fed. Appx. 831 (10th Cir. 2015)**

Debtors were guarantors of several real estate loans to their limited liability company. After they filed bankruptcy, the lender sought a determination that a portion of its claim was nondischargeable due to the debtors' diverting some of the loan proceeds for their own personal use. The bankruptcy court ruled in favor of the debtors on the nondischargeability action, and the lender appealed. While that appeal was pending, the bankruptcy court confirmed their plan which provided that the lender's claim had been satisfied in full in the LLC's Chapter 11 case. The lender did not oppose, or appeal, the confirmation order. The debtors moved to dismiss the appeal of the nondischargeability ruling as moot. The lender asserted that since the underlying unsecured claim was a necessary element of a nondischargeability action, the appeal had divested the bankruptcy court of jurisdiction to confirm a plan which treated the lender's claim as fully satisfied. The Tenth Circuit held that, if the appeal of the nondischargeability order divested the bankruptcy court's jurisdiction to confirm the plan which contained provisions mooting the appeal, then the lender should have appealed the confirmation order. Citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S.Ct. 2195 (2009), the Tenth Circuit said that, once the confirmation order became final, it became *res judicata* to the parties, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Since the lender did not challenge the bankruptcy court's jurisdiction to enter the confirmation order on direct review of that order, it could not now "reopen that question in a collateral attack upon an adverse judgment."

Bankruptcy Court Lacked Jurisdiction to Rule on an Injunction Motion While the Issue of Whether the Claimants' Claims Were Discharged was on Appeal. ***In re G-I Holdings, Inc.*****, 568 B.R. 731 (Bankr. D. N.J. 2017)**

In 2001, G-I Holdings, Inc. and its subsidiary filed Chapter 11 bankruptcy cases which were jointly administered. Their joint plan of reorganization, which contained certain discharge injunctions, was confirmed in 2009. In September 2015, certain entities known as "the Ashland Parties" filed a complaint in a New Jersey state court for breach of contract and a declaratory judgment that the debtor and certain other entities and successors were in breach of an indemnification agreement in connection with remediation of a superfund

site. Before any substantive proceedings in the state court occurred, the debtor filed a notice of removal to the bankruptcy court, which initiated an adversary proceeding. In December 2016, the bankruptcy court granted the Ashland Parties' motion to remand the case to the state court because, *inter alia*, although the ultimate outcome could involve an interpretation of the confirmed plan, state court matters were predominant and the outcome would not affect any distribution to creditors or impact the administration of the bankruptcy estate.

The debtor appealed to the federal district court for New Jersey. While that appeal was pending, the debtor filed, in the main bankruptcy case, a motion to enforce the plan's injunction and discharge provisions against the Ashland Parties on the ground that the bankruptcy court was the proper court to enforce its confirmation order, and that the bankruptcy court had expressly retained jurisdiction to do so in the order. The bankruptcy court held that the divestiture rule prohibited it from deciding the matter. Although everyone agreed that the interpretation of the confirmation order was a "core proceeding," and that the bankruptcy court therefore had subject matter jurisdiction over the injunction motion, and although the issues presented in the injunction motion were not identical to those on appeal, there was a substantial risk that the bankruptcy court's decision would interfere with the appeal or substantially undermine the federal district court's jurisdiction and the appellate process, inasmuch as the interpretation of the confirmation order was raised in the adversary. Moreover, the court held, it did not matter that the debtor brought the injunction motion in the main case rather than the adversary proceeding.

Bankruptcy Court Divested of Jurisdiction in Adversary Involving Arbitration Issues. ***Cibro Petroleum Prods, Inc. v. City of Albany*** **(*In re Winimo Realty Corp.*), 270 B.R. 99, 105 (S.D. N.Y. 2001)**

The bankruptcy court entered an order refusing to compel contractual arbitration of a dispute between the parties, and the party seeking arbitration appealed to the district court. Nevertheless, the bankruptcy court scheduled a trial on the merits of the adversary proceeding involving the underlying contract dispute, in part because the bankruptcy court had ruled that the contract dispute was core. Turning to non-bankruptcy law on the divestiture issue, and noting a disagreement among the circuits, the District Court for the Southern District of New York held that the appeal of a decision denying arbitration divested the trial court of jurisdiction to proceed on the merits of the dispute. For one thing, one of the reasons the bankruptcy court refused to order arbitration was that the dispute was core, which was one of the issues being appealed. Since the bankruptcy court only

had jurisdiction over the dispute if it was core, there was a risk of inconsistent rulings. Moreover, the appellant's appeal was not frivolous. Therefore, the district court held, staying the bankruptcy court's proceedings pending appeal would prevent inconsistent rulings and ensure that judicial resources were not wasted on useless litigation.

Appeal from Orders Denying Committee Standing to Pursue Claims on Behalf of Estate did not Divest Bankruptcy Court of Jurisdiction over Plan Confirmation, Even though the Plan Provided for Releases of Some of the Claims the Committee Wanted to Pursue. ***In re Sabine Oil & Gas Corp.*****, 548 B.R. 674 (Bankr. S.D. N.Y. 2016)**

The Official Committee of Unsecured Creditors appealed from a bankruptcy court order denying (i) the committee's motion for leave and standing to commence certain claims on behalf of the estates and for exclusive settlement authority of those claims; and (ii) a motion by certain indenture trustees seeking leave, standing, and settlement authority pertaining to certain claims on behalf of one of the debtor's estates. The committee also sought a stay pending appeal of those orders, specifically asking the bankruptcy court to stay, *inter alia*, any action to cause the release of the estate's claims which the court denied the Committee standing to pursue. The debtors and many other parties objected.

Acknowledging the general divestiture doctrine, the court pointed out that a bankruptcy court is not divested of jurisdiction to *enforce or implement* the order being appealed, nor is the bankruptcy court divested of jurisdiction to decide issues and proceedings different from and collateral to those involved in the appeal. "Courts have accordingly recognized a distinction in the divestment of jurisdiction between acts undertaken to enforce the judgment and acts which expand upon or alter it' the former being permissible and the latter prohibited." (Citation omitted.) The court pointed out that the application of this distinction is particularly germane in a Chapter 11 case which involves the issuance of "innumerable orders involving a myriad of issues, one or more of which may be on appeal at any given moment." (Citation omitted.) Rejecting the committee's argument to the contrary, confirmation of a plan containing releases of the estate's claims would in no way alter the order being appealed in part because the issue of whether the court should confirm a plan containing releases of certain claims was entirely distinct from the issue of whether the court should grant the committee standing to pursue such claims. Moreover, even if the court were to in effect "enforce" aspects of the prior order in a subsequent adjudication of disputes regarding releases at confirmation, doing so would merely constitute "implementation" rather than alteration of the prior order and the divestiture doctrine would not be implicated. The court said:

> If the divestiture doctrine were to be applied in a way that divests bankruptcy courts of jurisdiction over all issues relevant to confirmation on which the court has previously ruled and are the subject of a pending appeal, this would lead to an absurd result – courts would likely decline to rule on any issues that could be implicated at confirmation for fear of interfering with a debtor's ability to emerge from chapter 11. Moreover, it would effectively cede control of the conduct of a chapter 11 case to disappointed litigants. This cannot be, and is not, the law.

The court also denied the stay pending appeal.

Divestiture Rule Prevented Bankruptcy Court From Clarifying its Order on Chapter 11 Plan Confirmation. ***In re 710 Long Ridge Road Operating Co., II, LLC*****, 2014 WL 1648725 (Bankr. D. N.J. April 24, 2014) (unpublished)**

The National Labor Relations Board appealed the bankruptcy court's order confirming the Chapter 11 debtor's plan which, among other things, modified the debtors' collective bargaining agreements and gave third-party releases on the NLRB's case against certain non-debtor affiliates. After the plan was confirmed, and while the appeal was pending in the district court, the NLRB issued several subpoenas seeking financial information of the debtors' affiliates. After the affiliates threatened to move for contempt of the confirmation order, the NLRB filed a motion in the bankruptcy court asking it to clarify what it referred to as an ambiguity in the plan. Specifically, the NLRB claimed that nothing in the plan or confirmation order prevented the NLRB from continuing its administrative case against the affiliates, or from obtaining prospective injunctive relief.

The court denied the request for several reasons. First, the divestiture rule prohibits a court from taking action that will alter or modify its prior order while that order is pending on appeal. Second, Rule 60(a), on which the NLRB relied for relief, expressly prohibits corrections of any kind to an order if an appeal has been docketed and while it is pending without specific leave of the appellate court. Third, even if "clarification" were necessary, the clarification requested regarding the non-debtor releases was "in very large measure a critical issue on appeal to the district court." Moreover, the court rejected the NLRB's argument that § 105 and the court's equitable powers permitted it to grant the relief requested. Finally, the fact that the plan provided that the bankruptcy court retain jurisdiction "to consider any amendments to or modification of the Plan, to cure any defect or omission, or reconcile any inconsistency in any Order of the Bankruptcy Court,

including, without limitation, the Confirmation Order" did not change the fact that jurisdiction to do so had been divested to the district court.

Divestiture Rule Prevented Bankruptcy Court from Considering Debtor's Request to Modify Findings and Conclusions, Even Though Court did not Enter the Findings and Conclusions Until Ten Days After Entering Order Dismissing Case. *In re Bauer*, 305 B.R. 468 (W.D. Wis. 2002)

On the morning of a scheduled hearing on objections by the trustee and a creditor to confirmation of the *pro se* debtor's Chapter 13 plan, the debtor sent an email to the court stating she was unable to attend the hearing. The court held the hearing without her, and entered an order dismissing the case and barring the debtor from refiling for a year. Ten days later, the court entered findings of fact and conclusions of law relating to that order. That same day, the debtor filed a notice of appeal, stating that the sole issue on appeal was whether the dismissal was improper since the court had "denied" her the opportunity to be heard. Five days later, the debtor filed objections in the bankruptcy court to the findings and conclusions. She then argued to the district court that it lacked jurisdiction to decide the appeal because the bankruptcy court had not held a hearing or rendered a decision on her objections to the findings and conclusions.

The district court disagreed, saying that under the divestiture rule, the bankruptcy court lost its jurisdiction to modify its findings and conclusions once the debtor filed her notice of appeal, even though the bankruptcy court had not entered those findings and conclusions until ten days after entering the order. Rather, entry of findings and conclusions is not a jurisdictional requisite for appeal; rather, the entry of findings and conclusions is intended to facilitate appellate review. In addition, the district court said, it could not consider the merits of her objections to the findings and conclusions because the sole issue on appeal was the due process question.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Akron Thermal, Ltd. Partnership, N.D.Ohio, February 19, 2009

361 B.R. 337
United States District Court, S.D. New York.

In re ADELPHIA COMMUNICATIONS CORPORATION, et al., Debtors,
ACC Bondholder Group, Appellants,
v.
Adelphia Communications Corporation, et al., Appellees.

Nos. 02–41729, M47 (SAS)
|
Jan. 24, 2007.

Synopsis
Background: In Chapter 11 proceeding, creditors moved for stay pending appeal and for expedited appeal with respect to Bankruptcy Court's order confirming plan of reorganization.

Holdings: The District Court, Scheindlin, J., held that:

[1] creditors would suffer irreparable harm if stay was not granted;

[2] creditors had substantial likelihood of success on merits of their claims; and

[3] creditors had to post $1.3 billion bond.

Motion granted.

West Headnotes (22)

[1] **Bankruptcy** Clear error

Bankruptcy court's findings of fact are reviewed for clear error. 28 U.S.C.A. § 158(a).

3 Cases that cite this headnote

[2] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy court's conclusions of law are reviewed de novo on appeal. 28 U.S.C.A. § 158(a).

1 Case that cites this headnote

[3] **Bankruptcy** Right; grant or denial; discretion

In determining whether to issue stay of bankruptcy court's order pending appeal, district court should consider the following: (1) whether movant will suffer irreparable injury absent stay, (2) whether party will suffer substantial injury if stay is issued, (3) whether movant has demonstrated substantial possibility, although less than likelihood, of success on appeal, and (4) public interests that may be affected. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

56 Cases that cite this headnote

[4] **Bankruptcy** Right; grant or denial; discretion

In order to demonstrate "irreparable harm" necessary to justify issuance of stay pending appeal of bankruptcy court order, harm must be neither remote nor speculative, but actual and imminent. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

37 Cases that cite this headnote

[5] **Bankruptcy** Right; grant or denial; discretion

Where denial of stay pending appeal risks mooting any appeal of significant claims of error, irreparable harm requirement for stay pending appeal of bankruptcy court order is satisfied. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

45 Cases that cite this headnote

[6] **Bankruptcy** Moot questions

When, during pendency of appeal, events occur that would prevent appellate court from

fashioning effective relief, appeal should be dismissed as moot.

[7] **Bankruptcy** Moot questions

Appeal should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.

1 Case that cites this headnote

[8] **Bankruptcy** Moot questions

Mootness of appeal of bankruptcy court order confirming plan of reorganization under Chapter 11 is presumed when reorganization plan has been substantially consummated during pendency of appeal.

1 Case that cites this headnote

[9] **Bankruptcy** Effect of want of stay; conclusiveness of sale

Bankruptcy Presumptions and burdens of proof

Presumption that appeal of bankruptcy court order confirming plan of reorganization under Chapter 11 is moot when plan has been substantially consummated during pendency of appeal may be rebutted only upon showing that (1) court can still order some effective relief; (2) such relief will not affect re-emergence of debtor as revitalized corporate entity; (3) such relief will not unravel intricate transactions so as to knock props out from under authorization for every transaction that has taken place and create unmanageable, uncontrollable situation for bankruptcy court; (4) parties who would be adversely affected by modification have notice of appeal and opportunity to participate in proceedings; and (5) appellant pursued with diligence all available remedies to obtain stay of execution of objectionable order if failure to do so creates situation rendering it inequitable to reverse orders appealed from.

[10] **Bankruptcy** Right; grant or denial; discretion

In determining whether to grant stay pending appeal of bankruptcy court order, requisite showing of substantial possibility of success is inversely proportional to amount of irreparable injury appellant will suffer absent stay. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

33 Cases that cite this headnote

[11] **Bankruptcy** Bond

In determining whether bond should be ordered pending appeal of bankruptcy court order, district court looks to whether bond would be necessary to protect against diminution in property's value pending appeal, and to secure prevailing party against any loss that might be sustained as result of ineffectual appeal. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

5 Cases that cite this headnote

[12] **Bankruptcy** Right; grant or denial; discretion

Disgorgement was not practical remedy if creditors were successful on their appeal of bankruptcy court order confirming Chapter 11 debtors' plan of reorganization, and thus it was overwhelmingly likely that creditors' appeal would be dismissed as moot following implementation of plan, thereby establishing irreparable harm necessary for stay pending its appeal, where plan called for distributions of 111 million shares of freely tradable stock to 14,000 parties, and more than 9.4 billion interests and $7.136 billion in cash to over 10,000 parties. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

8 Cases that cite this headnote

[13] **Bankruptcy** Right; grant or denial; discretion

Creditors seeking stay pending their appeal of bankruptcy court order confirming Chapter 11 debtors' plan of reorganization had substantial likelihood of success on merits of their claim

that bankruptcy court erroneously approved invalid settlement and erroneously permitted its inclusion in plan, even though creditors' committee could and did object to confirmation of plan at later date, where court authorized creditors' committee to participate in inter–creditor dispute as debtors' proxy, but permitted debtors to make settlement proposal only on condition that creditors could separately accept or reject plan including proposed settlement and plan excluding proposed settlement, and creditors rejected settlement, but bankruptcy court refused to permit them to vote on plan excluding settlement. 11 U.S.C.A. § 1123(b)(3); Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

2 Cases that cite this headnote

[14] **Bankruptcy** Distribution

In order for implementation of bankruptcy law to be constitutional, it must provide for fair distribution of assets to debtor's creditors.

[15] **Bankruptcy** Factors, grounds, and objections

Bankruptcy Equitable powers and principles

Although bankruptcy court's power to effect substantive consolidation stems from its general equitable powers, it may do so only upon making determination that substantive consolidation would ensure equitable treatment of all creditors.

1 Case that cites this headnote

[16] **Bankruptcy** Factors, grounds, and objections

In order to justify substantive consolidation of assets and liabilities of multiple debtors, bankruptcy court must find that (1) creditors dealt with debtors as single economic unit and did not rely on their separate identity in extending credit, or (2) debtors' affairs are so entangled that consolidation will benefit all creditors.

1 Case that cites this headnote

[17] **Bankruptcy** Right; grant or denial; discretion

Creditors seeking stay pending their appeal of bankruptcy court order confirming Chapter 11 debtors' plan of reorganization had substantial likelihood of success on merits of their claim that bankruptcy court erroneously approved improper substantive consolidation and unfairly treated intercompany claims, where neither plan nor confirmation order identified each individual debtor's assets and liabilities and how they were being distributed pursuant to plan, plan essentially wiped out intercompany claims, but bankruptcy court expressly found that plan did not trigger cram-down provision, and creditors received less under plan than they would have received in express substantive consolidation. 11 U.S.C.A. § 1129(b); Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

2 Cases that cite this headnote

[18] **Bankruptcy** Right; grant or denial; discretion

Creditors seeking stay pending their appeal of bankruptcy court order confirming Chapter 11 debtors' plan of reorganization had substantial likelihood of success on merits of their claim that plan unfairly discriminated against them, where class members who voted to accept plan received broad releases and exculpations from debtors and other claimants who voted to accept plan, whereas those who rejected plan received no such benefits. 11 U.S.C.A. § 1123(a)(4); Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

2 Cases that cite this headnote

[19] **Bankruptcy** Confirmation; Objections

Proponent of Chapter 11 plan bears burden of showing that plan is in objecting creditors' best interests. 11 U.S.C.A. § 1129(a)(7).

7 Cases that cite this headnote

[20] **Bankruptcy** Right; grant or denial; discretion

Creditors seeking stay pending their appeal of bankruptcy court order confirming Chapter 11 debtors' plan of reorganization had substantial likelihood of success on merits of their claim that bankruptcy court erroneously found that plan was in objecting creditors' best interests, where court did not focus on objecting creditors' particular interest, and only witness on subject testified that if he were Chapter 7 trustee, he definitely would not have entered into settlement embodied in plan. 11 U.S.C.A. § 1129(a)(7); Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

4 Cases that cite this headnote

[21] **Bankruptcy** Provisions for satisfaction of claims; relation to recovery in liquidation

Bankruptcy Confirmation; Objections

In order to show that payment under Chapter 11 plan is equal to value that creditor would receive if debtor were liquidated, there must be liquidation analysis of some type that is based on evidence and not mere assumptions or assertions. 11 U.S.C.A. § 1129(a)(7).

11 Cases that cite this headnote

[22] **Bankruptcy** Bond

Creditors were required to post $1.3 billion bond in order to obtain stay pending their appeal of bankruptcy court order confirming Chapter 11 debtors' plan of reorganization, where full appellate review would not be complete for at least seven months, interest on debtors' combined postpetition debt was $70 million per month, delay would require debtors to conduct underwritten public offering (IPO) of at least one-third of stock used to purchase debtors, IPO would cost bankruptcy estate $715 million, professional fees were accruing at rate of $10 million per month, and further delay increased risk that plan would fall apart. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

7 Cases that cite this headnote

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OPINION AND ORDER

SCHEINDLIN, District Judge.

The present dispute arises out of the approximately 230 jointly administered chapter 11 cases of Adelphia Communications Corporation ("ACC") and its subsidiaries (collectively, the "Debtors"). The ACC Bondholder Group [1] now moves, pursuant ***342** to Federal Rule of Bankruptcy Procedure 8005, for a stay pending appeal and for an expedited appeal with respect to the Bankruptcy Court's confirmation order (the "Confirmation Order") approving the First Modified Fifth Amended Joint Chapter 11 Plan (the "Plan"). [2]

The application for a stay of an order confirming a chapter 11 reorganization plan in a highly litigated and complex bankruptcy proceeding presents a classic clash of competing interests, all of which have merit. Without a stay, it is extremely unlikely that Appellants will ever be able to have meaningful appellate review of the rulings of the Bankruptcy Court, a non-Article III court, and in any event, a lower court. The ability to review decisions of the lower courts

is the guarantee of accountability in our judicial system.[3] In other words, no single judge or court can violate the Constitution and laws of the United States, or the rules that govern court proceedings, with impunity, because nearly all decisions are subject to appellate review. At the end of the appellate process, all parties and the public accept the decision of the courts because we, as a nation, are governed by the rule of law. Thus, the ability to appeal a lower court ruling is a substantial and important right.

On the other hand, a stay of a confirmation order in one of the longest-running and most complex bankruptcies in our history threatens grave harm to thousands of parties who have been waiting for more than four years to obtain sizeable distributions from a group of bankrupt estates. After grueling negotiations, a plan of reorganization and a settlement of many ancillary disputes has been reached. The Plan was put to the vote of creditors and overwhelmingly approved. The Plan was subject to searching review by the Bankruptcy Court, which approved it in a lengthy decision. The inability to consummate the Plan resulting from a stay of that order could cause the estates to incur more than a billion dollars in additional costs or could even cause the Plan to collapse. This is not a risk that should be taken lightly.

In sum, as set forth above, two weighty interests are at stake. The right to review of lower court decisions clashes with the right of the majority of creditors to receive their distributions. Weighing these competing interests is one of the most difficult tasks this Court has yet confronted. This is so because the stay application, so to speak, is the ball game.[4] Without permitting Appellants an opportunity for full ***343** briefing and a hearing on the merits of the appeal, this Court's decision on the stay may well eliminate Appellants' right to challenge the lower court's ruling. Nonetheless, many courts have confronted this dilemma and guidelines have been developed to assist the Court in its task. After a careful review in the limited time available of all of the submissions and arguments, I am granting a stay pending appeal only upon a condition requiring the posting of a very substantial bond.

I. BACKGROUND[5]

These chapter 11 cases, which were are "among the most challenging—and contentious—in bankruptcy history,"[6] have been litigated for more than four and a half years in the Bankruptcy Court. Various disputes arose among the creditors as to how the ultimate value of the estate would be allocated, including how to resolve the Intercompany Claims (claims between and among the various debtors), fraudulent transfer actions, and other inter-debtor causes of action (collectively, the "Inter–Creditor Dispute").

In August 2005, the Bankruptcy Court established a process to resolve the Inter–Creditor Dispute by which the Debtors and the Official Committee of Unsecured Creditors (the "Creditors Committee") were ordered to remain neutral and several unofficial committees of creditors were deputized to litigate the Inter–Creditor Dispute (the "MIA [Motion in Aid of Confirmation] Litigation") on behalf of the debtors (the "MIA Order").[7] The twenty-three member Ad Hoc Committee of ACC Senior Noteholders (the "ACC Noteholders Committee") was one such committee; it was deputized as an authorized litigant on behalf of ACC.[8] The MIA Order explicitly reserved the Debtors' right to "seek [ ] to compromise" one or more issues in the Inter–Creditor Dispute, but the authorized litigants had the right to object to any such compromise as well as to assert that the Debtors had no authority to compromise those issues.[9]

Previously, in April 2005, ACC had entered into definitive sale agreements with Time Warner and Comcast (the "Buyers") to purchase substantially all of the Debtors' U.S. assets with cash and Time Warner Cable, Inc. ("TWC") stock (the "Sale"). Under the agreements, the Sale was to be implemented as part of a plan of reorganization and that plan had to become effective by a date certain. In November 2005, ***344** a plan was proposed that provided for the implementation of the Sale. However, multiple creditors pressed multiple objections, and the plan could not garner the requisite support among the creditor classes when it was put to a vote. With the deadline to consummate the Sale fast approaching, the Time Warner/Comcast deal was in jeopardy.

The parties spent months trying to settle the Inter–Creditor Dispute in order to facilitate an agreement on a plan to no avail. As a result, the Debtors and the Buyers agreed to a sale under section 363 of the Bankruptcy Code in lieu of a plan. As part of the renegotiation, however, the Debtors and the Buyers agreed in Purchase Agreements that the Debtors had to confirm a plan of reorganization within three months of the relevant Time Warner registration statement being declared effective by the SEC (the "IPO Deadline") or else the Debtors would be required to sell at least one-third of TWC stock in an underwritten public offering (the "IPO Condition").[10] A registrations statement has since been submitted to the SEC for comment, but has not yet been approved.

Even though the Time Warner/Comcast deal was no longer dependent on the resolution of the Inter–Creditor Dispute, the parties continued settlement negotiations. On April 6, 2006, the Bankruptcy Court entered an order authorizing the Debtors to file a plan of reorganization that included a proposed settlement of the Inter–Creditor Dispute.[11] The authorization was conditioned upon the plan being structured to permit creditors to accept or reject: (a) the plan with the settlement, or (b) the plan without the settlement.[12] In other words, continuation of the MIA Litigation had to be an option.

After months of negotiations, an early iteration of the current settlement of the Inter–Creditor Dispute (the "Settlement") was reached and the original term sheet was signed on or about June 21, 2006 by several of the ad hoc committees. However, at that time the term sheet was not signed by the Debtors, the Creditors Committee and several other ad hoc committees, including the ACC Noteholders Committee, which had unanimously rejected that term sheet.[13] Negotiations recommenced and on July 7, 2006, a second iteration of the Settlement was signed by Tudor and Highfields, two members of the ACC Noteholders Committee (in their individual capacity as creditors) as well as the Creditors Committee.[14] That second iteration was voted upon by the ACC Noteholders Committee, but was again rejected.[15] On July 21, 2006, the Debtors entered into the Settlement with all of the committees (except the ACC Noteholders Committee) plus the two individual members ***345** of the ACC Noteholders Committee.[16] However, eventually three more members of that Committee negotiated a slight improvement and signed the Settlement in their individual creditor capacity.[17]

On August 18, 2006, the Debtors, the Creditors Committee, and bank lender agents Wachovia, Bank of Montreal, and Bank of America (collectively, the "Plan Proponents" or "Appellees") filed the first iteration of the present Plan with the Bankruptcy Court. On October 17, 2006, the court approved the disclosure statement for the final Plan, and the solicitation process began. More than the two-thirds of the members of all classes of creditors, including the ACC impaired classes, voted to approve the Plan.[18]

In December 2006, the Plan Proponents jointly proposed the present Plan to the Bankruptcy Court for confirmation. If the Plan goes effective, it provides for the distribution of cash and TWC stock to creditors. The Plan also provides for the transfer of the Bank Litigation[19] to the Contingent Value Vehicle (the "CVV"), a litigation trust, tradeable interests in which will be distributed among creditors (the "CVV Interests"). In addition, the Plan includes the Settlement of the Inter–Creditor Dispute.

The Plan confirmation hearings commenced on December 7, 2006 and concluded on December 19, 2006. Various parties in interest raised objections, including the ACC Bondholder Group. On January 3, 2007, the Bankruptcy Court entered its order confirming the Plan. The Bankruptcy Court stayed its order for ten days pursuant to Federal Rule of Bankruptcy Procedure 3020(e), but declined to further extend the stay, directing any subsequent requests to be submitted to the District Court.[20]

II. LEGAL STANDARD

A. Appeals of Bankruptcy Court Orders

1. Final Order

The district courts are vested with appellate jurisdiction over bankruptcy court rulings.[21] Final orders of the bankruptcy court may be appealed to the district court as of right.[22] An order is final if "[n]othing in the order ... indicates any anticipation that the decision will be reconsidered."[23] Courts have held that orders confirming a plan of reorganization or denying relief from an automatic stay are final.[24]

***346** 2. Standard of Review

[1] **[2]** A district court functions as an appellate court in reviewing judgments rendered by bankruptcy courts.[25] Findings of fact are reviewed for clear error.[26] A finding of fact is clearly erroneous if the court is " 'left with the definite and firm conviction that a mistake has been committed.' "[27] A bankruptcy court's conclusions of law, by contrast, are reviewed de novo.[28]

B. Stay Pending Appeal

Rule 8005 of the Federal Rules of Bankruptcy Procedure governs the procedure for seeking a stay pending an appeal to the district court of a bankruptcy court's order. "The Rule does not articulate, however, the standard that governs such motions."[29] Courts within the Second Circuit have followed

the same standard used for stays of district court orders pending appeals to the circuit court under Federal Rule of Appellate Procedure 8(a)(1)(A) ("Rule 8A"), in large part because Bankruptcy Rule 8005 is directly adapted from Rule 8A. [30]

[3] The decision as to whether to issue a stay of an order pending appeal lies within the sound discretion of the district court. [31] "[F]our factors are considered" in exercising that discretion: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected." [32]

A number of lower courts within the Second Circuit have concluded that the failure of the movant to satisfy any one of ***347** the four factors on a motion for a stay pending appeal of a bankruptcy court order "dooms the motion." [33] However, the Second Circuit has never articulated such a rigid rule of law. To the contrary, the Second Circuit has consistently treated the inquiry of whether to grant a stay pending appeal as a balancing of factors that must be weighed. [34] This rift was recently noted, but not decided, by a district court in this circuit. [35] I will follow the Second Circuit's practice of weighing the factors. [36]

1. Irreparable Harm

[4] "A showing of probable irreparable harm is the principal prerequisite for the issuance of a [Rule 8005] stay." [37] Irreparable harm must be "neither remote nor speculative, but actual and imminent." [38]

[5] Courts are divided, and the Second Circuit has not yet spoken, on the issue of whether the risk that an appeal may become moot in the absence of a stay pending appeal satisfies the irreparable injury requirement. A majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm. [39] However, several courts, including ones within this Circuit, have held to the contrary. [40] While Appellees have ***348** strained to distinguish each of these cases, the fact is that loss of appellate rights is a "quintessential form of prejudice." [41] Thus, where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied.

[6] **[7]** Consequently, in evaluating the irreparable harm element, it is necessary to analyze the risk that an appeal would be mooted in the absence of a stay. The Second Circuit has held that "when, during the pendency of an appeal, events occur that would prevent the appellate court from fashioning effective relief, the appeal should be dismissed as moot." [42] Moreover, an appeal should also be dismissed as moot when, "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." [43]

[8] **[9]** Mootness of an appeal of a bankruptcy court order confirming a plan of reorganization under chapter 11 is presumed when the reorganization plan has been substantially consummated during the pendency of the appeal. [44] This presumption is rebutted only upon a showing of each of the following:

> (a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court; (d) the ***349** parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (e) the appellant pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order ... if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from. [45]

The strong possibility of mootness based on substantial consummation of a bankruptcy plan means that absent a

stay of an order confirming a plan of reorganization pending appeal, many bankruptcy court confirmation orders will be immunized from appellate review even if the remaining stay factors are satisfied.

2. Harm to Non–Moving Party

In addition to showing irreparable harm, the party seeking a stay must also establish that the non-moving party or other parties will not suffer substantial harm if the stay is granted.[46] In other words, the moving party must show that the balance of harms tips in favor of granting the stay.[47]

3. Degree of Showing on the Merits

[10] " 'The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other [stay] factors.' "[48] The requisite showing of "substantial possibility" of success is "inversely proportional to the amount of irreparable injury plaintiff[ ] will suffer absent the stay."[49] "Simply stated, more of one excuses less of the other."[50] "[T]he movant need not always show a 'probability of success' on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay."[51]

4. Public Interest

The "public interest favors the expedient administration of the bankruptcy proceedings."[52] Indeed, compromises are favored in bankruptcy precisely for the reason that they "minimize litigation and expedite the administration of a bankruptcy estate."[53] However, "[p]arties objecting to [a] settlement and [ ] distribution scheme have a right to appellate review ... [and] [d]istribution of the challenged settlement award ***350** before its validity has been tested would deprive those parties of that right."[54]

5. Bond

[11] Under Bankruptcy Rule 8005, a district court has the discretion to grant a stay of a judgment, order or decree of a bankruptcy judge without the posting of a supersedeas bond.[55] In determining whether a bond should be ordered, the court looks to whether the bond would be necessary to protect "against diminution in the value of property pending appeal" and to "secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal."[56] Moreover, the posting of a bond "guarantees the costs of delay incident to the appeal."[57] In analyzing whether to order movants to post a bond in support of a stay pending an appeal of a bankruptcy court order, district courts have obtained guidance from Federal Rule of Civil Procedure 62(d),[58] which requires appellants to post a bond when appealing a lower court order absent "exceptional circumstances."[59] The policy behind ordering the posting of a bond in that context was recently articulated by this Court:

> Because a supersedeas bond is designed to protect the appellee, the party seeking a stay without bond has 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. The bond requirement should not be eliminated or reduced unless doing so "does not unduly endanger the judgment creditor's interest in ultimate recovery."[60]

The same reasoning applies when a district court is called upon to exercise its discretion as to whether to require a bond in ***351** support of a stay of an order of a bankruptcy court. If a stay pending appeal is likely to cause harm by diminishing the value of an estate or "endanger [the non-moving parties'] interest in the ultimate recovery," and there is no good reason not to require the posting of a bond, then the court should set a bond at or near the full amount of the potential harm to the non-moving parties.

III. DISCUSSION

A. Irreparable Harm to Appellants

In the absence of a stay, this Plan will take effect and the distributions will be made, thereby substantially consummating the Plan.[61] Thus, there is a very strong likelihood that any appeal will be moot.

Appellees do not argue otherwise. Once the distributions are made pursuant to the Plan, it will become impracticable to ever fashion effective relief for Appellants.[62] In letter briefs to this Court, the parties addressed the feasibility of a disgorgement remedy upon the hypothetical reversal of an unstayed confirmation order. In support of disgorgement, Appellants contend that disgorgement is "[w]orkable with [p]rotections," and cite to a single chapter 11 case where the

bankruptcy court permitted approximately $213 million in disputed funds to be distributed to holders of notes, subject to disgorgement.[63] In the alternative, Appellants ask the Court to "authorize the debtors to make 'interim distributions' on secured and unsecured claims."[64]

In opposition, Appellees argue, persuasively, that notwithstanding the "array of novel and complex" jurisdictional and practical questions raised by the idea of disgorging distributions, once 111 million shares of freely tradeable TWC Stock are distributed to 14,000 parties, and more than 9.4 billion CVV Interests and $7.136 billion in cash are distributed to over 10,000 parties, disgorgement becomes, for all intents and purposes, impossible.[65] Once set in motion, the Plan truly cannot be unraveled. Any attempt to do so is proscribed by *Chateaugay II,* as it would, without a doubt, "knock the props out from ***352** under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation."[66]

[12] In sum, it is overwhelmingly likely, even without analyzing the remaining *Chateaugay II* factors, that any appeal of the Confirmation Order after implementation of the Plan would be dismissed as moot.[67] Thus, Appellants have made a showing that they will suffer irreparable harm in the absence of a stay.[68]

B. Harm to the Non–Moving Parties in the Absence of a Stay

Even assuming that the appeal is expedited, it is very likely that full appellate review would not be complete until September 2007 at the earliest.[69] Appellees list a host of harms that could befall all parties in interest if the Plan is stayed in the interim. *First,* Appellees cite the interest that is accruing on Debtors' combined postpetition debt (bank and non-bank debt). This interest, even after subtracting the interest earned on the proceeds from the Sale,[70] amounts to $70 million per month, or $2.4 million *per day.* Assuming the stay lasts for at least those seven months, the interest amounts to a quantifiable harm of $490 million. Appellants argue that harm resulting from the accrual of interest is avoidable because the principal of the bank debt could be paid at any time. It is not that simple. As Appellees point out, paying the banks gives the banks the very thing for which they bargained and made economic concessions during settlement negotiations. If the banks get what they want, they will have no further incentive to return to the negotiating table if necessary. Likewise, the repayment of the bank debt is a precondition (*i.e.,* a trigger) for various parties' payments pursuant to the Plan. Thus, repayment of the bank debt before the Plan goes effective could easily start the unraveling of a carefully negotiated and constructed plan. As such, repayment of the bank debt is not a reasonable course of ***353** action and the accrual of interest is a real and significant harm that must be considered.

Second, Appellees stress the harm that could result if the IPO is triggered. As discussed above, the Purchase Agreements for the Sale between the Debtors and the Buyers provide that if a plan is not confirmed by the IPO Deadline (ninety days after the registration statement is approved by the SEC), the Debtors will be forced to conduct an IPO of at least one-third of the TWC stock. The registration approval process is already underway and may be complete at any time. And ninety days is the *longest* that the Debtors can wait to conduct the IPO after approval of the registration statement. Once the statement is approved, the Debtors very well may have a fiduciary duty to conduct the IPO sooner than ninety days given the current volatility of the cable market. Indeed, in the course of the last nine months of 2006 the value of the TWC stock fluctuated by as much as $1.75 billion. Thus, if a stay is granted (*i.e.,* the Plan is *not* consummated), it may be prudent to conduct the IPO as soon as possible in order to take advantage of the fact that TWC stock is currently trading at its peak.[71] It cannot reasonably be disputed that an IPO will occur during the stay, whether as a matter of contract obligation or fiduciary obligation.

The attendant costs associated with an IPO are substantial. These costs can be broken down into two categories: (1) the "IPO discount," defined as the market perception that an IPO issuer must offer its shares at a discount in order to induce investor interest, which the Bankruptcy Court estimated to be seven percent; and (2) the underwriting fees, which the Bankruptcy Court estimated to be four percent. Assuming the stock is worth $6.5 billion (although it is currently worth closer to $6.7 billion), if the IPO were to go forward during a stay, $455 million would be lost due to the IPO discount, and another $260 million would be lost in underwriting fees, with total harm to the estate approaching $715 million.[72]

Third, less substantial but far from trivial are the continuing professional and audit expenses as well as expenses associated with remaining a public company during the pendency of a stay. Professional fees have been accruing at the rate of $10 million per month in these cases. Although it

is unclear what fraction of those costs have abated as a result of the confirmation of the Plan, various incremental costs will certainly continue to accrue, such as the costs of continuing to litigate the confirmation issues. In addition, if a stay is issued, ACC will be required to audit its 2006 financial statements in order to file a 10–K statement by the end of the first quarter of 2007. The fees associated with that event are estimated to be $12.4 million. [73]

***354** *Fourth,* there are additional harms that are substantial but not easily quantifiable, such as the risk that the Plan will fall apart and that the parties will fail to reach a new agreement given the uncertainty associated with what could be a seven-month stay. If the Plan falls apart, there is a risk that the Inter–Creditor Dispute will not settle and the parties will be faced with years of protracted litigation. That being said, the risk of implosion is minimal given that all the parties have a strong interest in seeing these disputes settled. [74] There are also some risks associated with the CVV that are not easily quantifiable. The CVV Interests are designed to be tradeable interests and their value depends, in part, on the ability of the CVV to take control of the Bank Litigation now, rather than seven months from now.

At bottom, the potential harm to the non-moving is value-erosion resulting in a decreased distribution. Thus, if Appellees are protected from such potential losses by an adequate bond, they will not risk or suffer substantial harm. [75] Because this Court would condition a stay on the posting of a substantial bond, the potential financial harm to the non-movants does not weigh against a stay in this case. [76]

C. Substantial Possibility of Success on the Merits

The ACC Bondholders raise eight separate claims of error on the part of the Bankruptcy Court. Based solely on the briefing of the motion for a stay pending appeal, I find that there are several claims on which Appellants have shown a substantial possibility of success on appeal. [77]

1. Appellants Have Shown a Substantial Possibility of Success on Their Claim that the Bankruptcy Court Erroneously Approved an Invalid Settlement and Erroneously Permitted Its Inclusion in the Plan

[13] On July 26, 2005, the Bankruptcy Court held that various unofficial creditors' committees would be authorized to litigate the Inter–Creditor disputes on behalf of the Debtors' estates through *Commodore* standing. [78] On August 4, 2005, the court ***355** memorialized in the MIA Order what was already outlined in the July 26, 2005 hearing, namely that the ACC Noteholders Committee would be a deputized "Participant" in the MIA Litigation (*i.e.,* the Inter–Creditor Dispute). [79] Indeed, there seems to be no dispute that the ACC Noteholders Committee took advantage of that authorization and clearly "carr[ied] the sword" for the ACC Debtor in the Inter–Creditor Dispute. [80] In that same MIA Order, the court noted that while the Debtors were free to "seek[ ] to compromise" any of the Disputed Issues (*i.e.,* the Inter–Creditor Dispute), such a proposal would not "prejudice the rights of any Participant to object to any such compromise and/or to assert that the Debtors have no authority to compromise such claims." [81] On January 23, 2006, the Bankruptcy Court again confirmed, in a published opinion, that it had previously approved the right of the various committees, including the ACC Noteholders Committee, to litigate the disputes among the Debtors' estates (*i.e.,* the Inter–Creditor Dispute). [82] Finally, on April 6, 2006, the court ordered that whereas the Debtors are authorized to propose a plan that includes a settlement of the Inter–Creditor Dispute, they can do so only on the condition that (among others) the Plan "be structured to permit creditors to separately accept or reject (i) the Plan including the proposed settlement, and (ii) the Plan excluding the proposed settlement ..." (the "April 6 Order"). [83] The April 6 Order also provided that the Debtors' authority to propose a Plan was "without prejudice" to any party's rights in the resolution of the Inter–Creditor Dispute and the prosecution or confirmation of any plan of reorganization. [84] Appellants' primary objection to the Confirmation Order is that those conditions were not met.

What this history shows is that the Bankruptcy Court gave the various Creditor Committees (including the ACC Noteholders Committee) the authority (via *Commodore* standing) to litigate the Inter–Creditor Dispute. It is beyond cavil that this includes the authority to settle those disputes. However, that authority may not have been exclusive—the ACC Noteholders Committee's consent to settle may not have been sufficient, but certainly was necessary.

The court-appointed mediator, another Bankruptcy Judge in this District, met with the various constituencies in an effort to reach a settlement of all of these disputes. ***356** Most of the Participants, as defined in the MIA Order, approved the Settlement that resulted from that mediation. But the ACC Noteholders Committee, *the court-authorized litigant*

representing the ACC Debtor, never approved that Settlement. Instead, only two of its twenty-three members originally signed the Settlement. When those two creditors brought it back to the ACC Noteholders Committee for a vote, the Committee voted it down. Under the holding in *Smart World Technologies, LLC v. Juno Online Services, Inc. ("In re Smart World Technologies, LLC"),* [85] those two individual creditors had no authority to act on behalf of the ACC Debtor. It must be remembered that it was the ACC Noteholders Committee —not each individual member of that Committee—that was authorized to act on behalf of the ACC Debtor. Thus, in the absence of the approval of that Committee, the authorized litigant for ACC had not agreed to the Settlement. [86]

In addition, the incorporation of the so-called Settlement in the proposed Plan, to be distributed to all creditors for their vote, diluted the ACC Noteholders Committee's ability to exercise its right to object to the Settlement and/or to assert that the Debtors lacked authority to settle those disputes—rights that were explicitly reserved to them in the MIA Order. While it is true that the Committee could and did object to confirmation of the Plan (as opposed to the Settlement) at a later date, it then faced an up-hill battle based on the fact that the majority of creditors had accepted the Plan (which included the purported Settlement). [87]

Perhaps most troubling of all, however, is the Plan Proponents' failure to comply with the Bankruptcy Court's April 6 Order and the Bankruptcy Court's failure to enforce that Order. Once the so-called Settlement was reached, it was incorporated in the Plan, which was proposed to the creditors without offering them an alternative plan that did not include that Settlement, in direct violation of paragraph 3 of the April 6 Order. Moreover, the Settlement clearly foreclosed the rights of the ACC Noteholders Committee in the resolution process, in that the MIA Litigation was effectively terminated without their consent, again in direct violation of the April 6 Order. [88]

The non-consenting members of the ACC Noteholders Committee raised these very objections at the Confirmation Hearing. In addressing these objections, the Bankruptcy Court first declared that the Committee was "dysfunction[al]" apparently ***357** because only two (later five) of its members supported the settlement, while the majority of the others did not. [89] Relying on *Smart World*, the court then found that the objections were meritless, because the Debtor always retains the authority to settle an estate's claims. This literal reading of *Smart World*, however, ignores the facts of both that case and this bankruptcy proceeding. In *Smart World*, the settling creditors *had no authority* to act on behalf of the Debtor. Here, the ACC Noteholders Committee (of which the objecting creditors were members) had been given the authority to settle claims, thus acting as a proxy for the Debtor. By contrast, the Debtor here had retained only limited authority to *propose* a settlement under clearly articulated conditions. Thus, just as the two creditors in *Smart World* could not settle the claims out from under the Debtor, two individual creditors (acting without court authority) could not settle the claims out from under the ACC Noteholders Committee, acting on behalf of and in place of the Debtor. [90]

Given the violations of both the MIA Order and the April 6 Order, and the fact that the ACC Noteholders Committee did not approve a settlement of the claims they were authorized to litigate and to settle, the Appellants have shown a substantial possibility that a reviewing court could find that the Settlement was not truly a settlement.

The consequences of such a finding are very significant. *First,* if a reviewing court were to find that there was never a settlement, the necessary result would be that the Bankruptcy Court made an error of law in reviewing whether the Settlement is in the best interests of the estate. Ordinarily an appellate court would review the Bankruptcy Court's approval of a settlement for abuse of discretion, reversing only if the settlement falls below the lowest point in the range of reasonableness. [91] The Bankruptcy Court's decision to approve the Settlement must be reviewed de novo if accepting the Settlement was erroneous as a matter of law. In reviewing the Settlement, the Bankruptcy Court explicitly applied the standard set forth by the Supreme Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson ("TMT")*, that the settlement must be "fair and equitable," [92] which requires only that the Bankruptcy Court "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.' " [93] Because Appellants have shown a substantial possibility that there was never a settlement agreed to by all authorized litigants, there is also a substantial possibility that the appellate court, in its de novo review, would find that the Bankruptcy Court erred in approving the Settlement. [94]

***358** *Second,* based on the substantial possibility that a reviewing court might conclude that there was no settlement

and/or that it was improperly approved by the Bankruptcy Court as a settlement, there is also a corresponding substantial possibility that the Bankruptcy Court erred, as a matter of law, in confirming the Plan given that the purported Settlement was an integral part of that Plan.

The heart of this issue of law is found in section 1123(b)(3) of the Bankruptcy Code. Appellees place great weight on this section as support for their argument that the so-called Settlement, even if not approved by the authorized litigants, could be included in the Plan and put up for a creditor vote. This argument puts the cart before the horse. Section 1123(b)(3) does indeed provide that a plan may include "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[95] It does not provide, however, that a *proposed* settlement that has not been authorized by the necessary parties can be included in a plan. Thus, if the reviewing court finds that there was no settlement, section 1123 does not permit it to be included in the Plan.[96]

[14] Given the apparent loss of very valuable rights to control the litigation that it was authorized to prosecute, Appellants have shown, at the very least, that they have a substantial possibility of success in overturning the Confirmation Order. Permitting the Plan to go effective as confirmed—thereby distributing the finite estate to the creditors and taking away forever the rights of Appellants to pursue the Inter–Creditor Dispute that a reviewing court might well find they had never agreed to compromise[97]—could be a fundamental violation of Appellants' constitutional due process rights.[98]

***359 2. Appellants Have Shown a Substantial Possibility of Success on Their Claim that the Bankruptcy Court Erroneously Approved an Improper Substantive Consolidation and Unfairly Treated the Intercompany Claims**

[15] **[16]** Substantive consolidation "is a product of judicial gloss."[99] It "has the effect of consolidating the assets and liabilities of multiple debtors and treating them as if the liabilities were owed by, and the assets held by, a single entity."[100] It "usually results in, *inter alia,* pooling the assets of, and claims against, [multiple] entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the [multiple] entities for purposes of voting on reorganization plans."[101] Although a bankruptcy court's power to effect a substantive consolidation stems from its general equitable powers,[102] it may do so only upon making a determination that substantive consolidation would "ensure the equitable treatment of all creditors."[103] Such a determination is appropriate where one of two "critical factors" exists: (i) the creditors dealt with the debtors as "a single economic unit and did not rely on their separate identity in extending credit;" or (ii) the "affairs of the debtors are so entangled that consolidation will benefit all creditors."[104] Consolidation should be undertaken deliberately and " 'sparingly,' "[105] for it is " 'a measure vitally affecting substantive rights.' "[106]

The parties agree that the Bankruptcy Court did not expressly undertake to analyze and make a finding that the Plan effects a substantive consolidation.[107] Rather, Appellants argue that the Bankruptcy Court improperly approved a Plan that implicitly imposes substantive consolidation and ignores the integrity of each Debtor's separate estate.[108] In other words, Appellants challenge the Confirmation Order because the Bankruptcy Court summarily approved, for the sake of administrative convenience,[109] a Plan that effected ***360** a *de facto* substantive consolidation.[110]

The Plan provides that the "treatment of Claims against ... the Debtors under this Plan represents, among other things, the settlement and compromise of the Inter–Creditor Dispute pursuant to the Global Settlement."[111] The Plan further provides that "Intercompany Claims shall be deemed resolved as a result of the settlement and compromise embodied in this Plan and therefore holders thereof shall not be entitled to vote on the Plan, or receive any Plan Distribution or other allocations of value."[112] The section of the Plan dealing with distributions to ACC creditors makes no mention of how the Intercompany Claims were resolved and how that affects the distributions—it merely recites how much each group of creditors receives.[113]

[17] Neither the Plan nor the Confirmation Order identifies each individual Debtor's assets and liabilities and how they are being distributed pursuant to the Plan. Moreover, the Plan does not identify how each of the issues in the Inter–Creditor Dispute (including the Intercompany Claims, fraudulent conveyance claims and other inter-debtor disputes) were resolved in the purported Settlement. Indeed, ACC's Chief Financial Officer, Vanessa Wittman, testified that one "would not be able to go through the numerous issues [of the Inter–

Creditor Dispute] and decide which [ ] issues went in favor of which group." [114] In the Confirmation Order, the Bankruptcy Court made no real attempt to ascertain the validity or value of the Intercompany Claims in its review of the Plan, instead stating that many of them "could go either way." [115] Given the failure of the Plan or the Bankruptcy Court to shed light on how the Intercompany Claims were resolved, there is a substantial possibility that a reviewing court would find that the Bankruptcy Court erred as a matter of law in confirming the Plan without making a "determination of what assets are subject to the payment of the respective claims." [116] Thus, a reviewing court would likely find that the Bankruptcy Court's confirmation of the Plan violated Appellants' constitutional right to a fair distribution of ACC's assets. [117]

Further, the Plan essentially wipes out the Intercompany Claims. They are given no vote, no distribution, no rights whatsoever. Appellees' attempt to label that treatment as the result of a negotiated settlement, rather than an improper substantive ***361** consolidation (which, by definition, results in the dissolution of intercompany claims), is a mischaracterization because when the creditors voted on the Plan, the Settlement had not yet taken effect. [118] Thus, a reviewing court may find that the Plan improperly eliminated the right of the class of Intercompany Claims to vote on that Plan and that class of claims "existed" prior to confirmation.

The consequences of the treatment of Intercompany Claims in the Plan could be grave. Appellants claim two points of error in this respect. *First,* Appellants assert that the Plan improperly classified Intercompany Claims because it lumped together prepetition and postpetition claims in violation of section 1122. [119] If these claims had not been improperly consolidated, Appellants argue that there is a reasonable possibility that the postpetition claims would have been entitled to administrative expense priority under section 1129(a)(9). [120] The record is devoid of any analysis as to the reason for and propriety of the lumping together of these claims in a single class. Thus, there is a substantial possibility that a reviewing court would find this classification to be clearly erroneous.

Second, Appellants claim that the Plan treats Intercompany Claims unfairly. The class of Intercompany Claims are clearly impaired under the definition of section 1124 because the Plan terminates those claims with prejudice. [121] However, any impaired class that does not receive a distribution is deemed to reject the Plan. [122] The Plan explicitly states that the class of Intercompany Claims receives no distribution under the Plan. Thus, there is a substantial possibility that a reviewing court would find that the Intercompany Claims are impaired, receive no distribution under the Plan, and thus are deemed to have rejected the Plan, thereby triggering the "cram-down" provision, which requires that the Plan not discriminate unfairly against the rejecting class. [123] The Bankruptcy Court, however, expressly found that the Plan did not trigger the cram-down provision and thus refused to analyze the Plan under section 1129(b). [124] This too may merit reversal.

In any event, Appellants claim—and Appellees do not seem to dispute—that if there were an express substantive consolidation, Appellants would be entitled to a 110% recovery as opposed to the 89% they receive under the current Plan. Thus, even if the reviewing court found that a *de facto* ***362** substantive consolidation is not procedurally improper, it could still find that Appellants are not receiving a fair distribution under the Plan because they are receiving less than they would receive in an express substantive consolidation.

3. Appellants Have Shown a Substantial Possibility of Success on Their Claim that the Plan Unfairly Discriminates in Violation of Section 1123(a)(4) of the Bankruptcy Code

Appellants argue that the solicitation process by which the Plan was established violates section 1123(a)(4) of the Bankruptcy Code, which provides that "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall ... provide the same treatment for *each claim or interest* of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." [125] Under the Plan, each member of the ACC Senior Noteholders class receives its pro rata share from the pool of available assets regardless of whether it voted to accept the Plan. However, those class members who voted to accept the Plan also receive broad releases and exculpations from the Debtors and other claimants who voted to accept the Plan, whereas those who rejected the Plan receive no such benefits.

According to the Bankruptcy Court, and the Appellees, the Plan satisfies the requirements of section 1123(a)(4) because each claimant receives its pro rata recovery from a single pool of funds in a like manner, distribution of which is "not

conditioned on or in any way tied to the releases." [126] Thus, the treatment of each claim under the Plan "is the same whether the holder of such claim voted to accept or to reject the Plan." [127]

Appellants characterize the process rather differently, asserting that these releases and exculpations are, in essence, an "illegal payoff" of "extra consideration" to induce claimants to vote for the Plan. As a result, Appellants assert that the Plan violates the Bankruptcy Code by treating the claims of certain class members more favorably than others. [128]

[18] Neither the Bankruptcy Code nor applicable decisions from this Circuit establish parameters for analyzing whether a plan satisfies the requirement of "same treatment for each claim or interest." Therefore, it is an open question whether that requirement is violated when the receipt of releases and exculpations is conditioned upon a particular class member's vote to accept the Plan. [129]

Appellees place heavy reliance on the decision in *In re Heron, Burchette, Ruckert, & Rothwell,* [130] for the proposition that it is only the claimant's "claim or interest" that must be treated equally, rather than the claimant itself. [131] Appellees urge the Court to likewise distinguish between the Plan's similar treatment of claims, on the ***363** one hand, and the dissimilar treatment of claimants for collateral reasons, on the other. [132]

Courts have not made a clear a distinction between treatment of "claimants" and treatment of "claims." For example, in *In re Joint Eastern and Southern District Asbestos Litigation*, the Second Circuit spoke in terms of equal treatment of "claimants" rather than "claims." [133] Likewise, in *In re AOV Industries, Inc.*, the D.C. Circuit focused on the treatment of claimants rather than claims, holding that "[i]t is disparate treatment when members of a common class are required to tender more valuable consideration—be it their claim against specific property of the debtor or some other cognizable chose in action—in exchange for the same percentage of recovery." [134]

Whether the Plan satisfies the requirements of equal treatment under section 1123(a)(4) of the Bankruptcy Code is a question that remains open for interpretation. There is no doubt here that in return for approving the Plan, some claimants will receive a more valuable settlement than others (*i.e.,* additional benefits on top of their pro rata distributions). While such an outcome may be permissible where the added benefit is given for truly collateral reasons (*i.e.,* independent from their status as claimants), here the benefit is given in exchange for the claimant's affirmative vote for the Plan—an added benefit that is tied directly to the Plan itself and given to some claimants in a class, but not all. Such an inducement may well have led some claimants to approve the Plan when they otherwise may have rejected it. As a result, creditors opposing the Plan may have been prejudiced by a quid pro quo exchange of Plan approval for valuable releases and exculpations.

Section 1123(a)(4) guarantees that each class member will be treated equally, regardless of how it votes on a proposed plan. Where the receipt of valuable benefits in a plan is conditioned on a vote to accept *that plan,* there is a very real possibility of dissuading or silencing opposition to the plan. In this context, the Bankruptcy Court's semantic distinction between the treatment of claims and claimants goes ***364** against the spirit of section 1123(a)(4) and what it seeks to protect. If an appeal of that issue is heard, there is a substantial possibility that Appellants will succeed in their argument that the distribution of certain benefits to some claimants but not others within a class violates section 1123(a)(4).

4. Appellants Have Made a Substantial Case on the Merits of Their Claim that the Bankruptcy Court Erroneously Found that the Plan Was in the Best Interests of the Objecting Creditors

The "best interest of creditors test" embodied in section 1129(a)(7) of the Bankruptcy Code [135] "involves a hypothetical application of chapter 7 to a chapter 11 plan." [136] The test requires that each holder of a claim or interest either (1) accept the chapter 11 plan, or (2) receive or retain property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7. [137] The best interest of creditors test "applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan." [138] If even one dissenting member of an impaired class would get less under the Plan than in a hypothetical liquidation, the fact that the class as a whole approved the Plan is immaterial. [139] Consequently, section 1129(a)(7) is one of the strongest protections individual creditors have in chapter 11. [140]

[19] The proponent of the plan bears the burden of showing that the plan complies with section 1129(a)(7). [141] "That burden ***365** is met by showing that creditors will receive at least as much under the [p]lan as they would receive in a liquidation of the [d]ebtor's assets under chapter 7." [142] The bankruptcy court must find by a preponderance of the evidence that the plan is in the best interests of the creditors. [143] That determination "is a finding of fact, and it is reviewed under the clearly erroneous standard." [144]

Under chapter 7, a debtor's estate is liquidated by a trustee appointed by the Bankruptcy Court. [145] Whether a settlement that is included in a plan is in the best interests of the creditors requires an inquiry into whether a hypothetical chapter 7 trustee of the debtor's estate would have adopted the settlement as being in the best interests of the parties in interest. [146]

[20] In evaluating whether the Plan was in the best interests of the objecting creditors, the Bankruptcy Court analyzed each of the five factors it considered to be significant. [147] The court began its discussion by noting that it considered the first two factors alone to be dispositive, but would nonetheless discuss all five. In its analysis of the first two factors, however, the court did not assess the interests of the ACC debtor in particular, but rather assessed the aggregate costs to the entire combined estate of all of the Debtors in the absence of a Plan. *First,* it found that if the Plan were not confirmed and the IPO were required, the estates would spend approximately $715 million. [148] *Second,* the court found that if the estates were consolidated under a single trustee, the trustee's fee would exceed $70 million. [149] The problem with these estimates, of course, is that they lump all of the Debtors together. [150] It is only with respect to the final factor, the adoption of the Settlement, that the court focused on the particular interest of the objecting creditors, the ACC Bondholder Group. That approach places an unduly heavy burden on an objecting creditor by requiring it to prove that it would receive more under a chapter 7 liquidation than under the Plan despite the total financial burden on the combined estates resulting from the absence of a settlement.

***366** Further, Appellants argue that the Plan Proponents failed to satisfy their burden of proof under section 1129(a)(7) with regard to the proposed Settlement. [151] In its discussion of that factor, entitled "Adoption of Settlement," the Bankruptcy Court stated:

> The Plan proposes distributions to creditors based on a settlement of disputed issues, including the MIA and a settlement with Bank Lenders. *The Plan Proponents believe it is reasonable to assume* that a chapter 7 trustee would adopt settlements similar to the Settlement and the settlement with the Bank Lenders embodied within the Plan in order to avoid the risks, length, costs and uncertainties of litigation. *I agree with the Plan Proponents.* I think that there's no realistic basis to conclude that a chapter 7 trustee for ACC would come to a different view as to the desirability of the Settlement than Tudor, Highfields, Oz, C.P., Satellite, and all of the accepting ACC classes of claims and interests did. Even if there were individual trustees for individual estates, and an ACC trustee took positions, as an advocate, allied with the interests of ACC creditors, there is no reasonable basis for a conclusion that he or she could argue anything other than the same merits that have been discussed at length above, or that the trustees for other estates would agree as to the merits of a chapter 7 trustee's positions. It is much more likely that taking into account the complexity and expense of litigating the MIA and the risk of protracted litigation, the chapter 7 trustee for the ACC estate will adopt the Settlement, concluding, as I do, that it is in the best interests of the ACC estate and its creditors. [152]

According to Appellants, the court's assumption is contrary to the evidence of record. Appellants cite the testimony of Harrison J. Goldin, the only witness on the subject, who testified that if he were the chapter 7 trustee for ACC, he

would definitely not enter into the Settlement.[153] In light of this testimony, the liquidation analysis prepared by Daniel Aronson, a Managing Director of Lazard, who testified as a fact witness, is flawed in that it *assumes* that the Settlement would exist in chapter 7 despite the fact that this is the very proposition to be evaluated.[154] Appellants argue that the "[p]roponents offered no alternative analysis as to what ACC creditors would receive in a chapter 7 case if there were no settlement and they had received instead what they were entitled to in a stand-alone liquidation."[155]

[21] "In order to show that a payment under a plan is equal to the value that the creditor would receive if the debtor were liquidated, there must be a liquidation analysis of some type that is based on evidence and not mere assumptions or assertions."[156] However, the valuation of a ***367** hypothetical chapter 7 liquidation is, by nature, "inherently speculative"[157] and "is often replete with assumptions and judgments."[158] Appellants offered evidence (Goldin's testimony) that directly contradicts the assumption made by the Bankruptcy Court. The question, then, is whether it was clearly erroneous for the Bankruptcy Court to disregard Goldin's testimony and to rely on the assumption that a chapter 7 trustee for ACC would not have "come to a different view as to the desirability of the Settlement than Tudor, Highfields, Oz, C.P., Satellite [the five settling members of the ACC Noteholders Committee], and all of the accepting ACC classes of claims and interests did."[159]

The Bankruptcy Court cites no evidence other than the fact that many sophisticated creditors accepted the Settlement as part of an overall chapter 11 plan that incontestably contained many valuable benefits such as avoiding the IPO costs and vastly reducing administrative expenses. But this goes against the grain of the best interests test, which is designed to protect individual creditors even in the face of majority support for a plan.[160] The Bankruptcy Court also cited the complexity and expense of protracted litigation if the Settlement were not adopted. Appellants, on the other hand, relied on Goldin's testimony, which contains a host of reasons why a chapter 7 trustee would not adopt the Settlement. While Appellants may not have shown a substantial possibility of success on the merits with respect to this point of error, Appellants have raised a serious legal question and made a substantial case on the merits.[161]

5. Appellants Have Neither Shown a Substantial Possibility of Success Nor Raised a Serious Legal Question as to Their Remaining Claims

Appellants also allege that the Bankruptcy Court erred in the following ways: (1) by permitting the Plan to go forward even though six debtors did not have at least one impaired accepting class in violation of section 1129(a)(10); (2) by denying the ACC Noteholders the right to obtain increases in the value of the TWC stock through the "true-up" mechanism in the Plan; and (3) by permitting material and adverse modifications to the Plan without requiring resolicitation. As noted earlier, none of these points merit further discussion.

D. Public Interest

There are public interest considerations on both sides of this dispute. On the one hand, there is a significant public interest in vindicating the rights of the minority and preventing the will of the majority to go unchecked by appellate review. "[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it."[162] On the other hand, there is also a strong public ***368** interest in the swift and efficient resolution of bankruptcy proceedings.[163] Indeed, compromises are favored in bankruptcy precisely for the reason that they "minimize litigation and expedite the administration of a bankruptcy estate."[164] On balance, however, the public interest does not favor either side and thus, does not affect the Court's determination on the stay.

E. Balancing of the Four Stay Factors

After evaluating and weighing the four stay factors described earlier, I conclude that a stay is warranted. Appellants have shown a substantial possibility of success on the merits of several claimed errors. In the absence of a stay, the merits of those claims will never be heard on appeal due to mootness—a quintessential form of prejudice—which will inevitably result from the substantial consummation of the Plan. Weighing against a stay is the potential for serious financial harm that all parties will suffer if a stay is ordered. But because a substantial bond would, in large part, ameliorate that harm, it does not outweigh the fact that Appellants have demonstrated both irreparable harm and a substantial possibility of success on the merits of their objections. The balancing of equities tips in favor of granting a stay conditioned upon the posting of a substantial bond.

F. Bond

[22] Even though Appellants have shown that they are entitled to a stay pending appeal of the Confirmation Order, and even though the risk of serious financial harm to the non-moving parties is outweighed by the remaining stay factors, that potential harm cannot be ignored. To the contrary, as outlined above, if a stay pending appeal is likely to cause harm by diminishing the value of an estate or "endanger [the non-moving parties'] interest in the ultimate recovery," and there is no good reason not to require the posting of a bond, then the court should set a bond at or near the full amount of the potential harm to the non-moving parties. As such, Appellants must post a substantial bond that is commensurate with the threatened loss to the non-moving parties. [165] Thus, Appellants are ordered to post a bond in the amount of $1.3 billion in cash or bond or a combination thereof. [166] Appellants shall post ten percent of that sum within twenty-four hours of the date of this Opinion, with the remainder to be posted within seventy-two hours of the date of this Opinion. [167]

***369 IV. CONCLUSION**

For the reasons discussed above, Appellants' motion for a stay pending appeal and for an expedited appeal is granted. Appellants are directed to post cash or a bond in the amount of $1.3 billion, with ten percent to be posted within twenty-four hours of the date of this Opinion and the remainder within seventy-two hours of the date of this Opinion. The briefing schedule on the expedited appeal is as follows: Appellants' brief is due fourteen days after the date of this Opinion. Appellees' brief is due fourteen days after service of Appellants' brief. Appellants' reply brief is due seven days after service of Appellees' brief. The Clerk of the Court is directed to close this motion.

SO ORDERED.

All Citations

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Footnotes

1 The ACC Bondholder Group is comprised of holders and/or investment advisors to certain holders of over one billion dollars of notes and debentures issued by the parent company, ACC, in the aggregate principal amount of $4.9 billion (or $5.1 billion including prepetition accrued interest), namely: Aurelius Capital Management, LP, Banc of America Securities LLC, Catalyst Investment Management Co., LLC, Drawbridge Global Macro Advisors LLC, Drawbridge Special Opportunities Advisors LLC, Elliott Associates, LP, Farallon Capital Management L.L.C., Lehman Brothers, Inc. (Global Principal Strategies Business), Noonday Asset Management L.P., Perry Capital LLC, and Viking Global Investors LP (collectively, the "ACC Bondholder Group" or "Appellants").

2 The Official Committee of Equity Security Holders (the "Equity Committee") has also moved for a stay of the Confirmation Order pending appeal. This Opinion does not address that motion as the parties have resolved that application. *See* Order dated January 23, 2007(SAS).

3 *See, e.g.,* Justice Sandra Day O'Connor, *"The Threat to Judicial Independence,"* The Wall Street Journal, Sept. 27, 2006, at A18 ("Judges can—and do—sometimes render erroneous decisions, but that is why appeals are allowed to higher courts.").

4 All parties have had a full opportunity to be heard on the stay application. Hundreds of pages of briefs and thousands of exhibits were submitted and the Court heard argument for more than five hours over the course of two days.

5 This section sets forth a general overview of the background of the present dispute. A more detailed summary of the record can be found in the Bankruptcy Court Bench Decision on Confirmation, dated January 3, 2007 ("Bench Dec.").

6 Bench Dec. at 1.

7 *See* Ex. 15 (Order in Aid of Confirmation, Pursuant to Sections 105(a) and 105(d) of the Bankruptcy Code Establishing Pre–Confirmation Process to Resolve Certain Inter–Creditor Issues, dated August 4, 2005 ("MIA Order")). Citations in the form "Ex. __" refer to exhibits attached to the Affidavit of Martin J. Bienenstock in Support of Order to Show Cause for Stay Pending Appeal and Expedited Appeal.

8 All of the members of the ACC Bondholder Group were members of the ACC Noteholders Committee. *See* Bench Dec. at 15 n. 16.

9 *See* MIA Order ¶ 12(a), which provides:

> Nothing contained herein shall preclude the Debtors from seeking to compromise one or more of the Dispute Issues (either by separate motion or in connection with a proposed plan of reorganization) on notice to the appropriate parties, and nothing herein shall prejudice the rights of any Participant [defined in paragraph 3 as any of the authorized litigants] to object to any such compromise and/or to assert that the Debtors have no authority to compromise such disputes.

10 The deal ultimately closed on July 31, 2006, and ACC received $12.7 billion in cash and 155,913,430 shares of TWC stock, which as of the date of confirmation, was valued at $6.5 billion. Of the cash, $2.7 billion has already been distributed pursuant to a separate plan that is not at issue here.

11 *See* Ex. 41 (April 6, 2006 Order Authorizing Debtors to File Plan of Reorganization that Provides for, Among Other Things, Proposed Settlement of Inter–Creditor Disputes ("April 6 Order")).

12 *See id.* ¶ 3.

13 *See* Ex. 16 (Affidavit of John Pike in Support of the ACC Bondholder Group's Objection to Approval of the Global Settlement and Confirmation of the Plan ("Pike Aff.")) ¶ 30.

14 *See* Bench Dec. at 46.

15 The split of the vote is not in the record, but Appellants represent that the split was twenty-one to two against the Settlement. *See* 1/15/07 Appellants' Reply Letter Brief to the Court ("Appellants' Rep. Mem."), at 11.

16 *See* Bench Dec. at 46–47.

17 *See* Brief in Support of Emergency Motion of Appellants['] for Stay Pending Appeal and Expedited Appeal ("Appellants' Mem."), at 4.

18 *See* Bench Dec. at 1.

19 The "Bank Litigation" consists of claims brought on behalf of Debtors against the Debtors' pre-petition lenders and investment banks in connection with their role in the ACC fraud perpetrated by the Rigas family.

20 In exercising his discretion to allow the ten day automatic stay provided for by Rule 3020(e) to take effect, the Bankruptcy Court wrote that "fairness to the ACC Bondholder Group ... requires that I not take an affirmative step that would foreclose all opportunities for judicial review...." Bench Dec. at 251. *See* Fed. R. Bankr.P.

3020(e) ("An order confirming a plan is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.").

21 *See* 28 U.S.C. § 158(a).

22 *See id.* § 158(a)(1).

23 *In re Palm Coast, Matanza Shores Ltd. P'ship,* 101 F.3d 253, 256 (2d Cir.1996).

24 *See In re Worldcom, Inc.,* No. M–47, 2003 WL 21498904, at *5 (S.D.N.Y. June 30, 2003). In any event, the parties do not dispute that the Bankruptcy Court's Confirmation Order and denial of a further stay is final.

25 *See In re Sanshoe Worldwide Corp.,* 993 F.2d 300, 305 (2d Cir.1993) ("[Appellant] relies on several cases for the reasonable proposition that the district court acts as an appellate court in reviewing a bankruptcy court's judgments.").

26 *See* Fed. R. Bankr.P. 8013 ("Findings of fact ... shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."). *Accord In re Cody, Inc.,* 338 F.3d 89, 94 (2d Cir.2003).

27 *In re Manville Forest Prods. Corp.,* 896 F.2d 1384, 1388 (2d Cir.1990) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

28 *See In re Cody,* 338 F.3d at 94; *In re 139–141 Owners Corp.,* 313 B.R. 364, 367 (S.D.N.Y.2004) (same).

29 *In re Savage & Assocs., P.C.,* No. 05 Civ. 2072, 2005 WL 488643, at *1 (S.D.N.Y. Feb. 28, 2005).

30 *See In re Turner,* 207 B.R. 373, 375–76 (2nd Cir. BAP 1997) (citing Fed. R. Bankr.P. 8005 Advisory Committee Note (1983) and *In re Country Squire Assocs. of Carle Place, L.P.,* 203 B.R. 182, 183 (2nd Cir. BAP 1996)).

31 *See, e.g., In re Lang,* 414 F.3d 1191, 1201–02 (10th Cir.2005) ("The decision of whether to grant a stay pending appeal is ... review[ed] ... for an abuse of discretion"); *WCI Cable, Inc. v. Alaska R.R. Corp.,* 285 B.R. 476, 478 (D.Or.2002) ("The decision to grant or to deny a stay pending appeal of a bankruptcy court order rests in the discretion of the district court.") (citing *In re First South Sav. Ass'n,* 820 F.2d 700, 709 (5th Cir.1987)); *In re Overmyer,* 53 B.R. 952, 955 (Bankr.S.D.N.Y.1985) ("A motion for a stay pending appeal, as authorized under Bankruptcy Rule 8005, is discretionary.") (citing *In re Pine Lake Village Apartment Co.,* 21 B.R. 395, 398 (S.D.N.Y.1982)).

32 *Hirschfeld v. Board of Elections in the City of N.Y.,* 984 F.2d 35, 39 (2d Cir.1993) (quotation marks omitted). *Accord Mohammed v. Reno,* 309 F.3d 95, 100 (2d Cir.2002) (citing *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)); *In re Savage,* 2005 WL 488643, at *1; *In re Suprema Specialties, Inc.,* 330 B.R. 93, 94–95 (S.D.N.Y.2005).

33 *EPlus, Inc. v. Katz (In re Metiom, Inc.),* 318 B.R. 263, 271 (S.D.N.Y.2004) ("failure to satisfy one prong of the standard ... dooms the motion"). *See also In re Tower Automotive, Inc.,* No. 05–10578, 2006 WL 2583624, at *1 (Bankr.S.D.N.Y. June 28, 2006) ("all four criteria must be satisfied to some extent before a stay is granted"); *In re Baker,* No. 05 Civ. 3487, 2005 WL 2105802, at *3 (E.D.N.Y. Aug. 31, 2005) (same).

34 *See Mohammed,* 309 F.3d at 101 (citing *Ofosu v. McElroy,* 98 F.3d 694, 703 (2d Cir.1996) ("weighing the four factors relevant to the grant of a stay")); *Hirschfeld,* 984 F.2d at 39 (finding that "consideration of these [four] factors clearly would *weigh* against the granting of the requested stay" (emphasis added)).

35 *See In re Albicocco,* No. 06–CV–3409, 2006 WL 2620464, at *1 n. 2 (E.D.N.Y. Sept. 13, 2006) (collecting cases, but declining to decide the question of the appropriate standard of review because the stay "should be denied under even the more generous standard, which treats the criteria as factors to be balanced rather than elements that all have to be necessarily satisfied").

36 I note, however, that for the reasons discussed below, the result here would be the same even under the more stringent test.

37 *Rothenberg v. Ralph D. Kaiser Co.,* 200 B.R. 461, 463 (D.D.C.1996) (quotations omitted). *Accord Stern v. Bambu Sales, Inc.,* 201 B.R. 44, 46 (E.D.N.Y.1996) (denying stay pending appeal where movant failed to show irreparable harm).

38 *Tucker Anthony Realty Corp. v. Schlesinger,* 888 F.2d 969, 975 (2d Cir.1989) (quotation marks and citation omitted).

39 *See, e.g., In re Sunflower Racing, Inc.,* 223 B.R. 222, 225 (D.Kan.1998); *In re 203 N. LaSalle St. P'ship,* 190 B.R. 595, 598 (N.D.Ill.1995); *In re Best Prods. Co.,* 177 B.R. 791, 808 (S.D.N.Y.), *aff'd on other grounds,* 68 F.3d 26 (2d Cir.1995); *In re Clark,* No. 95 C 2773, 1995 WL 495951, at *6 (N.D.Ill. Aug. 17, 1995); *In re Moreau,* 135 B.R. 209, 215 (N.D.N.Y.1992); *In re MAC Panel Co.,* No. 98–10952C–11G, 2000 WL 33673784, at *4 (Bankr.M.D.N.C.2000) (collecting cases); *In re Kent,* 145 B.R. 843, 844 (Bankr.E.D.Va.1991); *In re Charter Co.,* 72 B.R. 70, 72 (Bankr.M.D.Fla.1987); *In re Great Barrington Fair & Amusement, Inc.,* 53 B.R. 237, 240 (Bankr.D.Mass.1985); *In re Baldwin United Corp.,* 45 B.R. 385, 386 (Bankr.S.D.Ohio 1984).

40 *See, e.g., In re Norwich Historic Pres. Trust, LLC,* No. 3:05CV12, 2005 WL 977067, at *3 (D.Conn.2005) (acknowledging "persuasive" arguments that although foreclosure sale would not injure appellant, appellant's concern that his appeal would be mooted satisfied the irreparable harm requirement); *In re Country Squire,* 203 B.R. at 183 (staying a foreclosure sale where it was "apparent that absent a stay pending appeal ... the appeal will be rendered moot," resulting in a "quintessential form of prejudice" to appellant (quotation omitted)); *In re St. Johnsbury Trucking Co.,* 185 B.R. 687, 690 (S.D.N.Y.1995) (finding sufficient irreparable injury where denying a stay would threaten government's ability to appeal a bankruptcy court's decision); *In re Advanced Mining Sys., Inc.,* 173 B.R. 467, 468–69 (S.D.N.Y.1994) (finding irreparable injury prong met where, absent a stay of the bankruptcy court's order, the distribution of assets to creditors would moot any appeal and thus quintessentially prejudice appellants); *In re Grandview Estates Assocs., Ltd.,* 89 B.R. 42, 42–43 (Bankr.W.D.Mo.1988) (declining to stay the foreclosure sale of an asbestos-ridden apartment complex, but holding that irreparable injury is clearly shown where such sales moot any appeal, and concluding that to hold otherwise would preclude appellate review, thus running "contrary to the spirit of the bankruptcy system [and also] subvert[ing] the entire legal process"). *Cf. In re "Agent Orange" Prod. Liab. Litig.,* 804 F.2d 19, 20 (2d Cir.1986) (declining to lift the court's own stay of the implementation of a district court's scheme for the distribution of a settlement award because the pending appeals "involve[d] numerous complex issues arising out of [ ] extraordinary litigation," the objecting parties had "a right to appellate review," and "[d]istribution of the challenged settlement award before its validity [could be] tested would deprive those parties of that right").

41 *In re Country Squire,* 203 B.R. at 183. The sanctity of Appellants' right to appellate review is not lessened because they represent a minority, in both number and priority of claims. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson ("TMT"),* 390 U.S. 414, 450, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) (the rights of the lone committee objecting to a reorganization plan cannot be subjugated to those of the majority approving the plan).

42 *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.) ("Chateaugay I"),* 988 F.2d 322, 325 (2d Cir.1993).

43 *Id.* (stating that principles of mootness are "especially pertinent in bankruptcy proceedings, where the ability to achieve finality is essential to the fashioning of effective remedies"). *Accord In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 144 (2d Cir.2005).

44 *See Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.) ("Chateaugay III"),* 94 F.3d 772, 776 (2d Cir.1996) ("Reviewing courts presume that it will be inequitable or impractical to grant relief after substantial consummation of a plan of reorganization.").

45 *Frito–Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.) ("Chateaugay II"),* 10 F.3d 944, 952–53 (2d Cir.1993) (citations and quotations omitted).

46 *See, e.g., Mohammed,* 309 F.3d at 100.

47 *See, e.g., id.; Bermudez v. Reid,* 720 F.2d 748, 750 (2d Cir.1983).

48 *Mohammed,* 309 F.3d at 101 (quoting *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C.Cir.1977)).

49 *Id.* (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir.1991)). *Accord Ofosu,* 98 F.3d at 703 (four stay factors "weigh[ed]").

50 *Id.*

51 *LaRouche v. Kezer,* 20 F.3d 68, 72–73 (2d Cir.1994) (quotation omitted). *Accord Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir.1953) (on a motion for preliminary injunction, stating that if "the balance of hardships tips decidedly toward plaintiff," the movant plaintiff will meet its burden on the merits if "the plaintiff has *raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."* (emphasis added)).

52 *In re Savage,* 2005 WL 488643, at *2.

53 *Myers v. Martin (In re Martin),* 91 F.3d 389, 393 (3d Cir.1996).

54 *In re Agent Orange,* 804 F.2d at 20.

55 *See* Fed. R. Bankr.P. 8005 ("A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.... The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court."). *Accord In re Suprema Specialties, Inc.,* 330 B.R. 93, 96 (S.D.N.Y.2005)("the posting of a bond ... is discretionary and is not a prerequisite to obtain a stay pending appeal."); *In re Sphere Holding Corp.,* 162 B.R. 639, 644 (Bankr.E.D.N.Y.1994) ("Bankruptcy Rule 8005 provides in relevant part that the '[t]he district court ... may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court.' The posting of a bond, therefore, is discretionary.") (quoting 9 Collier on Bankruptcy ¶ 8005.07[2] (Lawrence P. King ed., 15th ed.1993)); *In re Max Sugarman Funeral Home, Inc.,* 94 B.R. 16, 17 (Bankr.D.R.I.1988) ("[T]he form, the amount, and the sufficiency of the bond generally[ ] are matters within the discretion of and for determination by the bankruptcy court.") (citing *In re Swift Aire Lines, Inc.,* 21 B.R. 12, 14 (9th Cir. BAP 1982)).

56 *In re Sphere Holding,* 162 B.R. at 644 (quoting 9 Collier on Bankruptcy ¶ 8005.07[2]).

57 *In re Suprema Specialties,* 330 B.R. at 96 (declining to impose a bond, but stating that if the stay would have delayed payment to creditors, "a bond should be required to guarantee the costs of delay incident to [the] appeal").

58 *See id.*

59 *State Indus., Inc. v. Mor–Flo Indus., Inc.,* 124 F.R.D. 613, 614 (E.D.Tenn.1988) (bond required unless appellant can show "undue financial burden or other exceptional circumstances").

60 *de la Fuente v. DCI Telecomm., Inc.,* 269 F.Supp.2d 237, 240 (S.D.N.Y.) (quoting *Morgan Guar. Trust Co. v. Republic of Palau,* 702 F.Supp. 60, 65 (S.D.N.Y.1988)), *aff'd,* 82 Fed.Appx. 723, 2003 WL 22922353 (2d Cir.2003) (unpublished).

61 It is undisputed that the distributions, once made, would constitute substantial consummation.

62 *See Chateaugay II,* 10 F.3d at 952–53 (holding that in order to rebut the presumption of mootness of an appeal of a bankruptcy court-approved confirmation plan, appellant must show that effective, practical relief is possible).

63 1/19/07 Letter from Martin J. Bienenstock at 2–3 (citing *In re Kaiser Aluminum Corp.,* No. 02–10429 (Bankr.D.Del. Mar. 3, 2006) (Docket No. 8370) (requiring each noteholder receiving a distribution to execute an affidavit agreeing to return all distributions within thirty days after notification of the entry of a final order reversing the distribution on appeal)).

64 *Id.* at 3.

65 1/19/07 Letter from Marc Abrams and Adam L. Shiff, counsel to the Debtors and the Creditors Committee, respectively, at 1. The ACC Bondholder Group's main objection to the Plan is that the entire class of ACC Senior Noteholders is to receive an 89% recovery whereas most of the creditor groups will receive a substantially greater percentage (*e.g.,* 112% for the Arahova Noteholders). This occurred, they claim, because the merits of the Inter–Creditor Dispute were never tried nor even carefully evaluated. *See infra* Part III.C.2. Under the current Plan, however, the difference between an 89% and 112% recovery is approximately $250 million—excluding the value of the CVV interests, which is dependent on the eventual recovery, if any, in the Bank Litigation. Nevertheless, counsel for the ACC Bondholder Group conceded at oral argument that $250 million is "an approximation of a high side benefit if we win here for my clients." 1/17/06 Transcript of Hearing on Motion for Stay Pending Appeal, at 16.

66 10 F.3d at 953 (quotations omitted).

67 Indeed, the Bankruptcy Court reached the very same conclusion. *See* Bench Dec. at 253 (analyzing the irreparable harm to the moving party factor, stating "I assume it to be true that if a stay isn't granted, the Plan will go effective, and that if that happens, there is a very high probability that any appellate court would then find an appeal to be moot. And I assume, without deciding, that the irreparable injury requirement could thus be deemed to be satisfied.").

68 Although the loss of appellate rights is dispositive for this factor, it is not dispositive of the ultimate question of whether to grant a stay pending appeal. While I place the highest value on the exercise of appellate rights, there is no doubt that the parties seeking appellate review here do so purely for the purpose of acquiring more money. The right to appeal a loss of even hundreds of millions of dollars is surely less urgent, for example, than the loss of liberty. *Cf. In re St. Johnsbury Trucking Co.,* 185 B.R. at 690 n. 1 (concluding that the risk of the government's appeal being mooted satisfied the irreparable injury requirement only because mootness

would preclude the government from, *inter alia,* enforcing provisions of federal law; it was "that threatened loss rather than the loss of the right to appeal *vel non* that [gave] rise to the Court's irreparable injury finding").

69 Assuming that the appeal before the district court could be fully briefed by the end of February (assuming there is no appeal from the decision on the stay), it would likely take two months (until the end of April) to decide. An appeal to the Second Circuit would likely take an additional four months (until September). Any petition for review to the Supreme Court would extend the time even further.

70 There is also an inherent loss to the creditors in any delay because the interest on the proceeds from the Sale earned by Debtors accrues at a very low rate. If the funds were distributed to the various creditors, many of which are hedge funds, they could likely achieve much higher rates of return.

71 Indeed, if the Debtors did not immediately pursue an IPO given the current hot market, that could send a signal to the market that there is a problem with the stock that is for some reason delaying the IPO process, which could negatively affect the TWC stock price.

72 Appellants claim that these fees are overestimated because the IPO Condition requires that only one-third of the TWC stock be sold in the IPO. However, Appellees counter that if less than all of the stock is sold, the remainder of the stock would be subject to the agreements' 180–day lockup period during which the Debtors would be prohibited from distributing the balance of the stock under the Plan, thereby subjecting the creditors to the volatility of the marketplace and depriving them of the right to make their own investment decisions with respect to the stock.

73 Appellees also point out that many of the key personnel that were working for the Debtors to implement the Plan are no longer so employed, and a renegotiation of the Plan if that becomes necessary and further day-to-day administration of the estate during the stay would place a heavy burden on the remaining "wind down" staff.

74 This is borne out by the record. For example, several "drop dead" dates have passed and new ones have been set and still no party has attempted to abandon the Plan. Hopefully, too much is now at stake to allow that to happen.

75 *See infra* Part III.F.

76 *Cf. Borey v. National Union Fire Ins. Co.,* 934 F.2d 30, 34 (2d Cir.1991) (noting in the preliminary injunction context that "[m]onetary loss alone will generally not amount to irreparable harm. 'A monetary loss will not suffice unless the movant provides evidence of damage that cannot be rectified by financial compensation.' " (quoting *Tucker Anthony Realty Corp.,* 888 F.2d at 975)). There is no inconsistency between this Court's finding that Appellants will suffer irreparable harm absent a stay and the fact that their true purpose in appealing is to obtain more money. The reason why monetary loss is not irreparable harm in the preliminary injunction context is because the party seeking an injunction may yet obtain monetary relief after the merits are heard. Here, by contrast, Appellants' alleged loss will never be recouped if they do not obtain a stay because their appeal will be moot and the merits will never be heard.

77 Other than the points discussed below, Appellants' remaining claims of error are either "de minimis" or unlikely to succeed on appeal, and thus, do not merit further discussion. *See infra* Part III.C.5.

78 *See* Ex. 164 (7/26/05 Transcript of Hearing ("July Hr'g")), at 295 ("The Debtors' approach is much more efficient and comprehensive and is fully consistent with the due process rights of the Arahova noteholders in the world of the Second Circuit in Commodore, which applied STN in a situation where the debtor consented

to the deputization of an estate representative."). *See also Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.),* 262 F.3d 96 (2d Cir.2001).

The Bankruptcy Court also noted that the framework of *Commodore* standing for deputized committees and Debtor neutrality is "essential to permit a full and fair litigation of the intercreditor issues ... consistent, of course, with due process" and "would ensure that [the Inter–Creditor Disputes] were appropriately litigated without requiring the Debtors to choose sides between one competing creditor group or another." July Hr'g at 289, 292.

79 *See* MIA Order ¶¶ 3(a), 3(f).

80 Bench Dec. at 165.

81 *See* MIA Order ¶ 12(a).

82 *See In re Adelphia Commc'ns Corp.,* 336 B.R. 610, 618 (Bankr.S.D.N.Y.), *aff'd,* 342 B.R. 122 (S.D.N.Y.2006). There can be little doubt that the right to litigate a cause of action must include the right to withdraw it, settle it or try it—every case must be "dropped, settled or tried." *United States v. Glens Falls Newspapers, Inc.,* 160 F.3d 853, 856 (2d Cir.1998).

83 April 6 Order ¶ 3.

84 *Id.* ¶ 4(b).

85 423 F.3d 166 (2d Cir.2005).

86 Appellees note that this unofficial committee had no by-laws. Thus, it is unclear what level of support would have been required to approve the Settlement on behalf of the Committee. In other words, must the Committee act unanimously, by super majority, or a simple majority. In any event, the record seems clear that not even a simple majority approved the Settlement.

87 Thus, the Bankruptcy Court's recitation that certain parties "had the right to object to any such compromise (which the ACC Bondholder Group has done), and/or to assert that the Debtors have no authority to compromise such disputes ... [which] [t]he ACC Bondholder Group has also done" misses the point. Bench Dec. at 161. These objections were made after the Plan—which included the Settlement—had been overwhelmingly approved by the creditors.

88 *See* April 6 Order ¶ 4. Indeed, given that the requirement in the April 6 Order that the Plan be offered without the settlement as an option was never satisfied, the voting creditors were in essence voting up or down on one choice, rather than choosing between two alternatives. This, together with the incentives of voting for the plan (namely full releases and exculpation), *see infra* Part III.C.3, may well have artificially inflated the vote.

89 Bench Dec. at 165. *See also* Appellants' Rep. Mem. at 10 (citing Pike Aff.). It is unclear from the record how the vote was split among the members. Despite the ACC Noteholders Committee's rejection, three more members negotiated a slight improvement and signed the Settlement in their individual creditor capacity.

90 The fact that the Debtors agreed to settle is immaterial. The Debtors were ordered to remain neutral and the authority to litigate and settle (for the ACC Debtor) was vested in the ACC Noteholders Committee. That Committee never approved the settlement.

91 *See In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir.1983).

92 390 U.S. at 424, 88 S.Ct. 1157.

93 *In re W.T. Grant Co.,* 699 F.2d at 608 (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972)).

94 Moreover, when analyzing the ACC Noteholders' recovery in the Settlement of nearly 89% under the lowest range of reasonableness standard, the Bankruptcy Court likely erred in its analysis of the possible recovery range for ACC Noteholders in the MIA Litigation. In determining the upside potential to ACC Noteholders to be 112.9%, the court used a $6.48 billion valuation of the TWC stock. *See* Bench Dec. 176–77. But in arriving at the low end of 53.7, the court erroneously relied on a valuation of the TWC stock in the range of $5.1 to $5.4 million. Had the 6.48 billion valuation been used, the low end would have been 73.3%—this is an underestimation of twenty basis points. *See id.; see also* Appellants' Mem. at 10–11. Appellees do not dispute this error, but speculate that the court would have reached the same result even in the absence of that error. *See* Plan Proponents' Memorandum of Law in Opposition to the ACC Bondholder Group's Motion for Stay Pending Appeal and Expedited Appeal ("Appellees' Mem.") at 26 n. 23. Nevertheless, there is a substantial possibility that a reviewing court would disagree and find that the Bankruptcy Court abused its discretion when it relied on erroneous material facts in approving the Settlement as falling within the range of reasonableness.

95 11 U.S.C. § 1123(b)(3)(a).

96 Section 1123(b)(6) states that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." However, if the purported Settlement is unenforceable, it should not be included in the Plan under 1123(b)(6). The subsections of section 1123 must be applied as to give meaning to the section as a whole.

97 *See* April 6 Order ¶ 4(b) (ordering that any proposal of settlement made by the Debtors shall be "without prejudice to any party's rights (i) in the Resolution Process [of the Inter–Creditor Dispute] and/or (ii) with respect to the prosecution or confirmation of any plan or plans of reorganization").

98 In order for the implementation of the Bankruptcy law to be constitutional, it must provide for a fair distribution of assets to a debtor's creditors. *See Kuehner v. Irving Trust Co.,* 299 U.S. 445, 451, 57 S.Ct. 298, 81 L.Ed. 340 (1937). For the reasons detailed above, approval of the Settlement could be found to be fundamentally unfair. *See supra* Part III.C.1.

99 *In re Augie/Restivo Baking Co.* (*"Augie/Restivo"*), 860 F.2d 515, 518 (2d Cir.1988).

100 *In re Worldcom, Inc.,* No. 02–13533, 2003 WL 23861928, at *35 (Bankr.S.D.N.Y. Oct. 31, 2003) (citing *Federal Deposit Ins. Co. v. Colonial Realty Co.,* 966 F.2d 57, 59 (2d Cir.1992)).

101 *Augie/Restivo,* 860 F.2d at 518 (citing 5 Collier on Bankruptcy ¶ 1100.06, at 1100–32 n. 1 (Lawrence P. King ed., 15th ed.1988)).

102 *See* 11 U.S.C. § 105. *See also Augie/Restivo,* 860 F.2d at 518 n. 1.

103 *Augie/Restivo,* 860 F.2d at 518.

104 *Id.* (citations omitted). *Accord In re 599 Consumer Elecs., Inc.,* 195 B.R. 244, 248 (S.D.N.Y.1996) ("[T]he Second Circuit's use of the conjunction 'or' suggests that the two cited factors are alternatively sufficient criteria.").

105 *Augie/Restivo,* 860 F.2d at 518 (quoting *Chemical Bank New York Trust Co. v. Kheel,* 369 F.2d 845, 847 (2d Cir.1966)).

106 *Id.* (quoting *Flora Mir Candy Corp. v. R.S. Dickson & Co.,* 432 F.2d 1060, 1062 (2d Cir.1970)).

107 Indeed, the Bankruptcy Court actually stated that substantive consolidation would be unavailable under the circumstances because it would not meet the *Augie/Restivo* requirements. *See* Bench Dec. at 137 ("As the ACC Bondholders recognized in their supplemental solicitation material, substantive consolidation would be 'a highly unlikely result,' given that the Debtors have issued restated financial statements and filed the May 2005 Schedules, 'thus evidencing an ability to generally determine the assets and liabilities of each Debtor.' ") (citation omitted).

108 *See* Appellants' Mem. at 14–15.

109 *See Augie/Restivo,* 860 F.2d at 518 (stating that the "sole purpose" of substantive consolidation is to ensure creditors' equitable treatment and "stress[ing] that substantive consolidation 'is *no mere instrument of procedural convenience' "* (emphasis added) (quoting *Flora Mir Candy Corp.,* 432 F.2d at 1062)).

110 Whether the Bankruptcy Court properly analyzed the Settlement and the treatment of the Intercompany claims are issues of law, which are reviewed de novo.

111 Ex. 4 (First Modified Fifth Amended Joint Chapter 11 Plan for Adelphia Communications Corporation and Certain of its Affiliated Debtors ("Plan")) § 2.1.

112 *Id.* § 2.3.

113 *See id.* § 5.1.

114 Ex. 167 (12/7/06 Transcript of Confirmation Hearing, vol. 2 ("Vol. 2 Hr'g")), at 19. *See also id.* at 20 ("I am not sure that it would be possible to back into the individual answers [as to how each issue is resolved] from the components of the settlement.").

115 Bench Dec. at 85. *See also id.* at 87.

116 *Consolidated Rock Prods. Co. v. du Bois,* 312 U.S. 510, 520, 61 S.Ct. 675, 85 L.Ed. 982 (1941). Thus, Appellees' argument that Appellants are relying on an assumption that the Intercompany Claims are valid is somewhat disingenuous. It was the duty of the Bankruptcy Court to make a determination on that very point one way or the other. *See id.*

117 *See Kuehner,* 299 U.S. at 451, 57 S.Ct. 298.

118 Indeed, there is a strong possibility that a Settlement was never reached. *See supra* Part III.C.1.

119 *See* 11 U.S.C. § 1122(a) ("[A] plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.").

120 *See id.* § 1129(a)(9) (in order for a plan to be confirmed, the plan must provide for payment in full of administrative expenses as defined under section 507(a)(1)).

121 *See id.* § 1124 ("[A] class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan ... leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.").

122 *See id.* § 1126(g).

123 *See id.* § 1129(b) (providing that a plan can be confirmed even if an impaired class does not vote to accept "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.").

124 *See* Bench Dec. at 148 (*"We do not have a cramdown situation here.* Thus the additional requirements of section 1129(b) are inapplicable.").

125 11 U.S.C. § 1123(a)(4) (emphasis added).

126 Bench. Dec. at 195. *See also* Appellees' Mem. at 30–31.

127 Bench Dec. at 196.

128 Appellants' Mem. at 11.

129 Because interpretation of the Bankruptcy Code is question of law, the Bankruptcy Court's ruling, on appeal, would be subject to de novo review.

130 148 B.R. 660, 672 (Bankr.D.D.C.1992) ("The objectors fail to distinguish between a [claimant's] treatment under the plan on account of a claim or interest and treatment for other reasons. Only the former is governed by § 1123(a)(4).").

131 *See* Appellees' Mem. at 31.

132 It is not entirely clear, however, that *In re Heron* provides all the support that Appellees suggest. As the Appellants note, the decision may well be distinguishable because it only "permitted extra consideration to creditors who paid consideration for special treatment." Appellants' Mem. at 11. Here, the releases and exculpations are granted to some members of the ACC Noteholders class solely in return for their votes to accept the Plan, rather than for further "paid consideration."

133 982 F.2d 721 (2d Cir.1992). Although the Second Circuit did not ultimately reach the question of whether the treatment at issue was permissible, the court's language is nonetheless instructive: "[W]e need not decide whether the Settlement also violates section 1123(a)(4) by failing to accord the 'same treatment' to health *claimant members* of [the class]." *Id.* at 749 (emphasis added).

134 792 F.2d 1140, 1152 (D.C.Cir.1986) (concluding that an individual claimant was being subjected to unequal treatment). The import of other decisions is less clear. For example, in *In re Central Medical Center, Inc.,* the court held that a lottery system that subjected each claimant to the same process but that would result in different recovery amounts was permissible because "the Plan subjects all members of the same class to the same means of claim determination." 122 B.R. 568, 575 (Bankr.E.D.Mo.1990). In another case, *In re Union Meeting Partners,* the court was presented with a situation similar to the one here, in which creditors would receive additional consideration if they voted in favor of a proposed plan and released certain claims of liability. 165 B.R. 553, 566 (Bankr.E.D.Pa.1994). However, the court did not comment on the propriety of that additional consideration, striking down the Plan on other grounds.

135 11 U.S.C. § 1129(a)(7) provides, in pertinent part:

> With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

136 *In re Lisanti Foods, Inc.,* 329 B.R. 491, 500 (D.N.J.2005) ("A liquidation and distribution analysis is performed to see whether each holder of a claim or interest in each impaired class, as such classes are defined in the subject plan, receive not less than the holders would receive in a hypothetical [c]hapter 7 distribution to those classes.").

137 *See In re Drexel Burnham Lambert Group, Inc.,* 138 B.R. 723, 761 (Bankr.S.D.N.Y.1992).

138 *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship,* 526 U.S. 434, 442 n. 13, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999). *Accord In re Am. Family Enters.,* 256 B.R. 377, 403 (D.N.J.2000) ("This subsection focuses on individual creditors rather than on classes of claims or interests."). "As § 1129(a)(7) makes clear, the liquidation analysis applies only to non-accepting impaired claims or interests. If a class of claims or interests unanimously accepts the plan, then the best interests test is automatically satisfied for all members of that class. Moreover, under § 1126(f), a class that is not 'impaired' under the plan is deemed to have accepted the plan." *In re Drexel Burnham,* 138 B.R. at 761 (footnote omitted). "[A] class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan ... leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1).

139 *See* 7 Collier on Bankruptcy ¶ 1129.03[7][a] (Lawrence P. King ed., 15th ed.2000).

140 *See In re Crowthers McCall Pattern, Inc.,* 120 B.R. 279, 297 (Bankr.S.D.N.Y.1990).

141 *See In re Lisanti Foods,* 329 B.R. at 500; *In re Am. Family Enter.,* 256 B.R. 377, 403 (D.N.J.2000); *Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship,* 248 B.R. 668, 690 (D.Mass.2000); *In re Lason, Inc.,* 300 B.R. 227, 232 (Bankr.D.Del.2003).

142 *In re Lisanti Foods,* 329 B.R. at 500.

143 *See In re Dow Corning Corp.,* 255 B.R. 445, 499 (E.D.Mich.2000), *aff'd,* 280 F.3d 648 (6th Cir.2002); *Southern Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc.,* 252 B.R. 373, 390 n. 79 (E.D.Tex.2000).

144 *Beal Bank,* 248 B.R. at 690. *Accord Kane v. Johns–Manville Corp.,* 843 F.2d 636, 649 (2d Cir.1988); *In re Dow Corning,* 255 B.R. at 523; *In re Travelstead,* 227 B.R. 638, 654 (D.Md.1998) (citing *Kane*). *Accord* Fed. R. Bankr.P. 8013.

145 *See generally* 11 U.S.C. § 704 (setting forth duties of a chapter 7 trustee).

146 *See id.* § 704(a) (providing that the chapter 7 trustee must "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously *as is compatible with the best interests of the parties in interest"* (emphasis added)).

147 These factors included: "(i) the costs and discounts associated with an initial public offering of the TWC stock; (ii) the additional administrative expense costs of having one or more chapter 7 trustees appointed to liquidate the estates; (iii) the loss of value associated with losing the expertise of the Debtors' employees and professionals; (iv) increased claims against the Debtors and resulting delays in distribution; and (v) the Settlement embodied in the Plan." Bench Dec. at 198.

148 *See id.* at 199.

149 *See id.* at 202.

150 *See supra* Part III.C.2.

151 *See* Appellants' Reply Mem. at 13.

152 Bench Dec. at 203–04 (emphasis added).

153 *See* Appellants' Mem. at 12 (citing Ex. 10 (Declaration of Harrison J. Goldin, dated December 4, 2006) ¶ 2).

154 *See id.* ("Mr. Aronson testified that he ran the liquidation analysis based on the assumption, given to him by the Debtors' attorneys, that chapter 7 trustees for all debtors would enter into the same settlement.") (citing Vol. 2 Hr'g at 92:15–25).

155 Appellants' Reply Mem. at 13.

156 *In re Smith,* 357 B.R. 60, 67–68 (Bankr.M.D.N.C.2006). *Accord Southern Pac. Transp. Co.,* 252 B.R. at 391 n. 79 ("A judgment about whether § 1129(a)(7) is met must be based on evidence, not assumptions."); *In re Hoosier Hi–Reach, Inc.,* 64 B.R. 34, 38 (Bankr.S.D.Ind.1986) ("The burden imposed by 1129(a)(7) must be met with evidence, not assumptions.").

157 *In re Affiliated Foods, Inc.,* 249 B.R. 770, 788 (Bankr.W.D.Mo.2000).

158 *In re Crowthers,* 120 B.R. at 297–98.

159 Bench Dec. at 203.

160 *See* 7 Collier on Bankruptcy ¶ 1129.03[7][a].

161 *See Mohammed,* 309 F.3d at 101 (discussing the inverse relationship between irreparable harm and the level of success on merits that must be shown, stating that "more of one excuses less of the other"); *LaRouche,* 20 F.3d at 72–73 (stating that where the balance of equities tips in favor of the movant, it need only present a "substantial case on the merits when a serious legal question is involved.").

162 *TMT,* 390 U.S. at 435, 88 S.Ct. 1157. *Accord In re Agent Orange,* 804 F.2d at 20.

163 *In re Savage,* 2005 WL 488643, at *2 ("[P]ublic interest favors the expedient administration of the bankruptcy proceedings.").

164 *In re Martin,* 91 F.3d at 393.

165 *See supra* Part III.B (outlining and estimating the harm to non-movants).

166 While bonds ranging from hundreds of millions of dollars to billions of dollars are uncommon, they have been required where the financial risks justified bonds of that size. *See, e.g., Burlington Indus., Inc. v. Edelman,* 666 F.Supp. 799 (M.D.N.C.1987) (half a billion dollar bond enjoining a tender offer); *Texaco, Inc. v. Pennzoil Co.,* 626 F.Supp. 250 (S.D.N.Y.1986) (one billion dollar appeal bond), *rev'd on other grounds,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Price v. Philip Morris, Inc.,* No. 00–112, 2003 WL 22597608 (Ill.Cir.Ct. Mar. 21, 2003) (twelve billion dollar appeal bond), *rev'd on other grounds,* 219 Ill.2d 182, 302 Ill.Dec. 1, 848 N.E.2d 1 (2005).

167 It should be noted that Appellants will not necessarily lose the full value of the bond if they do not prevail on appeal. The purpose of the supersedeas bond here is not to act as liquidated damages to Appellees. Rather, if Appellants ultimately lose the appeal, in order for Appellees to recover any portion of the bond they will be required to prove up the amount of damages that they actually suffered during and as a result of the stay. Once proven, that amount will be drawn from the bond fund, and the remainder will revert to Appellants. *See Matter of Theatre Holding Corp.,* 22 B.R. 884, 885–86 (Bankr.S.D.N.Y.1982) ("The purpose of filing a supersedeas bond ... is to indemnify the party prevailing in the original action against loss caused

by an unsuccessful attempt to reverse the holding of the bankruptcy court. However, the only compensable damages are those which are shown to be the 'natural and proximate' result of the stay.").

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re Qimonda AG, E.D.Va., May 7, 2012

409 B.R. 24
United States Bankruptcy Court,
S.D. New York.

In re GENERAL MOTORS CORP., et al., Debtors.

No. 09–50026 (REG).
|
July 7, 2009.

Synopsis
Background: Parties affected by court order approving sale of assets of bankrupt automobile manufacturer to purchaser sponsored by government moved to certify sales order for direct appeal to the Court of Appeals or, in alternative, for issuance of stay pending appeal.

Holdings: The Bankruptcy Court, Robert E. Gerber, J., held that:

[1] court would not certify, for appeal directly to the Court of Appeals, its order granting Chapter 11 debtor's motion for approval of proposed sale of assets of its automobile manufacturing business, and

[2] even assuming that mere threat of having appeal from bankruptcy court's sales order deemed "moot" was itself sufficient to constitute "irreparable injury," stay of sales order was still not warranted in light of appellants' minimal chances of success and threat of injury to other parties and public.

Motions denied.

West Headnotes (8)

[1] **Bankruptcy** Petition for leave; appeal as of right; certification

Bankruptcy court would not certify, for appeal directly to the Court of Appeals, its order granting Chapter 11 debtor's motion for approval of proposed sale of assets of its automobile manufacturing business free and clear of all interests to purchaser sponsored by the federal government, where order did not involve any question of law as to which there was unresolved dispute between bankruptcy or district courts in the Second Circuit, albeit there was some intercircuit difference of opinion on one issue, where it did not concern matters of public importance, in that all of the issues presented had previously been resolved by the Second Circuit and there was no need for yet another pronouncement thereon, and where it was difficult to see how the Second Circuit could rule on appeal before stay imposed by Bankruptcy Rule expired, so that immediate appeal to Court of Appeals would not materially advance progress of case. 28 U.S.C.A. § 158(d)(2); Fed.Rules Bankr.Proc.Rule 6006(g), 11 U.S.C.A.

14 Cases that cite this headnote

[2] **Bankruptcy** Petition for leave; appeal as of right; certification

While split between the Circuit Courts of Appeals might be appropriate matter for consideration by the United States Supreme Court in deciding whether to grant certiorari, it did not satisfy statutory requirement for certification of bankruptcy court order for appeal directly to the Court of Appeals. 28 U.S.C.A. § 158(d)(2).

12 Cases that cite this headnote

[3] **Bankruptcy** Right; grant or denial; discretion

Decision whether to grant stay of bankruptcy court order pending appeal lies within sound discretion of court. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

21 Cases that cite this headnote

[4] **Bankruptcy** Right; grant or denial; discretion

To obtain stay pending appeal from order of bankruptcy court, litigant must demonstrate the

following: (1) that it would suffer irreparable injury if stay were denied; (2) that there is substantial possibility, though less than a likelihood, of success on merits of movant's appeal; (3) that other parties will suffer no substantial injury if stay is granted; and (4) that the public interest favors a stay. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

32 Cases that cite this headnote

[5] **Bankruptcy** Proceedings; which court

Burden on movant seeking a stay of bankruptcy court's order pending appeal is heavy one, and to be successful, movant must show satisfactory evidence on all four criteria bearing on propriety of such relief. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

25 Cases that cite this headnote

[6] **Bankruptcy** Bond

If party seeking a stay of bankruptcy court's order pending appeal seeks such relief without offering to post a bond, party bears burden of demonstrating why court should deviate from its ordinary full security requirement. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

8 Cases that cite this headnote

[7] **Bankruptcy** Right; grant or denial; discretion

Even assuming that mere threat of having appeal from bankruptcy court's sales order deemed "moot" was itself sufficient to constitute "irreparable injury," stay of sales order, that authorized transfer of assets of bankrupt automobile manufacturer to government-sponsored purchaser in advance of loss of government funding necessary to stave off liquidation, was still not warranted in light of appellants' minimal chances of success, given circuit precedent against them, and threat of injury to other parties and public if car manufacturer was forced to liquidate. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

6 Cases that cite this headnote

[8] **Bankruptcy** Right; grant or denial; discretion

Substantial loss to parties, including at least $7.4 billion to unsecured creditors, if bankrupt automobile manufacturer lost government funding due to delay in sale of its assets and was forced into liquidation in which there would be no distribution upon unsecured claims, irreparable loss to manufacturer's 225,000 employees, 500,000 retirees, 11,500 suppliers and 6,000 dealers in event that it were liquidated, and appellants' unwillingness to post more than nominal bond provided additional reason for denial of stay pending appeal, even if court's other concerns could be addressed. Fed.Rules Bankr.Proc.Rule 8005, 11 U.S.C.A.

1 Case that cites this headnote

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BENCH DECISION [1] AND ORDER ON MOTIONS FOR § 158(D)(2) CERTIFICATION, OR IN THE ALTERNATIVE, FOR STAY PENDING APPEAL

ROBERT E. GERBER, United States Bankruptcy Judge.

In this contested matter in the jointly administered cases of GM and its affiliates, I have motions for certification to the Circuit, under 28 U.S.C. § 158(d)(2), and, alternatively for a stay, pursuant to Fed.R.Bankr.P. 8005, of the effectiveness of my July 5 Order. Both motions are denied.

The following are my Findings of Fact, Conclusions of Law, and bases for the exercise of my discretion in connection with these determinations.

Findings of Fact

Familiarity with the background facts underlying these motions is assumed. *See* my July 5 decision, as corrected 407 B.R. 463, 2009 WL 1959233 ECF # 2985 (the **"Decision"**). My Findings of Fact as set forth in the Decision are incorporated by reference here. I thus note only additional facts put forward on this motion that are potentially relevant to the issues before me this evening.

The Eisenband Affidavit, submitted by the Creditors' Committee in opposition to the stay request, sets forth significant matter relevant to the impact on parties of a stay. In reliance in material part on the May 31 Worth Declaration, Mr. Eisenband points out the total New GM enterprise value after completion of the proposed 363 transaction is between $63.1 billion and $73.1 billion. (Eisenband Decl. ¶¶ 5, 6). Mr. Eisenband further shows that the total imputed value of the equity and warrants in New GM that will go to unsecured creditors of the GM estate is between $7.4 billion and $9.8 billion. (*Id.* ¶ 6).

By contrast, the estimated net proceeds that would be available for distribution to all creditors in a liquidation, assuming the 363 transaction did not occur (net of wind ***27** down expenses), would be only between $6.5 billion and $9.7 billion. (*Id.* ¶ 5). And even that can be deceptive when comparing it to the amount that would be available to unsecured creditors. In a liquidation, the estate would not get the benefit of the U.S.Canadian credit bid (approximately $49 billion), the billions in assumed obligations that New GM agreed to pay (approximately $48.4 billion), or the greatly compromised amount that the UAW VEBA Trust agreed to take in stock, instead of cash. Thus a much bigger claims pool would share that limited liquidation value, but the secured debt alone would wipe out unsecured creditor recoveries. As I noted in the Decision, in the event of a liquidation, unsecured creditors would get nothing.

Mr. Eisenband points out, persuasively, that the loss to the estate from anything that would result in a liquidation would be between $53.4 and $66.6 billion, and the loss to the unsecured creditor community alone (not counting the loss to the secured creditors) would be no less than $7.4 billion. (*Id.* ¶ 7).

I'll note additional facts as I go along, so I don't need to address them twice.

Discussion

Motion for Certification

[1] The Individual Litigants and the Asbestos Litigants first ask me to certify the July 5 Order that was entered in accordance with the Decision under 28 U.S.C. § 158(d)(2).

Section 158 of the Judicial Code, 28 U.S.C, deals with appeals from orders and judgments in bankruptcy cases. Its subsection (d)(2) provides, in relevant part, with respect to appeals to the Circuit:

> (A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy

> appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree ... or all the appellants and appellees (if any) acting jointly, certify that—
>
> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal....

Thus the Judicial Code, as amended by the BAPCPA amendments, establishes a procedure under which certain appeals can be certified by the bankruptcy court, or the district court (there being no BAP in this Circuit), for direct appeal to the Circuit if one or more of the three factors identified in the romanettes, being linked by an "or," is satisfied. The Circuit does not have to take the appeal, however, and can decide whether or not to do so in the exercise of its discretion.

The Circuit has explained the thrust of § 158(d)(2):

> The focus of the statute is explicit: on appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation.

Weber v. United States, 484 F.3d 154, 158 (2d Cir.2007).

***28** *Factor (i):*
The first of the three factors is whether the issue on appeal "involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance."

I can't agree with the Individual Tort Litigants when they suggest, with respect to successor liability, that this factor is satisfied because there is "a very distinct split in the circuits on this issue." (Indiv. Tort Litigants Motion ¶ 4). While it's true that there's a Circuit Split, the statute requires that there be "no controlling decision of the court of appeals *for the circuit.*" (Emphasis added). And while the Circuit hasn't yet issued its written decision explaining *why* it affirmed, there has been, as the Tort Litigants acknowledge, *id.,* "a controlling judgment issued by the Second Circuit in *Chrysler.*" I can't agree with the Individual Tort Litigants' suggestion, orally argued this evening, that when the Circuit said "affirmed for substantially the reasons stated in the opinions below," that wasn't a "decision."

[2] While a circuit split might be an appropriate matter for consideration for the Supreme Court, in deciding whether or not it wishes to grant *certiorari,* it doesn't satisfy § 158(d)(2).

To the extent that I can go beyond textual analysis (and it is unclear whether I should, because in this respect the statutory text does seem to be subject to plain meaning analysis), common sense is consistent with that reading. If there were a conflict between bankruptcy courts, district courts, or some combination of the two, that could in many circumstances suggest that the Circuit might want to resolve the conflict. But where the Circuit has already decided the bottom line (it being remembered that appellate courts "review judgments, not statements in opinions," see Decision at 5 & n. 1, citing *In re O'Brien,* 184 F.3d 140, 142 (2d Cir.1999)), there's no conflict for the Circuit to resolve.

The next of the two subfactors within Factor (i) is whether the issue is of "public importance." Starting, once more, with textual analysis, "public importance" is not defined in the Code, nor does the Code articulate standards for deciding it. And ultimately, "public importance" is a relative thing, and it doesn't necessarily mean what a litigant considers to be important.

Certainly, many people would agree that GM's *well-being* is a matter of public importance; that's one of the reasons why the U.S. Treasury and EDC put billions of dollars at risk to keep GM alive. But what the statute requires is that "the judgment, order, or decree involves *a question of law* " that "involves a matter of public importance." (Emphasis added).

Whether successor liability can be imposed in section 363 sales is hardly a trivial issue as a matter of bankruptcy law and policy, and undoubtedly it's important to the individual litigants concerned, who understandably wish to proceed against as many parties as they can to recover on their claims. But it's ultimately a matter of statutory interpretation and common law analysis-as contrasted, for example, to constitutional issues, except as litigants try to elevate their state law rights to sue additional parties to matters of constitutional dimension. And it's already been decided by the Circuit; deciding it again is not a matter of public importance. I further agree with the Creditors' Committee when (noting Judge Griesa's comments that the TARP issues implicated "a very, very important matter of great public interest") the Committee contrasts the TARP authorization issues that were an ***29** element of the *Chrysler* appeal, and with the Debtors when they contrast the constitutional issues that *Chrysler* lenders raised.

Factor (ii)

What I've just said concerning Factor (i) overlaps with my consideration of Factor (ii)—resolution of conflicting decisions. There are no conflicting decisions within the Second Circuit for the Circuit to resolve. And the decisions from *outside* the Circuit are not a basis for § 158(d)(2) review. Moreover, the decisions from outside the Circuit that are relevant here are the same ones that were available for consideration by the Circuit's *Chrysler* panel.

Factor (iii)

Factor (iii), calling for consideration of whether an immediate appeal "may materially advance the progress of the case," likewise hasn't been satisfied here.

Frankly, the most important consideration in advancing the progress of the case is enabling GM to complete the sale of its assets that is essential to its survival, and which is stayed until Thursday at noon, but not beyond that. The Individual Tort Litigants aren't asking me to block the sale, presumably understanding the serious consequences that would have —discussed below in connection with the request, in the alternative, for a stay. The Asbestos Litigants want to block the sale only if I deny certification, and the appeal thus must go to the district court. But even if I were to grant certification (and the Circuit were to decide to take the appeal) it is hard to see how the Circuit could rule on this issue in the two days before the existing Rule 6006(g) stay expires. If the Individual Tort Litigants did indeed have such an expectation, that would be wholly inconsistent with their statements as to how important this issue is.

And if, as I sense, the Individual Tort Litigants want to take the issue of 363(f) construction to the Supreme Court, how could a decision presented and decided to the Second Circuit in two days (or on any other expedited basis) be helpful to the bankruptcy community, or the public, or the Supreme Court? If the Supreme Court is to decide an issue that's the subject of a Circuit split, doesn't it deserve the best decision the Second Circuit can provide? As the Circuit noted in *Weber:*

> [A]lthough Congress emphasized the importance of our expeditious resolution of bankruptcy cases, it did not wish us to privilege speed over other goals; indeed, speed is not necessarily compatible with our ultimate objective—answering questions wisely and well. In many cases involving unsettled areas of bankruptcy law, review by the district court would be most helpful. Courts of appeals benefit immensely from reviewing the efforts of the district court to resolve such questions. Permitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law.

484 F.3d at 160. And if the issue is not to be decided in the next two days, by which time the transaction can close, it makes no difference whether or not the district court looks at these issues first, or if the Circuit gets less frenzied briefing on the issues—other than the appellants' apparent desire to get a rushed decision out from which they can seek *certiorari.*

In short, I can't find that the requested order would expedite things in any way.

Request for Stay

The Asbestos Litigants (though not the Individual Tort Litigants) alternatively request, pursuant to Fed.R.Bankr.P. 8005, that if their appeal goes to the district court, I grant a Rule 8005 stay.

***30** **[3]** Fed.R.Bankr.P. 8005 provides, in relevant part:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for ... relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.... A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court ... but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court ... may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

The decision as to whether or not to grant a stay of an order pending appeal lies within the sound discretion of the court. *See, e.g., In re Overmyer,* 53 B.R. 952, 955 (Bankr.S.D.N.Y.1985) ("A motion for a stay pending appeal, as authorized under Bankruptcy Rule 8005, is discretionary.").

[4] Though the factors that must have to be satisfied have been stated in slightly different ways, and sometimes in a different order, it is established that to get a stay pending appeal under Rule 8005, a litigant must demonstrate that:

(1) it would suffer irreparable injury if a stay were denied;

(2) there is a substantial possibility, although less than a likelihood, of success on the merits of movant's appeal;

(3) other parties would suffer no substantial injury if the stay were granted; and that

(4) the public interest favors a stay.

See, e.g., Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir.1992); *In re DJK Residential, LLC,* 2008 WL 650389 (S.D.N.Y. Mar.7, 2008) (Lynch, J.); *In re WestPoint Stevens, Inc.,* No. 06 Civ. 4128, 2007 WL 1346616, at *4 (S.D.N.Y. May 9, 2007) (Swain, J.).

[5] **[6]** The burden on the movant is a "heavy" one. *See, e.g., DJK,* 2008 WL 650389 at *2; *see also United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.,* 44 F.3d 1082, 1084 (2d Cir.1995). To be successful, the party must "show satisfactory evidence on all four criteria." *In re Turner,* 207 B.R. 373, 375 (2d Cir. BAP 1997) (citations and internal quotation marks omitted). Moreover, if the movant "seeks the imposition of a stay without a bond, the applicant has the burden of demonstrating why the court should deviate from the ordinary full security requirement." *DJK,* 2008 WL 650389 at *2; *WestPoint Stevens,* 2007 WL 1346616, at *4.

[7] While, as Judge Lynch noted in *DJK,* the 2d Circuit BAP has held that failure to satisfy any prong of the 4–part test "will doom the motion," citing *Turner,* the Circuit and more recent cases have engaged in a balancing process with respect to the four factors, as opposed to adopting a rigid rule. I'll assume, without deciding, that the balancing approach is the more appropriate, but also note that it doesn't matter here, since the last three factors—likelihood of success, prejudice to those opposing the stay, and the public interest—so overwhelmingly compel denying the stay.

(1) Irreparable Injury

Turning first to the requirement of irreparable injury, this issue turns on whether the risk of the inability to overturn my order after a closing on the underlying sale transaction constitutes irreparable injury. The request comes in the context of the equitable mootness doctrine that is applied in connection with bankruptcy appeals. And I assume, without being the one who'll ultimately decide, that ***31** if the sale closes, there's at least a very high probability that the appeal will be dismissed as moot. That's why I tried very hard to get the decision right, and I burdened people with having to read an 87 page decision.

In *DJK,* whose analysis of this area is the most recent, and in my view the most comprehensive, Judge Lynch focused on the principal claim of irreparable injury here—that by application of the equitable mootness doctrine, the appellants may lose their rights. This case, like most of those addressing the issue, comes with both sides wanting to hedge their bets. The Individual Tort Litigants and the Asbestos Litigants don't want to concede that their appeals would be dismissed by reason of equitable mootness, and GM and the others supporting the sale don't want to give up the ability to argue that the appeals will be equitably moot after the 363 sale closes.

This tension was most extensively addressed by Judge Kaplan in *St. Johnsbury Trucking,* 185 B.R. 687, 690 (S.D.N.Y.1995). He there noted that the appellant was correct in its assertion that there was a risk that its appeal would be mooted absent a stay, and that the appellant thus was threatened with irreparable injury. *Id.* at 687. He recognized that there were a number of cases that held that the threat of mootness of an appeal was not alone sufficient to establish a threat of irreparable injury, but said that he "need not quarrel with that proposition to find a threat of irreparable injury" there. He went on to say that it was the "threatened loss rather than the loss of the right to appeal *vel non* that [gave] rise to the Court's irreparable injury finding." *Id.* at 690.

Since the time Judge Kaplan issued that decision, as observed in one of the *Adelphia* appeals, a "majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm." *See In re Adelphia Communications Corp.,* 361 B.R. 337, 347 & n. 39 (S.D.N.Y.2007) (citing cases) ("*Adelphia*"), Though for that reason, among others, the matter is close, I think I should assume, without deciding, that on balance Judge Kaplan was right. And thus I'll assume that the threat of equitable mootness is enough to satisfy the requirement of showing *some* irreparable injury—enough to get on the scoreboard with respect to this issue. How much that should be weighed, however—and especially how it should be weighed against different kinds of irreparable injury that others would suffer—is a very different question.

(2) Possibility of Success on the Merits.

The next factor is colloquially referred to as "likelihood of success" or "possibility of success." It has been more precisely articulated by the Circuit as "whether the movant has demonstrated a substantial possibility", although less than a likelihood, of success" on appeal. *LaRouche v. Kezer,* 20 F.3d 68, 72 (2d Cir.1994); *Hirschfeld v. Board of Elections,* 984 F.2d 35, 39 (2d Cir.1993).

Under the circumstances here, this requirement is not satisfied for an appeal to the district court, as the district court will be bound by the judgment of the Second Circuit just as much as I am. And I would also think that it would be as sensitive as I am to the importance of *stare decisis* in bankruptcy cases, and thus similarly follow Judge Gonzalez's *Chrysler* decision, when it is so closely on point. At most it will provide extra analysis for the benefit of the Circuit, though, as noted above, extra analysis is something the Circuit values. Similarly, I do not see any substantial possibility that the Individual Tort Litigants or Asbestos Litigants would prevail at the Second Circuit, given the Circuit's ***32** affirmance of the *Chrysler* judgment. It is possible, of course, that the Circuit could reverse the decision of the panel upon *en banc* review, but that theoretical possibility does not, in my view, equate to a *substantial* possibility.

Then it is possible that the Individual Tort Litigants could file a *certiorari* petition. And given the law in the Second Circuit, I think they'd have to, if they wished to prevail. Then, of course, they'd have to hope that the *certiorari* petition would be granted, and that they'd ultimately prevail in the Supreme Court, based on arguments that the contrary decisions are right and the Second Circuit is wrong.

But what we have so far as to the possibility of success in such an endeavor is not helpful to the Individual Tort Litigants. In denying the request for a stay pending appeal in the *Chrysler* case, the Supreme Court stated that the applicants have "not carried [the] burden" of demonstrating " '(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay.' " *Ind. State Police Pension Trust v. Chrysler LLC,* —— U.S. ——, 129 S.Ct. 2275, 2276–77, 173 L.Ed.2d 1285 (2009) (citing *Conkright v. Fommert,* 556 U.S. ——, —— (2009) (slip op., at 1–2) (Ginsburg, J., in chambers)). The failure to satisfy the first two deficiencies noted provides little basis for optimism with respect to the chances of a reversal by the United States Supreme Court.

Thus I must rule that this factor isn't satisfied at all (in terms of justifying a stay), and that, in a balancing exercise, it either must be disregarded or be considered to weigh against granting a stay.

(3) Injury to Other Parties

The third factor is injury to other parties, in this case to GM, GM's other creditors, and GM's employees, retirees, dealers and suppliers. Any grant of a stay would result in extraordinary prejudice to all of the other parties in this case, in both direct monetary terms and terms of *irreparable* injury.

In my Findings of Fact in the Decision, I included a whole section on the "Need for Speed," at pages 22 to 25 of that decision. I incorporate those factual findings by reference here. As I found as facts in the underlying Decision, GM will lose its funding if approval of this transaction is not secured by

July 10. The U.S. Government is not willing to keep funding GM while creditors block the 363 transaction to improve upon their individual recoveries. The only alternative to an immediate sale is liquidation—which would be a disastrous result for GM's creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates.

The continued availability of the financing provided by Treasury is expressly conditioned upon approval of this motion by July 10, and prompt closing of the 363 Transaction by August 15. Without such financing, GM faces immediate liquidation.

Even if funding were available for an extended bankruptcy case, many consumers would not consider purchasing a vehicle from a manufacturer whose future was uncertain and that was entangled in the bankruptcy process.

We simply don't have the luxury of letting GM languish in bankruptcy while an appellate court considers the issues the ***33** Tort Litigants and Asbestos Litigants want to raise.

Cases expressing a willingness to grant a brief stay pending expedited appeal are distinguishable from what we have here. For example, when Judge Kaplan granted a brief stay in *St. Johnsbury Trucking,* the stay resulted merely in the delay of payments to creditors, including employees, who had been waiting for about two years. Here the consequences, by reason of the loss of liquidity and the loss of consumer confidence, would be disastrous. We're not talking about delaying distributions to creditors for a little longer. We're talking about the death of a company. If I or any other court were to grant the requested stay, GM would soon have to liquidate.

(4) Public Interest

Last, while hardly least, we must consider the public interest.

While there is undoubtedly a public interest in giving litigants the ability to appeal, there are here huge contrary public interests, which is why the U.S., Canadian and Ontario governments are so involved in this case. This case involves not just the ability of GM creditors to recover on their claims. As I found in my Findings of Fact in the Decision, and which nobody has suggested will be challenged on appeal, it involves the interests of 225,000 employees (91,000 in the U.S. alone); an estimated 500,000 retirees; 6,000 dealers and 11,500 suppliers. If GM were to have to liquidate, the injury to the public would be staggering. This case likewise raises the specter of systemic failure throughout the North American auto industry, and grievous damage to all of the communities in which GM operates. If GM goes under, the number of supplier bankruptcies that we already have, in this District and elsewhere-another filed for bankruptcy in this district today-is likely to multiply exponentially. If employees lose their paychecks or their healthcare benefits, they will suffer great hardship. And states and municipalities would lose the tax revenues they get from GM and the people employed by GM, and the Government would be paying out more in unemployment insurance and other hardship benefits.

Under these circumstances, I find it hardly surprising that the U.S., Canadian, and Ontario governments would not stand idly by and allow those consequences to happen.

Causing all of those interests to be sacrificed for these litigants' ability to avoid mootness arguments is an intolerable result. If the Asbestos Litigants, asking me for a stay here, could compensate the American and Canadian public for all the loss that would result, I'd consider, as I'll discuss below, a bond of sufficient size, but here, with the death of GM on the line, the damage to the public interest would be irreparable. It would be incalculable. Here the public interest does not favor a stay; it compels the denial of one. While I am of course going through a balancing, I must say that this is a monumental factor.

(5) Balancing

When I look at all of the factors together, I don't regard the balancing as close. For instance, the injury in *St. Johnsbury Trucking* was a few weeks delay for creditors in getting their distributions. Here it is the destruction of General Motors, and all of the other systemic damage that I described.

So that the Asbestos Litigants can improve their odds of winning an equitable mootness argument, or to consolidate cases in the Supreme Court (in either case to thereby preserve the chance to argue that they can sue an additional defendant), they would have me or another court stay ***34** GM's exit from bankruptcy, when the Government has already told us it is not prepared to continue funding GM indefinitely. As Mr. Henderson testified, when that funding stops, GM liquidates. It comes as no surprise to me that the Individual Tort Litigants did not ask me for a stay.

Bond

[8] Normally I would be inclined to nevertheless consider a stay if one or more of the appellants were to post a bond that could compensate for the damage caused by an improper stay. I turn to that now.

A bond may sometimes be a practical alternative where the injury to the estate from delay is merely a matter of money, and the injury to the estate caused by delay, while serious, would not be irreparable. That was the case, for instance, in the *Adelphia* chapter 11 cases, where a number of hedge funds were appealing the confirmation order, and the estate would suffer (as it did suffer) monetary losses of $2.33 million per day during the period that the effectiveness of the confirmation order was stayed. The district court in that case required a bond, in the amount of $1.3 billion, *see* 361 B.R. at 368, which the hedge funds (some of whom had short positions in Adelphia bonds, and would profit from reduced recoveries by other Adelphia creditors), ultimately declined to post.

Here I've received, by affidavit, several reasonable estimates of the losses the estate would suffer, ranging from a low of $7.4 billion (that being the loss to unsecured creditors only, which I find to be quite conservative) and a high of about $80 billion. But I don't need to determine which of those two is more appropriate, since by the Asbestos Litigants* admission, they're not in a position to post anything more than a "nominal bond." So even if I imposed a bond requirement at the low end of the amount at risk, $7.4 billion, the Asbestos Litigants wouldn't post it anyway. And then we'd get to a huge consideration, identified by Judge Lynch in *DJK*. He stated that the party seeking the stay:

> argues, with some force, that it cannot be expected to post a bond, because the cost of a bond would be prohibitive in light of the magnitude of the potential loss to Debtors. *But this argument only serves to highlight the substantial risk of dramatic injury to Debtors and other creditors if the Bankruptcy Court's orders were erroneously stayed. Absent a bond, such injuries would be substantial and irreparable.*

2008 WL at 650389 at *5 (emphasis added).

So I find that a bond would have to be posted in an amount no less than $7.4 billion, even if any and all other concerns could be addressed. But the Asbestos Litigants have told us they couldn't do that, and thus this underscores the potential loss to the estate.

But there's a second factor as well. This isn't a case, like *Adelphia,* where the estate's monetary loss can be quantified, such as by the $49 million Adelphia lost during the time that the effectiveness of its confirmation order was stayed without a bond. We're here faced with *irreparable* injury to the interests of 225,000 GM employees, an estimated 500,000 GM retirees, 11,500 suppliers, and 6000 dealers whose lives turn on the ability to allow this sale to close. We're here faced with potentially grievous systemic damage to the automobile industry and the states and municipalities where GM workers, retirees and dealers reside. Even as I once more note my sympathy for asbestos victims, granting a stay on this showing (or lack of showing), at the expense of all of those other interests—and especially, without the bond that would be necessary to give them the ***35** slightest semblance of compensation—would be unconscionable.

Both motions are denied.

SO ORDERED.

All Citations

409 B.R. 24, 51 Bankr.Ct.Dec. 226

Footnotes

1 I use bench decisions to lay out in writing decisions that are too long, or too important, to dictate in open court, but where the circumstances do not permit more leisurely drafting or more extensive or polished discussion.

Because they often start as scripts for decisions to be dictated in open court, they typically have less in the way of citations and footnotes, and have a more conversational tone.

End of Document

2024 WL 4111142
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. Florida,
West Palm Beach Division.

IN RE: NS FOA LLC, Debtor.

Case No. 23-11183-EPK
|
Signed September 6, 2024

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CHAPTER 11

ORDER DENYING MOTION FOR CONTINUANCE OR STAY

Erik P. Kimball, Chief United States Bankruptcy Judge

***1 THIS MATTER** came before the Court for hearing on September 6, 2024 upon *Congwei "Allan" Xu's Motion for Continuance of September 11, 2024 Hearing on Fellsmere Joint Venture LLC's Motion to Dismiss NS FOA LLC's Bankruptcy Case and/or For Stay of Proceedings in Chapter 11 Case Pending Outcome of Appeal*. ECF No. 396 (the "Motion to Stay"). The movant failed to appear at the hearing. This alone supports denying the Motion to Stay. However, the Court finds it appropriate to also rule on the merits.

Although not entirely clear in the Motion to Stay, Congwei "Allan" Xu asks the Court to continue a hearing set on a motion to dismiss this chapter 11 case or, in the alternative, to stay all proceedings in this chapter 11 case, in each instance pending resolution of Mr. Xu's appeal from two orders entered by this Court. For the reasons set out more fully below, the Motion to Stay will be denied.

Relevant Background

This bankruptcy case has been pending since February 14, 2023, when the debtor NS FOA, LLC filed with this Court a voluntary petition under subchapter V of chapter 11. The debtor is a Florida limited liability company that operates a shrimp farm on leased property.

The following month, Yanping Ming filed a proof of interest stating that she is the owner of 50% of the membership interest in the debtor. ECF No. 46. More than a year after that, the debtor objected to Ms. Ming's proof of interest. ECF No. 295. After a preliminary hearing, the Court set the debtor's objection to Ms. Ming's proof of interest for evidentiary hearing on June 27, 2024. ECF No. 309. Prior to the evidentiary hearing, Mr. Xu joined in the debtor's objection. ECF No. 318. At the evidentiary hearing, the debtor did not participate. Mr. Xu, through counsel, took the lead in presentation of evidence. Ms. Ming acted *pro se*. The parties offered and the Court admitted documentary evidence. Both Ms. Ming and Mr. Xu testified. ECF No. 345 (transcript of evidentiary hearing).

At the close of the June 27, 2024 evidentiary hearing, the Court made findings of fact and conclusions of law on the record. Among other things, the Court found most of the documentary evidence unhelpful. The Court found Ms. Ming's testimony credible in its entirety. The Court found Mr. Xu lacked credibility on all material issues other than his admission that he and Ms. Ming never discussed allocation of ownership in the debtor based on their capital contributions. ECF No. 345 (page 74, lines 20-23). Mr. Xu's testimony on this point directly contradicted his principal argument that he is the majority owner of the debtor based on his and Ms. Ming's relative capital contributions. Based primarily on testimony of Ms. Ming and Mr. Xu, the Court overruled the objection to Ms. Ming's proof of interest and allowed her proof of interest at 50% of the membership interest in the debtor. In doing so, the Court found that Mr. Xu holds 49% of the membership interest in the debtor and other parties, not identified, hold the remaining 1%. After the evidentiary hearing, the Court entered an order incorporating its oral ruling and adding additional findings [ECF No. 338] (the "Proof of Interest Order").

***2** Mr. Xu sought reconsideration of the Proof of Interest Order under Civil Rules 59 and 60, made applicable here by Bankruptcy Rules 9023 and 9024.[1] ECF No. 341. Mr. Xu claimed that after the evidentiary hearing he located what he referred to as new material evidence. With his motion for reconsideration, Mr. Xu filed copies of his proposed

additional evidence along with his own declaration. Mr. Xu asked the Court for a new evidentiary hearing on the objection to Ms. Ming's proof of interest so he could present the additional documentary evidence.

The Court held a hearing on Mr. Xu's motion for reconsideration on July 30, 2024. Ms. Ming attended and explained that Mr. Xu's proposed additional documentary evidence, even if considered by the Court, would not change the Court's original ruling. The Court denied Mr. Xu's motion for reconsideration. The Court ruled, among other things, that the proposed additional documentary evidence was not "newly discovered evidence" under the well-worn standards applicable to motions under Civil Rules 59 or 60. By Mr. Xu's own admission, and as was apparent from Mr. Xu's ease in filing the documents only seven days after the evidentiary hearing, the documents were available to him with reasonable diligence prior to the evidentiary hearing. The Court entered an order denying Mr. Xu's motion for reconsideration incorporating its oral ruling on the record. ECF No. 358 ("Reconsideration Order").

Wernick Law, PLLC, attorney for the debtor, filed a *Motion to Clarify Order Denying Motion for Reconsideration* [ECF No. 360]. After entry of the Proof of Interest Order and the Reconsideration Order, Ms. Ming and Mr. Xu disputed who was in control of the debtor and could direct counsel for the debtor in this bankruptcy case. Counsel for the debtor sought guidance from the Court regarding the debtor's corporate governance. After a hearing, the Court ruled that the debtor is a member-managed Florida limited liability company and has no operating agreement. Because Ms. Ming holds 50% of the debtor's membership interest, neither Ms. Ming nor Mr. Xu holds a "majority-in-interest" of the membership interest in the debtor and so neither of them, alone, controls management of the debtor. ECF No. 376. It appears that Mr. Xu and Ms. Ming remain unwilling or unable to manage the debtor together.

On August 13, 2024, Mr. Xu appealed both the Proof of Interest Order and the Reconsideration Order. ECF No. 365.

The debtor operates its shrimp farm on a 120-acre agricultural parcel leased from Fellsmere Joint Venture, LLC. The debtor is involved in substantial litigation with Fellsmere in this bankruptcy case. Among other pending requests for relief, Fellsmere filed a motion for relief from stay, seeking authority to move forward with eviction of the debtor, which the Court set for a two-day evidentiary hearing in November. ECF No. 49. Fellsmere argues that the debtor breached its lease, before and during this bankruptcy case, including by discharging substantial amounts of saltwater in violation of Florida and local environmental laws. Fellsmere argues that the debtor's actions expose Fellsmere to government action by various state agencies. Fellsmere separately accused the debtor of spoliation of evidence, providing what it alleges to be photographic evidence that the debtor caused salt-stained soil to be removed from areas affected by saltwater release. ECF No. 330. The spoliation motion is set for hearing on October 8, 2024.

***3** On August 19, 2024, Fellsmere filed a motion to dismiss this bankruptcy case arguing that the debtor's original bankruptcy petition was not validly filed as it was authorized and signed only by Mr. Xu and Mr. Xu lacked corporate authority under Florida law. ECF No. 385. The Court set Fellsmere's motion to dismiss this bankruptcy case for hearing on September 25, 2024. ECF 405.

Relief Requested, Applicable Law, and Analysis

In the opening paragraph and at the end of the Motion to Stay, Mr. Xu asks for two forms of relief: an order continuing the preliminary hearing on Fellsmere's motion to dismiss this case and/or an order staying all proceedings in this chapter 11 case, in each instance pending the outcome of Mr. Xu's appeals. However, in the body of the Motion to Stay, based on Mr. Xu's legal arguments, it appears that Mr. Xu seeks a stay pending appeal pursuant to Bankruptcy Rule 8007(a) and/or suspension of all proceedings in this bankruptcy case under 11 U.S.C. § 305(a). Because Bankruptcy Rule 8007(a) and Bankruptcy Code section 305(a) are the only legal bases cited by Mr. Xu in support of the Motion to Stay, the Court will consider his requests for relief in the context of these provisions.

Mr. Xu states that his appeal of the Proof of Interest Order and the Reconsideration Order "is essentially asking for a determination that he is Debtor's majority controlling member, which determination would give him authority to manage Debtor." He argues that "[s]ince the outcome of Xu's pending appeal could change the Debtor's membership structure and establish Xu as majority member and manager, Xu believes that good cause exists for the requested relief as his appeal, if successful, may moot the Motion to Dismiss."[2]

Mr. Xu seeks a stay pending appeal pursuant to Bankruptcy Rule 8007(a). Unless stayed, orders and judgments entered by this Court are immediately enforceable upon entry. Even if an appeal is filed, absent a stay the prevailing party or parties may treat the order or judgment as final. Under the Bankruptcy Rules, certain orders and judgments are automatically stayed for a specified period. Execution on judgments is stayed for 14 days under Bankruptcy Rule 7062, and certain other orders are stayed for 14 days under Bankruptcy Rules 3020, 4001, 6004, and 6006. In each such case, the period of stay may be reduced or eliminated by the Court, either under the specific rule providing for the stay or under Bankruptcy Rule 9006(c). If there is no such automatic period of stay applicable to an order or judgment, or if such period has been eliminated or has expired, the non-prevailing party or parties must seek a stay in order to stop enforcement of, or action consistent with, the order or judgment.

The Bankruptcy Rules provide no automatic stay of either the Proof of Interest Order or the Reconsideration Order. They became effective immediately upon entry.

Bankruptcy Rule 7062, incorporating Civil Rule 62, is not applicable to the orders under appeal. When applicable, a party seeking a stay of judgment under Bankruptcy Rule 7062, incorporating Civil Rule 62, may obtain a stay upon posting of a bond or other security in an amount, and with conditions, satisfactory to the Court. In other words, in most cases where Bankruptcy Rule 7062 applies the appealing party has a right to entry of a stay upon posting the bond required by the Court.

***4** In this matter, Bankruptcy Rule 8007 alone governs the potential issuance of a stay pending appeal. Unlike Bankruptcy Rule 7062 and Civil Rule 62, Bankruptcy Rule 8007 does not provide for the granting of a stay as of right upon the filing of a sufficient supersedeas bond. Collier on Bankruptcy ¶ 8007.06 (Richard Levin & Henry J. Sommer eds., 16th ed.). The determination of whether to grant a stay pending appeal is left to the discretion of this Court. If a stay pending appeal is warranted, the Court may condition the stay on the posting of "a bond or other security." Fed. R. Bankr. P. 8007(a)(1)(B). The bond or security is intended to protect the opposing party or parties, which may include the bankruptcy estate generally, against loss that may be sustained as a result of a failed appeal. Because there is no stay pending appeal as of right under Bankruptcy Rule 8007, the Court must first determine whether a stay is warranted and, if so, determine whether a bond or other security will be required as a condition of the stay.

Ordinarily, the appellant must first seek a stay from this Court and, if unsatisfied, may seek relief from the District Court in which its appeal is lodged. Fed. R. Bankr. P. 8007. "Failure to first seek a stay or other relief in the bankruptcy court will ordinarily deprive the district court or appellate panel (or the court of appeals in the case of a direct appeal) of jurisdiction over a motion seeking a stay." Collier on Bankruptcy ¶ 8007.05 (citations omitted); *Rodriguez v. ALS Commer. Funding, LLC*, No. 19-20452, 2019 U.S. Dist. LEXIS 29651 (S.D. Fla. Feb. 21, 2019); *In re Rivera*, No. 15-04402, 2015 U.S. Dist. LEXIS 151860 (N.D. Cal. Nov. 9, 2015).

"A stay pending appeal is an 'extraordinary remedy' and the party seeking it must show: '(1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the[m] unless the [stay] is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest.' " *Woide v. Fannie Mae (In re Woide)*, 730 F. App'x 731, 737 (11th Cir. 2018) (quoting *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) and citing *In re Revel AC, Inc*., 802 F.3d 558, 568 (3d Cir. 2015)).

The first and most important factor for consideration is whether Mr. Xu has a substantial likelihood of success in his appeal. Mr. Xu has little or no chance of success on his appeals from the Proof of Interest Order or the Reconsideration Order.

After the evidentiary hearing on June 27, 2024, the Court made findings of fact and conclusions of law on the record, which were incorporated into the Proof of Interest Order. Because there was limited documentary evidence and the Court did not find it helpful in light of the parties' testimony, the Court's ruling was based primarily on the testimony of Mr. Xu and Ms. Ming. Importantly, the Court found Ms. Ming consistently credible, but found Mr. Xu's testimony lacked credibility on all but one material issue. The Court found credible Mr. Xu's admission that he and Ms. Ming never discussed allocation of their membership interests consistent with their capital contributions. Mr. Xu's testimony on this point was directly contrary to his primary argument – that he holds a majority of the membership interest in the debtor based on his and Ms. Ming's relative capital contributions. It is extremely unusual for an appeals court to overturn a ruling based primarily on the credibility of witnesses. Having

no opportunity to view the testimony, an appeals court is unlikely to substitute its judgment for that of the trial judge who viewed the testimony live. *See Kane v. Stewart Tilghman Fox & Bianchi PA (In re Kane)*, 755 F.3d 1285, 1288 (11th Cir. 2014). The Court's remaining findings were consistent with the evidence and the law relied on was unremarkable and was not in dispute.

Likewise, Mr. Xu has no or almost no likelihood of success on the appeal from the Reconsideration Order. Mr. Xu misunderstands the "newly discovered evidence" standard under Civil Rules 59 and 60. In light of Mr. Xu's own declaration filed with his motion for reconsideration, with reasonable diligence Mr. Xu had continuous access to the documents he asked the Court to consider at a new evidentiary hearing. Indeed, he located the proposed additional evidence and presented it to the Court only seven days after the evidentiary hearing. An unsuccessful litigant is not permitted to seek a new trial merely because he later feels he should have presented different or additional evidence that was always available to him with reasonable diligence. Nor was the Court swayed by Mr. Xu's statement that at a new evidentiary hearing he would testify in Chinese through a translator. Having witnessed Mr. Xu's testimony at the original evidentiary hearing, the Court discerned no inability by Mr. Xu to understand and respond to questioning. The Court's ruling on this issue in the Reconsideration Order has little chance of being overturned, again because an appeals court is unlikely to question the Court's conclusion based on viewing Mr. Xu's testimony in person.

***5** Mr. Xu argues he will suffer irreparable harm if his Motion for Stay is not granted. He argues that absent his requested relief the Court "may" grant Fellsmere's motion to dismiss this bankruptcy case which will "likely be fatal to Debtor's continuing business operations." There are several problems with this argument. First, Mr. Xu assumes that Fellsmere's motion to dismiss will be granted and also that dismissal of this bankruptcy case may be fatal to the debtor's business. To be considered irreparable, the alleged harm must follow with reasonable certainty from the Court's ruling. But the entry of the Proof of Interest Order does not necessarily require the Court to grant Fellsmere's motion to dismiss. Nor is it clear that dismissal of this bankruptcy case will be the death knell for the debtor. Second, even if Mr. Xu were correct about the impact of the Court not granting his requested stay, it is unclear how Mr. Xu *personally* is harmed by this result. Mr. Xu presents no evidence on how the failure to grant his Motion to Stay would impact him as opposed to the debtor. Finally, there is no reason Mr. Xu cannot work with Ms. Ming to guide the debtor in this bankruptcy case. That he has been unwilling or unable to do so for his own reasons does not support a finding of irreparable harm. Furthermore, there is no reason that Mr. Xu, individually, cannot oppose the motion to dismiss. As this Court found in the Proof of Interest Order, Mr. Xu is an equity interest holder of the debtor and interested party in the case, and thus has standing to oppose Fellsmere's motion to dismiss.

Mr. Xu argues that "Ms. Ming will not be damaged by the temporary stay pending appeal" without further edification. If the Motion to Stay is granted, Ms. Ming will have no opportunity to participate in management of the debtor at this important juncture. Even so, Ms. Ming is not the only party in interest who will be negatively impacted if the Court grants the Motion to Stay. The debtor operates on a 120-acre agricultural parcel leased from Fellsmere. Fellsmere argues that the debtor is discharging significant amounts of saltwater in violation of Florida and local environmental laws and has hidden this fact by removing salt-stained soil from the areas affected by saltwater release. If this case is due to be dismissed for whatever reason, it is harmful to all creditors subject to the automatic stay to wait indefinitely while Mr. Xu pursues a likely ill-fated appeal.

Mr. Xu argues that "the public interest will be served by a determination of the proper equity ownership of a chapter 11 debtor." After a duly held evidentiary hearing, based on uncontested law and detailed findings of fact, the Court already ruled on this question in a final order. The public interest does not support suspending any activity in this case while Mr. Xu prosecutes an apparently doomed appeal. If this argument had merit, any order or judgment material to a reorganization case would merit a stay pending appeal.

Mr. Xu has not satisfied any component of the standard for a stay pending appeal under Bankruptcy Rule 8007.

"The court, after notice and a hearing, ... may suspend all proceedings in a case under this title, at any time if – the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1). Mr. Xu does not make a specific argument under section 305(a) separate from his presentation under Bankruptcy Rule 8007. Mr. Xu asks the Court to freeze all activity in this chapter 11 case for however long it takes to litigate his appeal, potentially beyond the District Court. Even if the matter proceeds to appeal only so far as the District Court, based on recent

appeals in this district activity in this case could be suspended well into 2025. In the meantime, the automatic stay prevents creditors from protecting their interests. The debtor filed this case under subchapter V of chapter 11. Subchapter V cases are intended to move swiftly to confirmation. Particularly in light of the weakness of Mr. Xu's appeal, it is contrary to the purposes of subchapter V to suspend all activity in this bankruptcy case for an indeterminate time. Suspension of activity in this bankruptcy case is not in the best interests of creditors or the debtor as fiduciary. Mr. Xu has not satisfied the standard for relief under 11 U.S.C. § 305(a).[3]

***6** Finally, Mr. Xu failed to appear at the hearing on the Motion to Stay. This alone is sufficient to support denial of the relief requested.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that the Motion to Stay [ECF No. 396] is DENIED. The Clerk shall transmit a copy of this Order to the District Court for inclusion in the docket of the pending appeal.

ORDERED in the Southern District of Florida on September 6, 2024.

All Citations

Slip Copy, 2024 WL 4111142

Footnotes

1 In this order, the term “Bankruptcy Rule” refers to the applicable Federal Rule of Bankruptcy Procedure, and the term “Civil Rule” refers to the applicable Federal Rule of Civil Procedure.

2 Mr. Xu overstates the impact of his appeal. In the unlikely event he is successful, the best Mr. Xu could hope for is an order remanding the matter to this Court for consideration of his alleged “newly discovered evidence,” which does not appear likely to change the Court's original ruling.

3 It is possible Mr. Xu relies on section 305(a) solely in support of a request to continue the hearing on Fellsmere's motion to dismiss. That provision, however, applies only to suspension of “all proceedings in a case under” title 11, not to requests to delay or continue consideration of a single request for relief.

End of Document

2010 WL 3429646
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

In re Richard J. SHIELDS, Debtor.
The Bankruptcy Estate of Richard J. Shields, by and through Michael F. Burkart, Chapter 7 Trustee, Plaintiff,
v.
Neil McLean (aka Neal McLean)
and Russell Longaway, Defendants.

No. 2:09-cv-02910-GEB.
|
Bankruptcy Court Case No. 06-22377-C-7.
|
Adv. Proc. No. 08-02352.
|
Aug. 30, 2010.

West KeySummary

1 **Bankruptcy** Presentation of Grounds for Review

Creditor waived for appellate review his objections to depositions in adversary proceeding since the creditor did not specifically raise his objections. Thus, the evidentiary record need not have been supplemented. The creditor argued that the trial court made it clear that it was going to overrule his evidentiary objection. However, because the creditor failed to specifically raise his objections, the bankruptcy court did not rule on the objections. Fed.Rules Evid.Rule 103(a)(1), 28 U.S.C.A.

ORDER DENYING NEIL MCCLEAN'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL [*]

GARLAND E. BURRELL, JR., District Judge.

***1** On August 2, 2010, Cross-Appellant Neil McLean filed a motion to "supplement and correct an omission from the record on appeal pursuant to Federal Rule[ ] of Bankruptcy Procedure 8006 ...." (Docket No. 29, Mot. to Suppl. 1:20-23.) Specifically, McLean seeks an order which would include his evidentiary objections to the admission at trial of Kenneth Herold's deposition testimony in the record on appeal. Cross-Appellee Michael Burkart, the chapter 7 trustee of the bankruptcy estate of debtor Richard Shields, opposes McLean's motion, arguing the record may not be supplemented since the bankruptcy court did not consider McLean's evidentiary objections.

Although McLean seeks to supplement the appellate record under Federal Rule of Bankruptcy Procedure 8006, "courts generally apply Rule 10(e) of the Federal Rules of Appellate Procedure" when deciding such motions. *In re Flamingo 55, Inc.*, BK-S-03-19478 BAM, 2006 WL 2432764, at *4 (D.Nev. Aug.21, 2006) (also stating that "Rule 8006 does not ... provide a method to correct or modify the record on appeal"); *see also In re Khoe*, 255 B.R. 581, 585 (E.D.Cal.2000) (stating that "[s]upplementation of a record on appeal is governed by [Federal Rule of Appellate Procedure] 10(e)(2)"). Federal Rule of Appellate Procedure 10(e)(2) provides:

> If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
>
> (A) on stipulation of the parties;
>
> (B) by the district court before or after the record has been forwarded; or
>
> (C) by the court of appeals.

Fed. R.App. P. 10(e)(2). This rule is construed "narrowly" and "normally the reviewing court will not supplement the record on appeal with material not considered by the lower court." *In re Khoe*, 255 B.R. at 585 (citing *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir.1987)).

Debtor Shields filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of California and Michael Burkart was appointed to be the chapter 11 trustee of the bankruptcy estate. Shield's bankruptcy case was later converted to a chapter 7 case, and Burkart was appointed to be the chapter 7 trustee.

Burkart initiated an adversary proceeding against McLean on behalf of Shield's bankruptcy estate. In the adversary proceeding complaint, Burkart objected to certain of McLean's claims against the bankruptcy estate under 11 U.S.C. § 502(b); sought subordination of certain of McLean's claims under 11 U.S.C. § 510(c)(1); alleged state claims of interference with prospective economic advantage, interference with contract, breach of fiduciary duty and violation of California Business and Professions Code § 17200; sought declaratory relief under 11 U.S.C. § 723 and California Corporations Code § 16202; and sought a judgment against McLean in the deficiency amount that would be necessary for the bankruptcy estate to pay all claims.

***2** Prior to trial, McLean filed evidentiary objections to the admissibility of Kenneth Herold's deposition testimony. (Fernandez Decl. Ex. A.) McLean argued Herold's deposition was inadmissible at trial because Herold lacked personal knowledge of the negotiations to which he testified and his testimony constituted hearsay. (*Id.*)

A trial on Burkart's adversary proceeding claims was held on September 9 and 11, 2009 before the bankruptcy court. At the commencement of trial, the bankruptcy court addressed McLean's evidentiary objections as follows:

> THE COURT: Okay. Are there any preliminary matters we should dispose of before we get started?
>
> MR. MACDONALD [on behalf of McLean]: Well, your Honor, we suggest-we have filed pretty extensive evidentiary objections and would ask that those be considered before testimony begins.
>
> THE COURT: Well, I would rather not go through the whole gamut of objections at this point. However, I agree with you, we should review objections before actual testimony, so if you have objections to the testimony of a particular witness, I will hear them before the witness is put on.
>
> MR. MACDONALD: Okay.
>
> THE COURT: But I don't want to hear everything up front now.
>
> MR. MACDONALD: All right.

(Adversary Proceeding Docket No. 155 Trial Tr. 6:22-7:12.)

During the trial, when Burkart moved to admit Herold's deposition, the bankruptcy court inquired as to whether there were "[a]ny objections to the [admission] of Mr. Herold's [deposition]." (Fernandez Decl. Ex. B 48:8-9.) The following discussion then transpired:

> MR. MACDONALD: We found [sic] extensive objections.
>
> THE COURT: All right. I suppose we should have-we will have to redo them, won't we?
>
> MR. MACDONALD: I was thinking. We made a lot of hearsay objections. I think Your Honor has given us a pretty good sense of how the court feels about those objections.
>
> THE COURT: Well, hey, if you think there is a valid hearsay objection, I certainly don't intend in any way to disabuse you of that position. But I think you do have a sense of what I may rule in respect to certain types of hearsay objections.
>
> MR. MACDONALD: I was just going to-I think in the interest of time, if we could just admit the depo and reserve the objection, unless it becomes relevant later.
>
> THE COURT: Good idea. I approve that approach if it's okay with Mr. Sullivan.
>
> MR. SULLIVAN [on behalf of Burkart]: You know, I hate to do that, Your Honor, but I'm not exactly sure what that means. What does he mean by reserve objections in case they come up later?
>
> THE COURT: Maybe there is another way we can do it. That is-well, you are admitting the whole deposition, aren't you?
>
> MR. SULLIVAN: I am, Your Honor....
>
> MR. MACDONALD: What I was going to say is the deposition had a lot of exhibits to it, and I would say, let's just put in the whole deposition, but let's have the exhibits, too, so we know what he's talking about if it becomes relevant....
>
> ***3** MR. MACDONALD: You know what I would like to suggest, Your Honor, since we have the depo, let's just admit the whole thing. I don't-I'm very uncomfortable with having a summary which quotes selected parts because it argues and puts a spin on it, and the deposition is there. The testimony is there. Why don't we just put that in with the exhibits, the whole thing?

> MR. SULLIVAN: I have no objection to that, of course, Your Honor.
>
> THE COURT: Okay. We'll do that....
>
> MR. SULLIVAN: So my understanding of what just transpired is the entire deposition and the exhibits were all admitted into evidence.
>
> THE COURT: Is that what you wanted to do?
>
> MR. MACDONALD: Yes.
>
> THE COURT: All right....
>
> THE COURT: All right. The whole deposition with exhibits will be admitted into evidence.

(*Id.* 48:10-53:6.)

The bankruptcy court entered judgment in favor of Burkart on October 2, 2009, finding Burkart was entitled to recover $300,000 from McLean on his interference with prospective economic advantage claim, and subordinated certain of McLean's claims under 11 U.S.C. § 510(c)(1). Burkart then filed a notice of appeal and McLean filed a cross-appeal. McLean asserts that one of the issues on appeal is whether "the Bankruptcy Court err[ed] in admitting into evidence the deposition transcript of Kenneth J. Herold ...." Burkart's designation of items for the record on appeal did not include McLean's evidentiary objections. McClean designated additional items to be included in the record, but he also failed to include his written evidentiary objections. McLean argues this "omission" was "a mistake." (Mot. to Supplement Record 2:15-17.) Burkart counters "[b]ecause the written objections were not considered [by the bankruptcy court], they should not be part of the record on appeal." (Opp'n 5:8-9.) Burkart further contends that McLean waived any evidentiary objection to the admission of Herold's deposition by consenting to its admission during trial.

The appellate record should not be supplemented if McLean did not preserve his evidentiary objections for appellate review. As prescribed in the pertinent part of Federal Rule of Evidence 103:

> (a) Effect of Erroneous Ruling.-Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection.-In case the ruling is one admitting evidence, a timely objection or motion to strike appears on record, stating the specific ground of objection, if the specific ground was not apparent from the context ....

Fed.R.Evid. 103(a)(1). "By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise admissibility issues on appeal." *Marbled Murrelet v. Babitt,* 83 F.3d 1060, 1066 (9th Cir.1996) (citations omitted). "The failure of a litigant to request a ruling [on an evidentiary objection constitutes] a waiver of the right to raise any issue [on appeal] ... concerning admissibility." *Fenton v. Freedman,* 748 F.2d 1358, 1360 (9th Cir.1984); *see also Nat'l Union Fire Ins. Co. v. Seagate Technology, Inc.,* No. C 04-01593 JW, 2007 WL 2345023, at *1 (N.D.Cal. Aug.16, 2007) (stating that "Ninth Circuit law requires [appellant] to seek a ruling on its [evidentiary] objection in order to preserve it for appeal").

***4** The record does not show that the bankruptcy court considered McLean's evidentiary objections to Herold's deposition testimony. Although McLean argues in his reply brief that "the trial court made it clear that it was going to overrule [his] ... evidentiary objections," McLean did not specifically raise his objections, and there was no ruling on the objections. (Reply 3:1-2.) By failing to "request a ruling" on his objections, McLean "waive[d][his] ... right to raise any issue [on appeal] ... concerning [the] admissibility" of Herold's deposition testimony. *Fenton,* 748 F.2d at 1360. Since McLean's evidentiary objections were not "considered" and decided by the bankruptcy court, McLean failed to preserve his evidentiary objections for appeal and the record need not be supplemented. *Kehoe,* 255 B.R. at 585 (stating that "the reviewing court will not supplement the record on appeal with material not considered by the lower court"). Therefore, McLean's motion to supplement the record is DENIED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3429646

Footnotes

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

End of Document

1990 WL 19988
Only the Westlaw citation is currently available.
United States District Court, D. Maine.

In re THE INN AT GOOSE ROCKS LIMITED PARTNERSHIP, Debtor.
Leonard M. GULINO, Trustee, Appellee/Plaintiff
v.
Edmund F. WAKELIN, Sr., et al., Appellants/Defendants,
and
NEW HAMPSHIRE SAVINGS BANK, Plaintiff,
v.
THE INN AT GOOSE ROCKS LIMITED PARTNERSHIP, Defendant,
Roger MacBRIDE, and Randolph Lea Corporation, Appellees/Defendants Cross Claimants.

CIV. No. 89–0056–P.
|
Feb. 22, 1990.

Attorneys and Law Firms

Leonard M. Guilino, Portland, Me., Trustee, The Inn at Goose Rocks Ltd. Partnership.

Grover Alexander, Gray, Me., for all defendants.

Daniel Amory, Portland, Me., for Randolph Lea Corp.

MEMORANDUM OF DECISION AND ORDER AFFIRMING THE DECISION OF THE UNITED STATES BANKRUPTCY COURT

GENE CARTER, Chief Judge.

***1** Appellants, Edmund F. Wakelin, Jr., Edmund F. Wakelin, Sr., Serena Wakelin, and Miriam Wakelin, appeal a final judgment entered by the United States Bankruptcy Court for the District of Maine. The court found an attempted conveyance of two apartments from the Debtor to a corporation wholly owned by Appellants fraudulent as an attempt to hinder, delay and defraud partnership creditors under both Maine law, as defined by 14 M.R.S.A. § 3575(1)(A), and the federal Bankruptcy Code, as defined by 11 U.S.C. § 548(a)(1). The court therefore ruled that the transfers were avoidable by the Trustee pursuant to 11 U.S.C. § 548(a)(1) and 11 U.S.C. § 544(a)(1), and recoverable by the Trustee for the benefit of the Debtor's estate under 11 U.S.C. § 550(a)(1). The Wakelins appeal this judgment. This Court affirms the judgment of the Bankruptcy Court.

Facts

In 1984 Edmund F. Wakelin, Jr. and his father, Edmund F. Wakelin, Sr., owned a parcel of property in Kennebunkport, Maine. The property consisted of ten acres of land and a duplex in which two generations of the Wakelin family resided. In August 1984 Edmund Wakelin, Jr. approached Roger MacBride with a proposal to develop an inn on the property. The parties agreed to form the Inn at Goose Rocks, Inc. ("IGR") to develop and operate the inn. The parties formed IGR, the Wakelins and MacBride each taking an equal number of shares in the new corporation. On December 12, 1984 the Wakelins conveyed the property to IGR as their equity contribution. The deed contained no reservation or reference to any right of the Wakelins in the property or the proposed apartments.

The inn opened in late summer of 1985 and immediately experienced financial difficulties. As a means of raising additional capital, MacBride and Wakelin formed the Debtor, the Inn at Goose Rocks Limited Partnership, in December 1985. Through the sale of limited partnership subscriptions the inn project raised an additional $350,000. The Bankruptcy Court found that the limited partnership offering memorandum sent to prospective investors made no attempt to specify that the apartments would not belong to the partnership. When the limited partnership was formed MacBride gave up his interest in IGR and formed the Randolph Lea Corporation, becoming its president and sole shareholder. The Randolph Lea Corporation and IGR became joint general partners of the Debtor.

Despite the infusion of capital from the sale of limited partnership subscriptions, the inn project continued to experience economic difficulties. The Bankruptcy Court found that Wakelin, Jr., with full knowledge of the partnership's financial condition, realized that the Wakelin equity contributions would be totally lost. On December 5, 1986 Wakelin, Jr., acting as president of IGR, executed and delivered two deeds purporting to convey the apartments from IGR to the Wakelins. When he realized that the deeds conveyed nothing because title to the property was in the Debtor, he attempted to convey the apartments from the

Debtor to IGR by executing two additional deeds. In this transaction he purported to act as president of IGR and as the general partner of the Debtor. The Bankruptcy Court found that in making these conveyances he acted without giving notice to the other general partner or to any of the limited partners.

***2** An involuntary petition was filed against the limited partnership on May 15, 1987 and an order of relief entered on May 28, 1987. On July 17, 1987 the Bankruptcy Court ordered that all real and personal property of the Debtor be sold at auction, free and clear of liens, with valid liens to attach to the proceeds. Appellants asserted a lien in the sale proceeds based on their alleged ownership of two apartments which were part of the inn premises. The Chapter 11 Trustee brought an action against Appellants disputing their interest in the apartments. In a related action brought by the New Hampshire Savings Bank, Randolph Lea Corporation and its sole shareholder, Roger MacBride, filed cross-claims also disputing the Wakelin interest in the apartments. After a bench trial the Bankruptcy Court found the attempted conveyance of the partnership property a fraudulent transfer under both Maine law and the federal Bankruptcy Code, and thus recoverable for the benefit of the Debtor's estate pursuant to 11 U.S.C. § 550(a)(1). Appellants appealed, assigning numerous errors to the Bankruptcy Court's findings.

Sufficiency of the Evidence

Appellants argue that the evidence adduced at trial was insufficient to support the Bankruptcy Court's finding that the transfers of property were made with the actual intent to hinder, delay or defraud creditors. In reviewing the decision of the Bankruptcy Court, this Court is bound by the conventional standard of appellate review: findings of fact are not set aside unless clearly erroneous. Bankruptcy Rule 8013. *See also In re Martin,* 62 Bankr. 943, 944 (D.Me.1986), *vacated on other grounds,* 817 F.2d 175 (1st Cir.1987). [1] Based on the entire evidence, this Court concludes that the findings of the Bankruptcy Court are not clearly erroneous.

The Trustee has the burden of proving by clear and convincing evidence that the transfer was made with the actual intent to hinder, delay and defraud creditors. The Bankruptcy Court determined that the transfers were fraudulent as to creditors under provisions in the federal Bankruptcy Code and under Maine law. [2] These findings are supported by the entire record and thus will not be set aside.

Because direct proof of fraudulent intent is often unavailable, certain objective indicia of fraud, commonly referred to as "badges of fraud," may be shown to support an inference of fraudulent intent. A court may properly consider the following nonexclusive list of factors in making an inference of fraudulent intent: whether the transfer was to an insider; whether the transfer was concealed; whether before the transfer the debtor was sued or was threatened with suit; the lack or inadequacy of consideration for the transfer; and the financial condition of the party sought to be charged, both before and after the transaction in question. *See In re Kaiser,* 722 F.2d 1574, 1582 (2d Cir.1983); 14 M.R.S.A. § 3575(2).

Numerous indicia of fraud present in this case support the Bankruptcy Court's finding of fraudulent intent. The court could have found, *inter alia,* the following facts: the transfers were made to IGR, the general partner of the Debtor, in order to benefit the Wakelins, insiders; the transfers were made without any *bona fide* consideration; at the time of the conveyances the partnership was in debt to various creditors and could meet only the most basic expenses; the banks holding mortgages on the property had threatened foreclosure; the inn could not meet its payroll and therefore it was no longer open; and Wakelin, Jr., purporting to act as president of IGR, one of the general partners, made the conveyances without informing the other general partner or any of the limited partners. In sum, substantial evidence and the record as a whole support the conclusion that the transfers were made with the actual intent to defraud creditors, and thus this Court cannot say that the Bankruptcy Court's findings were clearly erroneous.

***3** Appellants' sole claim of right to the apartments derives from an agreement, allegedly entered into between the Wakelins and Roger MacBride, whereby either IGR retained an ownership interest in the apartments when it conveyed the property to the Debtor, or that the partnership would convey the apartments back to Appellants at a later date. The Bankruptcy Court found no credible evidence to support these contentions. The court noted that "in all of the various attempts to describe the debtor's property in mortgages, deeds, financial statements, and in the offering memorandum there was never once an attempt to segregate the two apartments in question as property not belonging to the partnership." This Court holds that this finding is amply supported by the evidence. The only evidence offered by Appellants to support the existence of the alleged agreement was their own self-serving testimony. The Bankruptcy Court

did not find that testimony credible. Numerous witnesses testified that there was no such agreement. [3] This Court must give due regard to the Bankruptcy Court's opportunity to determine the credibility of witnesses. *See* Bankruptcy Rule 8013. Moreover, the only reference to the apartments in the partnership offering memorandum, the document upon which Appellants rely to prove the existence of the agreement, states that the partnership would receive rental income from the apartments. Wakelin, Jr. testified that the family did in fact pay rent in the form of reduced salaries. These circumstances refute Appellants' contention that a reservation agreement existed with respect to the apartments.

The Bankruptcy Court found that "[t]his case demonstrates nothing more than the classic attempt by insiders to retrieve their equity contribution from a failing business venture at the expense of outside creditors." After reviewing the entire evidence, this Court is not left with the firm conviction that the Bankruptcy Court has committed error in its factual findings, and thus those findings will not be set aside.

Exclusion of Parol Evidence

Appellants assign as error the Bankruptcy Court's limiting of further testimony by the last witness, Wakelin, Jr., on the alleged agreement between IGR and the Debtor. Counsel for the Trustee objected to the testimony on the grounds of the parol evidence rule, Statute of Frauds and the doctrine of merger by deed. The Court allowed him to testify over the Trustee's objections. Wakelin, Jr. thereafter testified that when the Debtor was formed, the Wakelins and Roger MacBride agreed that the apartments would not be considered part of the partnership property, that some of the limited partners were aware of this agreement and consented to it, and that the Wakelins would never have agreed to the conveyance if the apartments were not reserved to them.

When the testimony became repetitive, the Bankruptcy Judge inquired into its relevancy. Appellants stated to the court that they were trying to show that the apartments were reserved as personal property and that the Debtor, as grantee, was bound by the reservation. The court ruled that in the bankruptcy context the existence of such an unrecorded reservation would be irrelevant due to the Trustee's status, under the Bankruptcy Code, as a *bona fide* purchaser of real property as of the date of the bankruptcy petition. 11 U.S.C. § 544(a)(3). The court restricted further testimony on that theory, and Appellants contend that the exclusion was reversible error.

***4** In order to successfully argue on appeal that evidence was erroneously excluded at trial, the proponent of the evidence must have made an adequate offer of proof to the trial court. Fed.R.Evid. 103(a)(2). [4] This rule serves two purposes: first, it permits the trial judge to reevaluate his decision in light of the actual evidence to be offered; and second, it allows the reviewing court to ascertain if the exclusion affected the substantial rights of the proponent of the evidence. *Fortunato v. Ford Motor Co.,* 464 F.2d 962, 967, (2d Cir.1972). Appellants have failed to properly preserve any error here because they did not present a sufficient offer of proof such that this Court on appellate review can determine if a substantial right was affected by the exclusion. *Andrews v. Bechtel Power Corp.,* 780 F.2d 124, 140 (1st Cir.1985) ("Under Federal Rule of Evidence 103(a)(2), ... a claim of error cannot be predicated upon evidence which is never actually offered to the court."). [5]

The Bankruptcy Court specifically gave Appellants an opportunity to make an offer of proof. Counsel for Appellants stated that if given an opportunity, he would demonstrate the existence of the alleged agreement through Wakelin, Jr. That witness testified to the agreement in some detail, on direct examination, cross examination and through examination by the court. The court expressed its concern, on numerous occasions, that Wakelin, Jr.'s testimony on the alleged agreement was repetitive. Appellants' offer of proof does not indicate to this Court any evidence, oral or written, that was not already received into evidence and weighed by the factfinder, and thus it was inadequate to preserve error on appeal. A trial court is not required to hear the same testimony endlessly. The Bankruptcy Court considered extensive testimony on the alleged agreement and concluded that no such agreement existed. Giving due regard to the Bankruptcy Court's opportunity to determine the credibility of witnesses, this Court cannot say that that finding was clearly erroneous, and thus will not disturb it on appeal.

Jurisdiction

The court below held that because the parties stipulated that the actions before it were core proceedings, it had jurisdiction under 28 U.S.C. § 1334(b) and 157(b)(1). Appellants argue that at all times they have denied that the Bankruptcy Court had jurisdiction.

Although Appellants never actually stipulated to the fact that the proceedings were core proceedings, at no point, including on this appeal, have they presented a legal argument explaining why the Bankruptcy Court did not have jurisdiction. At the commencement of trial the presiding judge asked counsel for the parties to discuss the issue of core jurisdiction. None of the parties disputed the issue and the Bankruptcy Judge ruled that the matters pending before the court were in fact core matters. Although in its opinion the court was technically incorrect in stating that the parties stipulated to that result, it is clear from the record that the court made a finding that the matters before it were in fact core matters and that this result is manifestly correct. The Trustee brought an action to set aside a fraudulent conveyance. The Bankruptcy Code provides a nonexclusive list of matters that are core proceedings, including "proceedings to determine, avoid or recover fraudulent conveyances." 28 U.S.C. § 157(b)(2)(H). In light of the explicit language in the statute and the lack of any contrary argument, this Court holds that the Bankruptcy Court was correct in ruling that the action involved core proceedings and assuming jurisdiction under 28 U.S.C. § 1334(b).

Appellants' Request for a Jury Trial

***5** Appellants argue that the Bankruptcy Court should have abstained pursuant to 28 U.S.C. § 1334(c)(2) and permitted the action to be heard before a state court jury. Appellants base their argument on the Maine Constitution, contending that its guarantee of a trial by jury in "all controversies concerning property" override the provisions of the Bankruptcy Code.

The abstention provision upon which Appellants rely provides in pertinent part that:

in a proceeding based upon a State law claim or State law cause of action, *related to a case under title 11 ... but not arising under title 11 ... or arising in a case under title 11* ... with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2) (emphasis added). The Trustee's action to set aside a fraudulent conveyance was correctly determined to be a core proceeding and one that arises under title 11. The mandatory abstention provision applies only when the case before the court is a related proceeding, not when it arises under title 11. Because the proceeding before the Bankruptcy Court was an action by the Trustee to set aside a fraudulent conveyance pursuant to 11 U.S.C. § 548, and thus a core proceeding arising under title 11, the court was not required to abstain.

Appellants also contend that the Seventh Amendment of the United States Constitution mandates that they should have been granted a trial by jury in this action. Congress amended the Bankruptcy Code in 1984, providing explicit authorization for jury trials only in personal injury or wrongful death tort claims. 28 U.S.C. § 1411(a). Without resolving the question of whether Congress intended that those instances be the exclusive circumstances warranting jury trials in bankruptcy proceedings, this Court holds that a Chapter 11 Trustee's action to set aside a fraudulent conveyance under 28 U.S.C. § 548 is a traditional equitable action, and thus no general right to a jury trial attaches. *See Katchen v. Landy,* 382 U.S. 323, 336 (1966) (holding that because proceedings in bankruptcy are inherently equitable in nature, there is not a general right to jury trials in bankruptcy proceedings). Moreover, Appellants' defenses of specific performance, constructive trust and estoppel all lie in equity, and therefore do not provide support for their contention that they should be granted a jury trial.

Appellants' Motions for Recusal

During litigation of this case the Wakelins made two motions for the Bankruptcy Judge to recuse himself under 28 U.S.C. § 455(a) and (b).[6] Appellants contend that his failure to do so requires reversal. This Court holds that the Bankruptcy Judge did not abuse his discretion in declining to recuse himself.

***6** Appellants based the first motion on the Judge's alleged prejudgment of the case prior to hearing all the evidence. These allegations are based on remarks made by the Judge at a hearing on the Trustee's motion to sell the property free and clear of all liens. This Court finds no merit in Appellants' contention. The Bankruptcy Judge ruled, after a full day of testimony, that the Appellants' claim of ownership was in *bona fide* dispute within the meaning of 11 U.S.C. § 363(f)(4) and ordered the sale of the property free and clear of liens, with proceeds of the sale to be held in escrow pending resolution of the ownership issue. Appellants contend that comments made by the Judge at the hearing indicated his bias and his inability to impartially try Appellants' case. At

the hearing the judge stated that "in the opinion of the Court [the documents presented by Appellants thus far] do not present even a paululum of evidence in favor of your case...." Courts often make similar decisions, in the course of ruling on pretrial motions, which implicitly reflect on the strength of a defense, and these decisions do not constitute the type of prejudgment that warrants recusal. *See In re Cooper,* 821 F.2d 833, 844 (1st Cir.1987).

Appellants also contend that the Bankruptcy Judge's improper interrogation of witnesses, his use of harsh language, and his attitude during pretrial proceedings and at trial demonstrated his prejudgment and indicated "scorn and ridicule toward the Defendant's counsel and the evidence." Appellants' contention that the Judge should have recused himself cannot be predicated alone upon a mere disagreement over the state of the law or the correctness of the court's factual findings. *In re Cooper, supra,* at 838. Furthermore, it is well settled that it is permissible for a judge to examine a witness to clarify testimony, *United States v. Cepeda Penes,* 577 F.2d 754, 757 (1st Cir.1978), and after reviewing the record this Court finds no improper motive for the Bankruptcy Court's questioning.

Finally, the conduct cited by Appellants does not demonstrate the Judge's adverse attitude toward the defendants in the suit, but rather toward the trial tactics of their counsel. The First Circuit has held that "[a] court's disagreement—even when strongly stated—with *counsel* over the propriety of trial tactics does not reflect an attitude of personal bias against the *client.*" *In re Cooper, supra,* at 841. This Court finds that the conduct of the Bankruptcy Judge is devoid of personal bias against Appellants, and that the charge of lack of impartiality is not grounded on facts that would create a reasonable doubt concerning the impartiality of the Judge in the mind of the reasonable person. [7] Recusal, therefore, was not warranted.

Accordingly, it is *ORDERED* that the decision of the United States Bankruptcy Court for the District of Maine be, and it is hereby, *AFFIRMED.* The Court finds that Appellants' position was not completely frivolous and thus Appellee's request for costs is *DENIED.*

All Citations

Not Reported in F.Supp., 1990 WL 19988

Footnotes

1 *See also Chicago Title Insurance Co. v. Sherred Village Associates,* 708 F.2d 804, 810 (1st Cir.1983), wherein the First Circuit states:

> [W]e acknowledge the deference we owe to the trial court's findings.... We are guided ... by the Supreme Court's insistence in *Pullman–Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), that a court of appeals not, by labelling a finding an "ultimate fact" seek to substitute its own assessment of the evidence for that of the trial court.... We consider ourselves bound by that court's determinations unless "on the entire evidence [we are] left with the definite and firm conviction that a mistake has been committed." (*Quoting United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

2 The Bankruptcy Code provides in pertinent part that:

> The trustee may avoid any transfer of an interest of the debtor in property ... that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily
>
> (1) made such transfer ... with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made ... indebted....
>
> 11 U.S.C. § 548(a)(1).

The Maine statute provides in part that:

A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made ... if the debtor made the transfer ... [w]ith actual intent to hinder, delay or defraud any creditor of the debtor.

14 M.R.S.A. § 3575(1)(A).

3 In direct contradiction to the Wakelins' testimony as to the alleged agreement is the testimony of Roger MacBride, who denied he ever entered into any such agreement. The testimony of Roland Lambalot, a certified public accountant who was hired to do an outside audit and prepare a financial statement of the partnership assets, also contradicts Appellants' testimony. Lambalot testified that he met with Wakelin, Jr. on numerous occasions and was never informed of the Wakelin claim of ownership in the apartments. Alexander Harris, a real estate developer who was hired by MacBride and Wakelin, Jr. to prepare the limited partnership offering memorandum, testified that Wakelin, Jr. told him that "[he] was putting everything he owned on the line to do this deal." John Lathrop, a limited partner in the Debtor, testified that although he spoke with Wakelin, Jr. on a number of occasions, he was never told that the apartments were not part of the partnership and he in fact relied on the offering memorandum as including the apartments. John Bradford, the lawyer who was hired by Wakelin, Jr. to draft the deed conveying the property from IGR to the Debtor, testified that he was instructed by Wakelin, Jr. to draft a deed to convey the entire property without reservation, and that the Wakelins never told him of the alleged reservation of the apartments.

4 Federal Rule of Evidence 103(a)(2) provides that:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offeror or was apparent from the context within which questions were asked.

5 On appeal Appellants contend that the testimony was relevant and admissible to show that a constructive trust arose under Maine law. Appellants also claim that the testimony is relevant to show the absence of fraudulent intent. Appellants did not adequately present these theories to the Bankruptcy Court and thus this Court should not consider them on appeal. "A party may not claim error on appeal in the exclusion of evidence unless the district court was told not only what the party intended to prove but also for what purpose." *Tate v. Robbins & Meyers, Inc.*, 790 F.2d 10, 12 (1st Cir.1986) (holding that a party cannot challenge a ruling excluding evidence on appeal on ground that evidence could have properly been admitted for some purpose not articulated to the trial court). Moreover, this Court should not consider the issue of constructive trust on appeal where it was not properly presented to the trial court. "The rule in the First Circuit is clear: 'It is by now axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal.' " *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049, 1067 (1st Cir.1985) (holding that an issue that was raised only in the pleadings and not specified to the trial court is not "presented" to the court and is waived on appeal.)

Even if these theories were considered on appeal, this Court would find no error. The success of each of Appellants' contentions depends on a finding that the Wakelins and Roger MacBride agreed to reserve ownership of the apartments to Appellants. The Bankruptcy Judge considered this contention and found, as a matter of fact, that no such agreement existed. This finding is not clearly erroneous and will not be set aside.

6 Recusal is warranted under those provisions when the impartiality of the court is reasonably suspect, when the court has a personal bias or prejudice concerning a party, or when the court has personal knowledge of the

evidence. The proper test in determining whether the impartiality of a court might reasonably be questioned is whether the charges are grounded on facts that would create a reasonable doubt concerning the court's impartiality in the mind of the reasonable man. *United States v. Kelley,* 712 F.2d 884, 890 (1st Cir.1983).

7 A careful review of the record below persuades this Court that the Bankruptcy Judge had ample cause for irritation and frustration with the conduct of Appellants' counsel and his trial tactics in the proceedings below. Counsel even appears to have deliberately generated some heat on the part of the Judge by baiting him with redundant questioning and irrelevant lines of inquiry. Regrettably, the Judge on several occasions took the bait. However, while the improprieties of counsel's strategies and conduct could have been better handled by a short, sharply worded chambers conference with counsel, the Court is fully satisfied that the record does not disclose to the view of any reasonable person any bias or prejudice against the Appellants or in favor of any other party or its position on the part of the Bankruptcy Judge. While a rigorous display of courtesy, expressed often with reserve if not steely disapproval, is the expected judicial norm of conduct under fire of counsel, every departure therefrom may not be taken to indicate a judge's prejudgment of the case before him or the existence of bias or prejudice against a litigant or his cause.

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80 F.4th 901
United States Court of Appeals, Ninth Circuit.

In the MATTER OF: EAST COAST FOODS, INC., Debtor,
Clifton Capital Group, LLC, Appellant,
v.
Bradley D. Sharp, former Chapter 11 Trustee, Appellee.

No. 21-55967
|
Argued and Submitted September 2, 2022
|
Submission Withdrawn September 26, 2022
|
Resubmitted May 2, 2023 Pasadena, California
|
Filed May 8, 2023
|
Amended September 14, 2023

Synopsis

Background: Chapter 11 trustee filed final fee application seeking $1,155,844.71, the maximum allowable under the Bankruptcy Code's fee cap, which represented lodestar plus 65% enhancement for exceptional services. Creditor objected. The United States Bankruptcy Court for the Central District of California, Sheri Bluebond, J., entered order awarding the statutory maximum fees, and creditor appealed. The District Court, Michael W. Fitzgerald, J., 2021 WL 3473926, affirmed. Creditor appealed.

[Holding:] The Court of Appeals, R. Nelson, Circuit Judge, held that creditor failed to show that enhanced fee award would diminish its payment under the bankruptcy plan, with respect to either likelihood or timing of payment, and so it failed to establish "injury in fact" needed for Article III standing to appeal award.

Reversed and remanded with instructions.

See also 2019 WL 6893015.

Opinion, 66 F.4th 1214, amended and superseded.

Procedural Posture(s): On Appeal; Application for Bankruptcy Trustee Fees; Petition for Rehearing; Petition for Rehearing En Banc.

West Headnotes (13)

[1] Federal Civil Procedure In general; injury or interest

Question of whether a party has standing is a threshold issue that must be addressed before turning to the merits of a case. U.S. Const. art. 3, § 2, cl. 1.

1 Case that cites this headnote

[2] Bankruptcy Right of review and persons entitled; parties; waiver or estoppel

To appeal a bankruptcy court's order, a party must establish Article III standing and that it is "aggrieved" by the order. U.S. Const. art. 3, § 2, cl. 1.

8 Cases that cite this headnote

[3] Bankruptcy Conclusions of law; de novo review

Bankruptcy Particular cases and issues

On appeal of a bankruptcy court's order, the Court of Appeals reviews Article III standing determinations de novo, but reviews factual determination that plaintiff was "person aggrieved" for clear error. U.S. Const. art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[4] Federal Civil Procedure In general; injury or interest

Federal Courts Case or Controversy Requirement

Because the Constitution limits federal court jurisdiction to "cases" and "controversies," standing is an essential and unchanging requirement. U.S. Const. art. 3, § 2, cl. 1.

4 Cases that cite this headnote

[5] **Federal Courts** Want of Actual Controversy; Mootness and Ripeness

Party must establish Article III case or controversy before Court of Appeals exerts subject matter jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

4 Cases that cite this headnote

[6] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

"Person aggrieved" standard, a prudential requirement initially found within the Bankruptcy Act of 1898, was designed to limit appeals in bankruptcy proceedings because such cases invariably implicate the interests of various stakeholders, including those not formally parties to the litigation.

[7] **Federal Civil Procedure** In general; injury or interest

The party invoking federal jurisdiction bears the burden of establishing the elements of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[8] **Federal Civil Procedure** In general; injury or interest

To establish Article III standing, a party must establish such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[9] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that it has: (1) suffered an "injury in fact" that is concrete, particularized, and actual or imminent, (2) the injury is fairly traceable to the defendant's conduct, and (3) the injury can be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

13 Cases that cite this headnote

[10] **Federal Civil Procedure** In general; injury or interest

Injury in fact is the "first and foremost" of the three standing elements. U.S. Const. art. 3, § 2, cl. 1.

6 Cases that cite this headnote

[11] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Creditor failed to show that enhanced fee award made to Chapter 11 trustee on his final fee application, which represented lodestar plus 65% enhancement for exceptional services and was maximum allowable under Bankruptcy Code's fee cap, would diminish creditor's payment under debtor's plan, and thus creditor failed to establish "injury in fact" needed for Article III standing to appeal award; creditor's alleged harms were too conjectural and hypothetical to establish injury in fact, as fee award did not impair creditor's likelihood of payment, given that plan was not a limited fund, but was a detailed reorganizing plan that guaranteed creditors full payment with interest, to be funded from debtor's ongoing operations and non-estate sources, and with 35% equity cushion, and there was no showing that fee order's grant of trustee bonus harmed the timing of any payment to creditor, which knew from the start that such timing could be longer or shorter than plan's initial estimates. U.S. Const. art. 3, § 2, cl. 1; 11 U.S.C.A. § 326(a).

1 Case that cites this headnote

[12] **Bankruptcy** Eligibility to vote; impairment

Creditors whose claims are "impaired" vote on a Chapter 11 plan before it is approved by the bankruptcy court. 11 U.S.C.A. § 1126.

[13] **Federal Civil Procedure** In general; injury or interest

Standing must exist from start of action. U.S. Const. art. 3, § 2, cl. 1.

***903** Appeal from the United States District Court for the Central District of California, Michael W. Fitzgerald, District Judge, Presiding, D.C. No. 2:20-cv-10982-MWF

Attorneys and Law Firms

Anthony Bisconti (argued), Bienert Katzman Littrell Williams LLP, Los Angeles, California; Steven J. Katzman, Bienert Katzman Littrell Williams LLP, San Clemente, California; for Appellant.

John N. Tedford IV (argued) and Uzzi O. Raanan, Danning Gill Israel & Krasnoff LLP, Los Angeles, California, for Appellee.

Before: Milan D. Smith, Jr. and Ryan D. Nelson, Circuit Judges, and Gershwin A. Drain, * District Judge.

ORDER

The opinion filed on May 8, 2023, and appearing at 66 F.4th 1214, is amended as follows: On slip opinion page 4, lines 7–8, delete <Plan's assets contained within the Plan Collateral Package> and replace with <Collateral Package>.

On page 13, line 6, delete footnote 9.

On page 13, line 8, replace footnote 10 with <The disclosure statement requires that the plan include a classification of claims and how each class of claims will be treated under the plan. *See* 11 U.S.C. § 1123. Creditors whose claims are "impaired" generally vote on the plan before it is approved by the bankruptcy court. *See id.* at § 1126. Here, however, Clifton waived that right in a stipulation approved by the bankruptcy court and the plan was subsequently approved pursuant to § 1128.>.

On page 14, line 10, delete <Plan's assets contained within the Plan> and replace with <Package>.

On page 16, line 6, delete <Given Clifton's consent to the Plan, and b> and replaced with <B>.

With these amendments, Judges M. Smith and R. Nelson vote to deny the petition for rehearing en banc, and Judge Drain so recommends. The full court was advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. The Petitions for Rehearing ***904** and Rehearing En Banc are DENIED. No further petitions for rehearing will be accepted.

AMENDED OPINION

R. NELSON, Circuit Judge:

Creditor Clifton Capital Group, LLC challenges the district court's order affirming the bankruptcy court's enhanced fee award of over $1 million dollars to the trustee in a funded bankruptcy. Because Clifton has failed to show that the enhanced fee award will diminish its payment under the bankruptcy plan, Clifton lacks standing. We thus reverse the district court's order finding standing and remand with instructions to dismiss the appeal for lack of Article III standing.

I

This is not a normal bankruptcy. Roscoe's House of Chicken & Waffles is a landmark Los Angeles restaurant chain. Building on a staple menu predating the American Revolution —Thomas Jefferson served his guests chicken and waffles —Roscoe's has garnered celebrity attention since opening in 1975. President Obama enjoyed chicken wings and a waffle there in 2011, with "Obama's Special" added to the menu. [1] Several movies have referenced Roscoe's. [2] And numerous songs have memorialized the restaurant, including one by Ludacris who suggests that the listener "roll to Roscoe's and grab somethin' to eat." [3] Despite its cultural ubiquity, even Roscoe's was not immune to a $3.2 million judgment in a racial discrimination case. [4] This significant judgment, along with other debt, threatened to impair Roscoe's ability to pay its creditors.

But fear not. The public can still indulge in Roscoe's famous soul food. As part of the bankruptcy plan, the restaurants

remain open and founder Herb Hudson has guaranteed payment to Roscoe's creditors. As a failsafe, Snoop Dogg suggested buying the chain to keep it in business. [5]

In 2016, East Coast Foods, Inc. (ECF), manager of the four Roscoe's locations, filed for Chapter 11 bankruptcy. The Office of United States Trustee appointed an official committee of unsecured creditors (Committee) to monitor ECF's activities, of which Clifton Capital Group, LLC (Clifton) was named chair. After an examiner found that ECF could not meet its fiduciary obligations, the court appointed Sharp as trustee, the de facto head of ECF for two years.

The Committee and ECF's principal submitted a Chapter 11 bankruptcy plan (the Plan), effective September 2018. The Plan granted $450 per hour plus expenses for Sharp's services as trustee.

***905** The Plan guaranteed the creditors full payment with interest secured by a "Collateral Package," which included all of the ECF's assets, and up to a $10 million contribution from Hudson. The Plan's appraiser estimated the value of the Collateral Package at over $39.2 million with $23.4 million of net equity, far exceeding the claims to be paid under the Plan.

In his final fee application filed in October 2018, Sharp requested $1,155,844.71, the maximum allowable under the fee cap statute, 11 U.S.C. § 326(a). This amount represented the lodestar (1,692.2 hours worked times an hourly rate of $448.50, for $758,955.50) plus a 65% enhancement for exceptional services.

Clifton objected in the bankruptcy court, arguing the fee cap was not presumptively reasonable as the record did not support an enhancement beyond the lodestar. The court disagreed, holding that the fee cap was presumptively reasonable and, in the alternative, that the case was exceptional and merited deviation from the lodestar.

Clifton then appealed to the district court and moved to strike the Fee Order. Sharp countered that Clifton lacked standing to appeal because it was not a "party aggrieved." The district court found Clifton aggrieved because there was insufficient capital in the estate to pay all creditors. *In re E. Coast Foods, Inc.*, No. CV 18-10098, 2019 WL 6893015, at *3 (C.D. Cal. Dec. 18, 2019). It held that "[b]ecause the increased compensation to the Trustee will further subordinate Clifton Capital's claim, the Court concludes that Clifton Capital is directly and adversely affected by the Final Fee Order." *Id.*

The district court further held that the lodestar was the starting point for reasonable compensation and vacated and remanded for the bankruptcy court to award fees equal to the lodestar or "make detailed findings sufficient to justify a higher amount." *Id.* at *4, 6.

On remand, the bankruptcy court again found that Sharp was "entitled to an enhancement because the results in this case were truly exceptional." The bankruptcy court again awarded the statutory maximum. Clifton again appealed and the district court this time affirmed. Clifton now appeals to this court.

II

[1] **[2]** The question of whether a party has standing is a threshold issue that must be addressed before turning to the merits of a case. *Horne v. Flores*, 557 U.S. 433, 445, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009). To appeal a bankruptcy court's order, a party must establish Article III standing and that it is "aggrieved" by the order. *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983).

[3] We review Article III standing determinations de novo. *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1098 (9th Cir. 2022). But we review the factual determination that Clifton was a person aggrieved for clear error. *In re Point Ctr. Fin., Inc.*, 890 F.3d 1188, 1191 (9th Cir. 2018).

III

A

[4] **[5]** Our authority under Article III is dispositive. Because the Constitution limits our jurisdiction to "cases" and "controversies," standing is an "essential and unchanging" requirement. *In re Sisk*, 962 F.3d 1133, 1141 (9th Cir. 2020) (quoting U.S. Const. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Accordingly, a party must establish an Article III case or controversy before we exert subject matter jurisdiction. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff ***906** without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction." (citation omitted)).

[6] In the bankruptcy context, we have historically bypassed the Article III inquiry, instead analyzing whether a party is a "person aggrieved." *See Fondiller*, 707 F.2d at 443. This standard is a prudential requirement initially found within the Bankruptcy Act of 1898, which permitted appeal by any "person aggrieved by an order of a referee." 11 U.S.C. § 67(c) (1976) (repealed 1978). The "person aggrieved" standard was designed to limit appeals in bankruptcy proceedings because such cases invariably implicate the interests of various stakeholders, including those not formally parties to the litigation. *See Fondiller*, 707 F.2d at 443. Even after Congress repealed and replaced the Bankruptcy Act of 1898, however, we continued to apply the "person aggrieved" standard.[6] *See id.*; *In re Com. W. Fin. Corp.*, 761 F.2d 1329, 1334 (9th Cir. 1985).

It is unclear why we continued to apply the person aggrieved rule in the absence of the statute providing the basis for doing so. We appear to have recast the pre-1978 statutory standard and applied it as a principle of prudential standing. But the Supreme Court has since questioned prudential standing, noting it "is in some tension with [the Court's] recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.' " *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Still, our bankruptcy cases have historically addressed prudential standing with little attention to Article III standing. *See, e.g., Fondiller*, 707 F.2d at 441–43; *In re Int'l Env't Dynamics, Inc.*, 718 F.2d 322, 326 (9th Cir. 1983); *Klein v. Rancho Mont. De Oro, Inc.*, 263 F.2d 764, 772 (9th Cir. 1959); *Com. W. Fin.*, 761 F.2d at 1334.

After the Supreme Court's decision in *Driehaus*, however, we have returned emphasis to Article III standing. *See, e.g., Sisk*, 962 F.3d at 1141–43. And determining our Article III jurisdiction before any prudential considerations does not offend our precedent. *See, e.g., In re P.R.T.C., Inc.*, 177 F.3d 774, 777–79 (9th Cir. 1999) (addressing Article III standing before person aggrieved prudential standing). We thus first examine Article III standing, which we find lacking here.

B

[7] **[8]** **[9]** As the party invoking federal jurisdiction, Clifton "bears the burden of establishing" the elements of Article III standing. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. A party must establish "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Horne*, 557 U.S. at 445, 129 S.Ct. 2579 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (emphasis in original)). Clifton must therefore show that it has: (1) suffered an "injury in fact" that is concrete, particularized, and actual or imminent, (2) the injury is "fairly traceable" to the defendant's conduct, and (3) the injury can be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130 (alterations in original omitted).

***907** 1

[10] Injury in fact is the "[f]irst and foremost" of the three standing elements. *Sisk*, 962 F.3d at 1142 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Clifton argues that it suffered an injury-in-fact because the Plan established the expectation that it would receive full payment of its claim, which has not yet occurred and which the Fee Order exacerbates. The Plan estimates that Clifton would "receive a *pro rata* share of Available Cash[7] in the annual sum of $1,816,701 in 2022, $2,996,321 in 2023, and $634,634 in 2024 ... " To date, Clifton notes that this totals millions of dollars in payments that have not been made. Clifton argues that the Fee Order's grant of the $400,000 trustee bonus harms both the likelihood and timing of any payment by further subordinating it.

This, Clifton contends, suffices as an injury 'fairly traceable' to the wrongful conduct of the excessive fee award because its "injury need not be financial," *P.R.T.C.*, 177 F.3d at 777 (citation omitted), and because, under 11 U.S.C. § 330, payment of the fee award has priority and must be paid in full before unsecured creditors like Clifton receive any distribution. Clifton thus argues that it suffered a traceable and redressable injury in fact because a favorable decision would result in the excessive fees being returned to the ECF estate to pay out claims, and therefore would "increase the likelihood and timing" of payment to Clifton.

Sharp counters that Clifton's alleged injury is too conjectural and hypothetical to establish an injury in fact because there is no diminished likelihood that Clifton will be paid in full. The Plan's Collateral Package[8] guarantees Clifton full

payment with interest. Sharp further argues that Clifton cannot claim injury arising from the Plan's estimates because Clifton approved the Plan understanding that the timing of its distributions depended on the allowed amounts of senior claims, meaning payment could be delayed by any increase in any Allowed Non-Subordinated Claims. Thus, Sharp asserts that Clifton's alleged harm is no harm at all because Clifton's payment is certain, and the only question at issue is when payment will occur.

2

[11] We conclude that Clifton's alleged injury is too conjectural and hypothetical to establish an injury in fact for Article III standing. We similarly conclude that Clifton is wrong that the fee award both impaired the likelihood and delayed the timing of its payment. The district court erroneously concluded that the fee award would further subordinate Clifton's claim.

a

We first address the likelihood of payment. The district court concluded that Clifton had standing because it was an aggrieved party. Noting that Clifton had not been paid on any of its Allowed Claim, the court adopted Clifton's argument that "[t]here are not yet enough funds on hand to pay all creditors, including Clifton Capital, in full" and that "there are outstanding ***908** contingencies under the Plan that must occur before those funds become available." *E. Coast Foods*, 2019 WL 6893015, at *3. Sharp pointed out, however, that because Clifton was guaranteed 100% payment of its alleged claim under the Plan, it was not aggrieved. *Id.* at *2–3.

The district court seemingly concluded, without explicitly stating, that the Plan concerns a limited fund. *See id.* at *3. It found that the alleged lack of sufficient capital to pay all claims would further subvert Clifton's claim and thereby adversely affect its payment. *Id.* Therefore, the district court held that Clifton was aggrieved because it was appealing an order disposing of assets from which it (the claimant) seeks to be paid. *Id.* (citing *Int'l Env't Dynamics*, 718 F.2d at 326).

The district court relied on our precedent that in cases involving competing claims to a limited fund, "a claimant has standing to appeal an order disposing of assets from which the claimant seeks to be paid." *Id.* (quoting *P.R.T.C.*, 177 F.3d at 778). A limited fund necessarily concerns a finite pool of assets to pay claims, thus creating the risk that creditors will not be paid, either in full or at all. In the limited fund context, changes to any allotment or transfer of funds, including an enhanced fee award, would materially affect the likelihood of any potential payment and therefore directly implicate creditor interests. Along these lines, we have found a party aggrieved when limited fund plans "eliminated" a party's interest in estate assets from which they sought payment. *Com. W. Fin.*, 761 F.2d at 1335. We have also found standing when a bankruptcy court's order transferred all significant assets out of the estate, effectively barring a creditor's claim. *P.R.T.C.*, 177 F.3d at 778–79.

In contrast, in *Klein*, we found that plaintiffs challenging an order seeking payment of their attorney fees lacked standing because the plan specified that there were "additional monies" available, even though the plan did not expressly contemplate payment of their claims. 263 F.2d at 771–72. The plaintiffs challenged orders confirming a plan which they asserted disregarded compensation for legal services to which they were entitled. *See id.* Plaintiffs argued that because the plan disposed of the estate's assets, the plan rendered payment impossible. *Id.*

Our court rejected both arguments. Even though the plan did not expressly contemplate the plaintiffs' compensation claims, the plan provided that "additional monies are available if need(ed) ... to ... pay off the unsecured creditors their claims in full." *Id.* at 772 (alterations in original). At judgment, the court noted that "if the sum which is actually available to pay appellants' claims as finally allowed proves insufficient, the court has only to enforce the provisions of the plan ... requiring that additional monies be deposited or accrued in the registry." *Id.*

Even though *Klein* was decided under the "person aggrieved" standard, it is most analogous to this case. As in *Klein*, the Plan here does not relate to a limited fund because there is no finite amount of assets from which all creditors could be paid. *See id.* Rather, "the Plan is a reorganizing plan that **proposes to pay all Allowed Claims in full** (unless otherwise agreed) from the Debtor's ongoing operations and non-Estate sources."

[12] The Plan's mandatory "disclosure statement" which outlines the Plan, its risk factors, and its financial projections bolsters this conclusion.[9] *See* ***909** 11 U.S.C. §§ 1121, 1125. The Plan makes clear that Clifton's claim will be paid in

full with interest after all other allowed unsecured claims and penalty claims are satisfied. Clifton understood these terms: its principal Sam White testified that "the Plan was proposed to move this case forward and to ensure 100% payment to creditors as quickly as possible."

Indeed, the Plan's promise of full payment with interest is unconditionally guaranteed and secured by a "Collateral Package," which includes all of ECF's assets. The Debtor's principal (Hudson) is responsible for contributing up to $10 million to the Plan to affect the payment of claims. ECF is required to contribute to the Plan roughly $110,000 per month plus the excess free cash flow from its post-confirmation operations. Additional funds are available from other entities owned by Hudson which are to contribute about $130,000 per month to the Plan. Payments from ECF and Hudson will continue until all claims are paid in full with interest.

The Package further ensures enough available collateral to pay the Plan's covered claims in full, plus a 35% equity cushion. The Plan's appraiser estimated the value of the Package at over $39.2 million with 23.4 million of net equity, exceeding the claims to be paid under the Plan by about $17.3 million (the 35% equity cushion).

Given the detailed Plan which guarantees payment to creditors plus interest, and the net equity in the Plan, the district court's finding that the estate is a limited fund and that "there are not sufficient funds to pay back all the creditors," is clearly erroneous. *E. Coast Foods*, 2019 WL 6893015, at *3. Moreover, even if Sharp receives the contested $400,000 bonus, this will not impact Clifton's ability to be paid because there are other sources from which to make Clifton's payment at the appropriate time.

b

We similarly disagree with Clifton's assertion that it suffered injury to the timing of its payment. In agreeing to the Plan, Clifton knew from the start that the timing of its payment could be longer or shorter than the Plan's initial estimates depending on the amounts owed to senior claimants. The Disclosure estimates that all Allowed Unsubordinated Claims would be paid in full within four years, by mid-2022. But the Statement also notes that "[t]he term of the Plan can be shorter or longer than expected depending on the amount of the Allowed Claims."

The Plan further estimates that allowed claims could be paid within six years, but "for every $1 million change in allowed claims, the term of the Plan will change by 3.3 months." Sharp points to specific unresolved allowed claims that have delayed payment, such as a pending priority claim by the IRS for over $10.2 million which it asserts Clifton knew was present at the time the Plan was approved, and for which $15 million is being held in reserve to pay. Sharp also points to the effects of COVID-19 and a missing $1.5 million payment from Hudson as reasons that Clifton has not been paid yet. Sharp has entered into a series of forbearance agreements to give Hudson additional time to pay the balance due. No evidence suggests that payment will not occur. And in any event, this potential default is not traceable to the Fee Order itself.

Given these uncertainties, the Plan estimated that the distribution timeframe for subordinated claims, such as Clifton's, would be between 2022 and 2024. But ***910** these were only estimates. Ultimately, the Plan's guarantee that Clifton will be paid with interest precludes a finding of an injury in fact now even though these estimates thus far have proven inaccurate.

Clifton's alleged harms are thus conjectural at best. It remains possible that Clifton will be paid within the Plan's initial estimated window before the end of 2024. Because this period has not passed, Clifton has failed to establish that the timing of its payment has been harmed beyond what the Plan initially provided. Since the Plan did not guarantee Clifton payment by a specific date (it merely provided an estimated window which has not passed), and the estimated timing of payment was subject to change based on priority claims, Clifton has not yet shown an actual injury. That is particularly true where Clifton is entitled to interest on the payments that are due. As such, Clifton has failed to establish the negative impact of any delayed payment not already addressed by the Plan.

This remains the case even where Sharp receives his payment before Clifton is paid. The Plan anticipates fulfilling Clifton's claims even if Sharp receives the challenged bonus. As we held in *Klein*, the availability of additional funds to satisfy plaintiffs' claims foreclose standing. 263 F.2d at 771. The same is true here.

[13] This is not to say that no potential remedy would exist should the Plan prove insufficient. We agree with our prior analysis in *Klein* that Clifton, if necessary, could sue to enforce those provisions of the Plan. At that time, there may

be an actual injury that is both fairly traceable and would be easily redressable by ordering additional money deposited into the estate to pay Clifton's claims. *See id.* at 766. But such facts do not presently exist. And standing must exist from the start of an action. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence...."). As such, Clifton has failed to establish actual injury thus far and therefore lacks Article III standing to challenge the Fee Award. [10]

IV

Because Clifton currently lacks an injury in fact, we reverse the district court's order and remand with instructions to dismiss the appeal for lack of Article III standing.

REVERSED.

All Citations

80 F.4th 901, 23 Cal. Daily Op. Serv. 9219, 2023 Daily Journal D.A.R. 9508

Footnotes

* The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

1 Adrian Miller, *The Layered Legacy of Roscoe's House of Chicken & Waffles*, RESY Blog (Sept. 8, 2020) https://blog.resy.com/2020/09/the-layered-legacy-of-roscoes-house-of-chicken-waffles/.

2 *See id.* ("The restaurant has gotten a mention in films including: *Tapehead* (1988), *Swingers* (1996), *Jackie Brown* (1997), *Rush Hour* (1998), *Soul Plane* (2004). In 2004, Roscoe's got more than a mention on the big screen: It got its own eponymous feature-length film.").

3 LUDACRIS, CALL UP THE HOMIES (Def Jam Recordings 2008).

4 *See Beasley v. East Coast Foods, Inc. et. al.*, No. BC509995 (L.A. Sup. Ct.); *see also* Shan Li, *Parent Company of Roscoe's House of Chicken and Waffles Files for Bankruptcy Protection*, LA Times (Mar. 29, 2016) https://www.latimes.com/business/la-fi-roscoes-chicken-waffles-bankruptcy-20160329-story.html.

5 Farley Elliott, *Snoop Dogg Says He'll Save Roscoe's Chicken N' Waffles if it Comes to That*, LA Eater (Mar. 31, 2016) https://la.eater.com/2016/3/31/11338382/snoop-dogg-buy-roscoes-chicken-waffles.

6 The Bankruptcy Reform Act of 1978 replaced the Bankruptcy Act of 1898. It governs the relationship between creditors and debtors when debtors can no longer pay their debts. Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 101).

7 "Available Cash" is defined as cash in the estate from various sources, *less* (among other things) "the amount necessary or estimated and reserved to pay in full [ ] any Allowed Administrative Expense Claims," which includes the Trustee's awarded compensation pursuant to the Fee Order. *See* 11 U.S.C. § 503(b)(2) (providing that an administrative expense claim includes "compensation and reimbursement awarded under [11 U.S.C. § 330(a)].").

8 As discussed below, the Collateral Package protects against any risks of nonpayment and includes all of the Reorganized Debtor's assets.

9 The disclosure statement requires that the plan include a classification of claims and how each class of claims will be treated under the plan. *See* 11 U.S.C. § 1123. Creditors whose claims are "impaired" generally vote on the plan before it is approved by the bankruptcy court. *See id.* at § 1126. Here, however, Clifton waived that right in a stipulation approved by the bankruptcy court and the plan was subsequently approved pursuant to § 1128.

10 Because Clifton lacks Article III standing, we need not address the prudential "person aggrieved" standard. *See Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222–23 (9th Cir. 1998) (holding that a suit seeking declaratory judgment must first pass constitutional and statutory muster as presenting a case-or-controversy before the court exercises its prudential discretion).

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57 F.4th 494
United States Court of Appeals, Fifth Circuit.

In the MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P. Debtor,
Highland Capital Management Fund Advisors, L.P.; NexPoint Advisors, L.P.; The Dugaboy Investment Trust, Appellants,
v.
Highland Capital Management, L.P., Appellee.

No. 22-10189
|
FILED January 11, 2023

Synopsis

Background: Following confirmation of debtor's Chapter 11 reorganization plan, the United States Bankruptcy Court for the Northern District of Texas, Stacey G. C. Jernigan, J., granted debtor's motion for order authorizing creation of indemnity sub-trust and entry into indemnity trust agreement. Objecting creditors appealed. The United States District Court for the Northern District of Texas, Sidney A. Fitzwater, Senior District Judge, 2022 WL 270862, affirmed. Objectors appealed.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

[1] challenge to district court's partial dismissal below for lack of standing was not preserved for appeal;

[2] creditor was aggrieved by bankruptcy court's order, as required to have standing;

[3] plan was not modified by bankruptcy court's order;

[4] use of indemnity sub-trust did not alter parties' rights, obligations, and expectations under plan allowing for creation of reserve; and

[5] proceeding by motion for order from bankruptcy court was not unusual or unique, and therefore it did not indicate that requested relief somehow modified Chapter 11 plan.

Affirmed in part and dismissed in part.

Procedural Posture(s): On Appeal; Other.

West Headnotes (13)

[1] **Bankruptcy** Scope of review in general

Court of Appeals reviews decision of district court, sitting in its appellate capacity, by applying same standards of review to bankruptcy court's finding of fact and conclusions of law as applied by district court.

1 Case that cites this headnote

[2] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Clear error

Court of Appeals reviews bankruptcy court's conclusions of law, as well as mixed questions of law and fact, de novo, and bankruptcy court's findings of fact for clear error.

2 Cases that cite this headnote

[3] **Federal Courts** Standing

Court of Appeals reviews issues of standing de novo.

[4] **Bankruptcy** Record; assignments of error; briefs

Even if an issue is argued in the bankruptcy court and ruled on by that court, it is not preserved for appeal unless the appellant includes the issue in its statement of issues on appeal; in such cases, the issue is waived on subsequent appeal to the Fifth Circuit, even if the issue was argued before the district court.

4 Cases that cite this headnote

[5] **Bankruptcy** Record; assignments of error; briefs

Challenge to district court's partial dismissal below for lack of prudential standing was not preserved for consideration before Court

of Appeals; although statement of issues on appeal included district court's affirmance of bankruptcy court's order authorizing creation of indemnity sub-trust and entry into indemnity trust agreement following confirmation of debtor's Chapter 11 reorganization plan, it did not include district court's partial dismissal of appeal on basis that one of debtor's creditors and client lacked standing, those were separate issues, and appellants' statement of issues on appeal did not fairly encompass separate issue of district court's dismissal for lack of standing.

4 Cases that cite this headnote

[6] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

In a bankruptcy case, the Court of Appeals may consider prudential standing issues sua sponte.

2 Cases that cite this headnote

[7] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Prudential standing to appeal a bankruptcy court order is, of necessity, quite limited.

2 Cases that cite this headnote

[8] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

The "person aggrieved" standard is used to determine whether a party has prudential standing to appeal a bankruptcy court order; this standard is an even more exacting standard than traditional constitutional standing, as it requires an appellant to show she is directly, adversely, and financially impacted by a bankruptcy order. U.S. Const. art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[9] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

As required to have prudential standing, creditor was aggrieved by bankruptcy court's order, following confirmation of debtor's Chapter 11 reorganization plan, authorizing creation of indemnity sub-trust and entry into indemnity trust agreement, since creditor possessed claim when appeal was initiated that was valued at $250,000, which required claimant trust that wholly owned limited partnership interests in reorganized debtor to reserve funds against it.

[10] **Bankruptcy** Construction, execution, and performance

Chapter 11 reorganization plan was not modified following confirmation by bankruptcy court's order authorizing creation of indemnity sub-trust and entry into indemnity trust agreement, since claimant trust that wholly owned limited partnership interests in reorganized debtor for winding-down debtor's estate over approximately three years by liquidating its assets and issuing distributions to class claimants as trust beneficiaries could contribute capital to reorganized debtor for any purpose, including indemnification, and so creditors did not face any greater risk of lost recoveries following order than they did under plan because plan always permitted claimant trust to use its assets in that manner. 11 U.S.C.A. §§ 1125, 1127(b).

[11] **Bankruptcy** Modification or revocation

Modifications to a Chapter 11 plan must be disclosed to claim-holders and their acceptance or rejection of the proposed modifications must be solicited. 11 U.S.C.A. §§ 1125, 1127(c).

1 Case that cites this headnote

[12] **Bankruptcy** Construction, execution, and performance

Use of indemnity sub-trust did not alter parties' rights, obligations, and expectations under Chapter 11 plan allowing for creation of reserve and contemplating use of directors and officers (D&O) insurance to provide collateral security supporting indemnification obligations it outlined, since indemnity sub-trust served same purpose and was one of several ways debtor could, as plan demanded, "reserve or retain any cash reasonably necessary to meet claims and

contingent liabilities," including indemnification obligations, and plan still strictly limited how assets may be invested absent oversight board approval. 11 U.S.C.A. §§ 1125, 1127(b).

1 Case that cites this headnote

[13] **Bankruptcy** Modification or revocation

Proceeding by motion for order from bankruptcy court authorizing creation of indemnity sub-trust and entry into indemnity trust agreement during period between confirmation and effective date was not unusual or unique, and therefore it did not indicate that requested relief somehow modified Chapter 11 plan. 11 U.S.C.A. §§ 1125, 1127(b).

***496** Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:21-CV-1895, Sidney A. Fitzwater, U.S. District Judge

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Before King, Stewart, and Haynes, Circuit Judges.

Opinion

King, Circuit Judge:

Following the bankruptcy court's confirmation of its reorganization plan, Highland Capital Management, L.P. filed a motion with the bankruptcy court seeking entry of an order authorizing the creation of an indemnity sub-trust. Over several objections, the bankruptcy court entered an order approving the motion. Several objectors appealed, arguing that the order impermissibly modified the plan. The district court affirmed the bankruptcy court's order and dismissed several of the appellants from the appeal. The appellants then sought review in this court. We DISMISS IN PART the appeal and AFFIRM the district court's judgment.

I.

A. The Parties

Highland Capital Management, L.P. ("Highland Capital") was co-founded in 1993 by James Dondero and Mark Okada. It was a multibillion-dollar global investment advisor that operated through a complex set of entities doing business under the Highland umbrella. Prior to plan confirmation, ***497** Appellant Dugaboy Investment Trust ("Dugaboy"), a trust created to manage some of Dondero's assets, possessed a fractional (0.1866%) limited partnership interest in Highland Capital; this interest was canceled under the confirmed plan.

Dondero also manages the other appellants, which were two of Highland Capital's clients—Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NexPoint"). Like Highland Capital, HCMFA and NexPoint serviced and advised large, publicly traded investment funds.

B. The Reorganization Plan

In October 2019, Highland Capital filed for Chapter 11 bankruptcy in the District of Delaware due to significant business litigation claims that it faced. In December 2019, the bankruptcy court transferred the case to the Northern District of Texas.

The reorganization of Highland Capital was negotiated by a four-member Unsecured Creditors' Committee (the "Committee"). Early in this process, the Committee sought to appoint a Chapter 11 trustee due to its concerns over and distrust of Dondero. After many weeks of negotiation, the Committee and Dondero reached a corporate governance settlement agreement whereby Dondero relinquished control of Highland Capital and resigned his positions as an officer and director. As part of the settlement, three independent

directors were chosen to carry Highland Capital through reorganization. The bankruptcy court approved the settlement in January 2020. It later appointed James Seery, Jr., one of the independent directors, as Highland Capital's Chief Executive Officer, among other titles.

In August 2020, the independent directors, with the support of the Committee, filed the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"). This court previously sketched the basic structure of the Plan:

> The Plan works like this: It dissolves the Committee, and creates four entities—the Claimant Trust, the Reorganized Debtor, HCMLP GP LLC,[1] and the Litigation Sub-Trust. Administered by its trustee Seery, the Claimant Trust "wind[s]-down" Highland Capital's estate over approximately three years by liquidating its assets and issuing distributions to class-8 and -9 claimants as trust beneficiaries. Highland Capital vests its ongoing servicing agreements with the Reorganized Debtor, which "among other things" continues to manage the CLOs [collateral loan obligations] and other investment portfolios. The Reorganized Debtor's only general partner is HCMLP GP LLC. And the Litigation Sub-Trust resolves pending claims against Highland Capital under the direction of its trustee Marc Kirschner.
>
> The whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of four creditor representatives and one restructuring advisor. The Claimant Trust wholly owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust. The Claimant Trust (and its interests) will dissolve either at the soonest of three years after the effective date (August 2024) or (1) when it is unlikely to obtain additional proceeds to justify further action, (2) all claims and ***498** objections are resolved, (3) all distributions are made, and (4) the Reorganized Debtor is dissolved.

NexPoint Advisors, L.P. v. Highland Cap. Mgmt. L.P. (In re Highland Cap. Mgmt., L.P.), 48 F.4th 419, 426–27 (5th Cir. 2022) (footnote omitted).

The Plan also includes several conditions precedent that may be waived in whole or in part by Highland Capital, including a condition that Highland Capital shall obtain directors' and officers' ("D&O") insurance coverage acceptable to it, the Committee, the Oversight Board, the Claimant Trustee, and the Litigation Trustee. The bankruptcy court found that the absence of such insurance, which protects the personal assets of directors and officers against lawsuits arising from actions taken as part of their duties, would present unacceptable risks to parties, like the independent directors, because of Dondero's continued litigiousness.

In February 2021, the bankruptcy court confirmed the Plan over several remaining objections by Dondero and Dondero-owned or -controlled entities. The confirmation order roundly criticized Dondero's behavior before and during the bankruptcy proceedings and deduced that Dondero was a serial litigator whose objections to the Plan were not made in good faith. *Id.* at 428. It also approved the Plan's voting and confirmation procedures and its treatment of dissenting classes, and held that the Plan complied with the statutory requirements for confirmation. *Id.* Dondero and a web of Highland-related entities moved to directly appeal the confirmation order to this court, which the bankruptcy court granted. *Id.* In September 2022, we affirmed the Plan in all respects except one, concluding that the Plan exculpated certain non-debtors beyond the bankruptcy court's authority. *Id.* at 429.

C. The Indemnity Sub-Trust Motion

While that appeal was ongoing, disputes surrounding the Plan's implementation continued before the bankruptcy court. According to Seery, the appeal of the confirmation order made it more difficult for Highland Capital to secure D&O insurance because of the additional risk it presented. The only D&O insurance that Highland Capital could have secured at that time was, in Seery's view, insufficient because of its coverage gaps and cost. Highland Capital and the Committee decided to investigate alternative structures, and they determined that the Indemnity Sub-Trust would provide the same protections as the D&O insurance considered by the Plan.

On June 25, 2021, Highland Capital filed a motion with the bankruptcy court for entry of an order authorizing the creation of the Indemnity Sub-Trust. The Indemnity Sub-Trust was contemplated as a mechanism to secure the indemnity obligations of the Claimant Trust, the Litigation Trust, and the Reorganized Debtor, serving as a source of claim indemnification only in the event that one of these entities did not pay such claims. Under the proposal, the Claimant Trust would fund the Indemnity Sub-Trust with $2.5

million in cash and a funding note in the amount of $22.5 million. The Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor would be jointly and severally liable for the indebtedness evidenced by the note.

Dugaboy, NexPoint, and HCMFA (collectively, "Appellants"), as well as Dondero, objected to the motion, arguing that it was a modification to the Plan requiring solicitation, voting, and confirmation under § 1127(b) of the Bankruptcy Code. The bankruptcy court disagreed and granted the motion in an order authorizing the creation of the Indemnity Sub-Trust on July 21, 2021 (the "Order"). It determined ***499** that the creation of the Indemnity Sub-Trust was within the literal terms of the Plan because the Plan "contained a provision addressing that a reserve might be established for potential indemnification claims"; the Claimant Trust Agreement, the Litigation Trust Agreement, and the Limited Partnership Agreement for the Reorganized Debtor contemplated it; and the Indemnity Sub-Trust was not "materially astray from the concepts built into the plan." It concluded that the Indemnity Sub-Trust was within the bounds of the Plan and thus not a modification. Lastly, it held that the creation of the Indemnity Sub-Trust was a valid exercise of business judgment as required by § 363(b)(1) of the Bankruptcy Code.

D. The Appeal

Appellants appealed the Order to the district court, arguing that it was an impermissible Plan modification. Highland Capital moved to dismiss the appeal as equitably and constitutionally moot.

The district court dismissed the appeal in part for lack of prudential standing and affirmed the Order on January 28, 2022. It held that HCMFA and Dugaboy lacked standing and dismissed their appeals, but it reached the merits of Appellants' claim because NexPoint possessed standing. On the merits, the district court held that the Order was not a modification because it did not alter the parties' rights, obligations, and expectations under the Plan.

Appellants timely appealed to this court, contesting the district court's ruling that the Order was not a Plan modification and that HCMFA and Dugaboy lacked standing to pursue the appeal. Highland Capital argues that the Order did not modify the Plan and that HCMFA and Dugaboy failed to preserve for appellate review the district court's dismissal of their appeal.

II.

[1] **[2]** **[3]** "We review the decision of a district court, sitting in its appellate capacity, by applying the same standards of review to the bankruptcy court's finding of fact and conclusions of law as applied by the district court." *ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 600 (5th Cir. 2011). We review the bankruptcy court's conclusions of law, as well as mixed questions of law and fact, *de novo*, and the bankruptcy court's findings of fact for clear error. *Id.* at 601. We review issues of standing *de novo*. *Dean v. Seidel (In re Dean)*, 18 F.4th 842, 844 (5th Cir. 2021).

III.

[4] Bankruptcy Rule 8009—previously Rule 8006—requires that, in an appeal to a district court or bankruptcy appellate panel, "[t]he appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented." FED. R. BANKR. P. 8009(a)(1)(A). A similar rule governs appeals from a district court to an appellate court in bankruptcy cases and requires that "the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk." FED. R. APP. P. 6(b)(2)(B)(i). We have previously held that, "even if an issue is argued in the bankruptcy court and ruled on by that court, it is not preserved for appeal under Bankruptcy Rule 8006 unless the appellant includes the issue in its statement of issues on appeal." *Smith ex rel. McCombs v. H.D. Smith Wholesale Drug Co. (In re McCombs)*, 659 F.3d 503, 510 (5th Cir. 2011) (quoting ***500** *Zimmermann v. Jenkins (In re GGM, P.C.)*, 165 F.3d 1026, 1032 (5th Cir. 1999)). In such cases, "[t]he issue is waived on subsequent appeal to the Fifth Circuit, even if the issue was argued before the district court." *Id.*

[5] Appellants timely filed a statement of the issues on appeal, which we must consider to determine whether they properly preserved for appeal the issues and arguments

contained in their briefs. Appellants' statement of the issues on appeal presents the following issues:

> 1. Whether the District Court erred by affirming the *Order Approving Debtor's Motion for Entry of an Order (I) Authorizing the (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* (the "Order"), entered by the Bankruptcy Court on July 21, 2021 in the above captioned bankruptcy case.
>
> 2. Whether the relief requested and granted in the *Debtor's Motion for Entry of an Order (I) Authorizing the Debtor to (A) Enter into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan and (B) Incur and Pay Related Fees and Expenses, and (III) Granting Related Relief* (the "Motion") constituted a plan modification.
>
> 3. Whether the relief requested and granted in the Motion satisfied the requirements of 11 U.S.C. §§ 1122, 1123, 1125 and 1127.
>
> 4. Whether the Bankruptcy Court otherwise erred by granting the Motion.

By contrast, in their appellate brief Appellants state and argue, as relevant here, the following issue: "Whether the District Court erred by affirming the Indemnity Trust Order, entered by the Bankruptcy Court on July 21, 2021, including, without limitation, by (a) holding that the Indemnity Trust Order did not effectuate a plan modification; and (b) holding that HCMFA lacked standing to appeal."[2]

The parties dispute whether Appellants preserved issue (b) in their appellate brief, namely the issue of the district court's dismissal of the appeal as to Dugaboy and HCMFA for lack of standing. Highland Capital asserts that Appellants have not preserved this issue for appeal because they did not mention this issue in their statement of the issues on appeal. We agree. As we have previously held, "the rules regarding preservation of issues on appeal in bankruptcy cases apply with equal force regardless of whether the appeal is from the bankruptcy court to the district court ... from the district court to the court of appeals ... or from the bankruptcy court to the court of appeals"—in other words, Appellants' "statement of issues must be considered to determine whether [they] properly preserved for appeal the issues and arguments contained in [their] brief." *Id.* at 511.

As relevant here, Appellants' statement of the issues on appeal includes the district court's affirmance of the Order; however, it does not include the district court's partial dismissal of the appeal on the basis that HCMFA and Dugaboy lacked standing. These are separate issues—in fact, they are separate decrees—and Appellants' statement of the issues on appeal does not fairly encompass the separate issue of the district court's dismissal for lack of standing. *See Galaz v. Katona (In re Galaz)*, 841 F.3d 316, 324–25 (5th Cir. 2016) (rejecting the notion that we should construe the statement of the issues on appeal broadly). Therefore, Appellants did not preserve for appeal a challenge to the district court's partial dismissal below for ***501** lack of standing. The appeals of HCMFA and Dugaboy remain dismissed below and, for this reason, they must be dismissed from the current appeal as well.

[6] [7] [8] [9] Unlike HCMFA and Dugaboy, NexPoint was not dismissed from the appeal below. The district court determined that NexPoint had standing to pursue the appeal, and the parties do not contest this issue. Nonetheless, we may consider prudential standing issues *sua sponte*. *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012). "[S]tanding to appeal a bankruptcy court order is, of necessity, quite limited." *In re Dean*, 18 F.4th at 844 (quoting *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 385 (5th Cir. 2018)). This circuit uses the "person aggrieved" standard to determine whether a party has standing to appeal a bankruptcy court order. *Id.*; *see also Gibbs & Bruns LLP v. Coho Energy Inc. (In re Coho Energy Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004). This standard "is an even more exacting standard than traditional constitutional standing," *In re Dean*, 18 F.4th at 844 (quoting *Fortune Nat. Res. Corp. v. U.S. Dep't of Interior*, 806 F.3d 363, 366 (5th Cir. 2015)), as it requires an appellant to show she is "directly, adversely, and financially impacted by a bankruptcy order," *id.* (quoting *In re Technicool*, 896 F.3d at 384). When this appeal was initiated, NexPoint possessed the claim of Hunter Covitz valued at $250,000.[3] This claim, though small, requires the Claimant Trust to reserve funds against it, which makes NexPoint a person aggrieved by the Order. Accordingly, NexPoint has standing, and we proceed to the merits.

IV.

[10] Appellants argue that the Order impermissibly effectuated a modification to the Plan previously approved by the bankruptcy court. We disagree and affirm.

[11] Under § 1127(b) of the Bankruptcy Code, "the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan," if "the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title." 11 U.S.C. § 1127(b). Plan modifications must comply with § 1125, which requires disclosure to claimholders and solicitation of their acceptance or rejection of the proposed modifications. *Id.* §§ 1125, 1127(c). Of course, not every proposed post-confirmation action by the reorganized debtor is a plan modification. Although the Bankruptcy Code does not define "modification," we have previously held that post-confirmation proposals constitute modifications in cases where they "would alter the parties' rights, obligations, and expectations under the plan." *U.S. Brass Corp. v. Travelers Ins. Grp. (In re U.S. Brass Corp.)*, 301 F.3d 296, 309 (5th Cir. 2002).

Appellants argue that the Order alters the parties' rights, obligations, and expectations under the Plan in three ways: first, the Order requires the Claimant Trust to indemnify numerous parties beyond those ***502** authorized by the Plan; second, the creation of a trust is different from the establishment of a reserve and is thus not contemplated by the Plan; and third, Highland Capital's filing of the motion with the bankruptcy court necessarily admits that it sought to modify the Plan. But Appellants agree that, if the motion is not a Plan modification, then the bankruptcy court properly exercised its discretion to enter the Order.

Highland Capital disagrees and instead characterizes the Order as one of several permissible ways it could have implemented the Plan. In its view, the Indemnity Sub-Trust accomplishes the same objective as D&O insurance and does not alter any party's rights, obligations, or expectations under the Plan.

The Claimant Trust Agreement, which was incorporated into and fully enforceable under the Plan, outlines several parties that shall be indemnified by the Claimant Trust: the Claimant Trustee, the Delaware Trustee,[4] the Oversight Board, and all past and present members of the Oversight Board. Appellants argue that the Plan permits the Claimant Trust to indemnify only these parties, while the Order requires the Claimant Trust to also indemnify the Reorganized Debtor's professionals, officers, and employees. Greater indemnification obligations, they contend, risk reducing creditor recoveries because they entangle the Claimant Trust's assets with the Reorganized Debtor's post-confirmation activity.[5] Even if the Indemnity Sub-Trust does not indemnify the Reorganized Debtor's professionals, officers, and employees, Appellants contend that up to $25 million of creditor recoveries will be irrevocably transferred to the Indemnity Sub-Trust in favor of these potential obligations.

However, the Plan approves of such asset sharing; the Claimant Trust's assets may be employed for the benefit of the Reorganized Debtor without any relevant limitations. Under the Claimant Trust Agreement, the Claimant Trust is permitted to withhold funds from disbursement that, among other things, are "necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses and any other expenses incurred by the Claimant Trust." Claimant Trust Expenses encompass the "costs, expenses, liabilities, and obligations incurred by the Claimant Trust and/or the Claimant Trustee in administering and conducting the affairs of the Claimant Trust, and otherwise carrying out the terms of the Claimant Trust and the Plan on behalf of the Claimant Trust." As part of its duties under the Plan,[6] the Claimant Trust may "make additional capital contribution to the Partnership," which includes the Reorganized Debtor, if requested by HCMLP GP LLC, which itself is wholly owned by the Claimant Trust. The Plan contains no limitations on such capital contributions in either amount or purpose. Separately, the Plan requires the Claimant Trustee to "exercise and perform the rights, powers, and duties arising from the Claimant Trust's role" as sole member of HCMLP GP LLC and HCMLP GP LLC's role as general partner of the Reorganized Debtor. Such duties include, as relevant here, calling ***503** capital from the Claimant Trust to the Reorganized Debtor as necessary. Therefore, the Claimant Trust may contribute capital to the Reorganized Debtor for any purpose, including indemnification. Accordingly, creditors face no greater risk of lost recoveries following the Order than they did under the Plan; the Plan always permitted the Claimant Trust to use its assets in this manner.[7]

[12] Appellants also argue that the Plan did not sanction the creation of the Indemnity Sub-Trust. They concede that the Plan allows the Claimant Trust to establish a reserve but aver that the Indemnity Sub-Trust goes far beyond that allowance. In their view, the Indemnity Sub-Trust grants extraneous relief not contemplated by the Plan in several respects: it involves appointing a corporate trustee, who receives indemnification; the Indemnity Trust Administrator may hire her own financial and legal professionals, and the Claimant Trust must pay their fees; beneficiaries have no rights with respect to the administration of the Indemnity Sub-Trust; and it eliminates

the Oversight Board's authority over investments held by the Indemnity Sub-Trust.

These arguments are unavailing. The Plan allows for the creation of a reserve and contemplates the use of D&O insurance to provide collateral security supporting the indemnification obligations it outlines. The Indemnity Sub-Trust serves the same purpose and is one of several ways Highland Capital could, as the Plan demands, "reserve or retain any cash ... reasonably necessary to meet claims and contingent liabilities," including indemnification obligations. By arguing that the Plan did not permit the creation of the Indemnity Sub-Trust, Appellants seek to restrain Highland Capital's exercise of its authority to those actions clearly defined in the Plan. However, that is not the proper inquiry. Instead, we must determine whether the use of the Indemnity Sub-Trust, as opposed to a reserve or D&O insurance, alters the parties' rights, obligations, and expectations. *In re U.S. Brass*, 301 F.3d at 309.

In *U.S. Brass*, we considered a confirmed plan of reorganization that provided certain claims "would be resolved in a court of competent jurisdiction and determined by settlement or final judgment" and a subsequent proposed agreement "to liquidate the claims through binding arbitration." *Id.* at 299. We held that the proposed agreement constituted a plan modification for several reasons. Under the plan, the requirement to resolve claims by settlement or final judgment minimized the risk of collusion, whereas arbitration would allow parties to "collusively generate a binding award that is inconsistent with the facts and applicable law" of the approved plan. *Id.* at 308. Moreover, arbitration of claims was not contemplated and negotiated by the parties at plan confirmation—in fact, the insurers were actively concerned with collusive behavior among parties during plan negotiations, and the bankruptcy court decided not to confirm the plan until insurers were satisfied with the plan and withdrew their objections. *Id.* In short, the parties specifically bargained for the right to litigate or settle their claims, and arbitration undercut those bargained-for rights. For that reason, we ruled that the ***504** proposed agreement constituted a plan modification.

Here, the record shows that securing funds for indemnification obligations was particularly important for agreement to the Plan. The Plan includes D&O insurance as a waivable condition precedent, and the condition was waived only upon approval of the motion seeking authorization for the creation of the Indemnity Sub-Trust. In Seery's words, it was crucial that the parties "could reserve for, protect, and indemnify the indemnification obligations that each of the trusts and the Reorganized Debtor have to those running it." But the mechanism for providing collateral security was not clearly defined as part of the Plan—D&O insurance was one option, but it also more generally permitted the Claimant Trust to reserve funds for indemnification obligations. The precise contours of the collateral mechanism were not a "bargain" won during Plan negotiations. *See In re U.S. Brass*, 301 F.3d at 308. Rather, indemnification was the bargained-for requirement, and the details were left to be determined. As previously explained, the Order does not alter the parties' rights, obligations, or expectations under the Plan because the Plan permits the Claimant Trust to contribute capital to the Reorganized Debtor for indemnification.

Moreover, the supposed extraneous relief created by the Indemnity Sub-Trust is nothing new. The Indemnity Sub-Trust is an agent of the Claimant Trust, so its employees and appointees are contemplated by the Plan and have rights to payment and indemnification. Indemnification beneficiaries would have no rights with respect to the indemnity funds regardless of whether they were held by the Indemnity Sub-Trust or the other post-confirmation entities. And while the Oversight Board must approve the investment of Claimant Trust Assets (as defined in the Plan), it is not obvious that this includes assets transferred to other entities such as the Indemnity Sub-Trust. Even if it does, Appellants have failed to explain how this alters the rights, obligations, or expectations of the parties; absent Oversight Board approval, the Plan still strictly limits how assets may be invested.

[13] Lastly, Appellants question why Highland Capital filed the motion in the first place, suggesting that there is no reason to file a motion with the bankruptcy court unless the requested relief somehow modifies the Plan. For this argument, they rely upon our statement in *U.S. Brass* that, "if the agreement is indeed consistent with the plan, the question becomes why ... file the motion for approval." 301 F.3d at 307. Highland Capital answered this question at oral argument. In its view, proceeding by motion during the period between confirmation and the effective date is not unusual. Nor was it unique in this case: during that period, Highland Capital filed a motion for exit financing with the bankruptcy court, and it was approved. We are satisfied by this explanation in light of the circumstances of this case.

V.

For the foregoing reasons, the appeal is DISMISSED IN PART and the judgment of the district court is AFFIRMED.

All Citations

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Footnotes

1 The Plan calls this entity "New GP LLC," but it was later named HCMLP GP LLC. For the sake of clarity, we use HCMLP GP LLC.

2 In separate briefing, Dugaboy challenged solely the portion of the district court's opinion holding that Dugaboy lacked standing to pursue the appeal.

3 The claim was disallowed and expunged by the bankruptcy court on January 13, 2022. However, this order has been appealed, and the district court reviewing the order disallowing this claim has not yet issued a ruling. For this reason, the bankruptcy court's order is not final, and NexPoint still possesses the claim for the purposes of this appeal. *Cf.* *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 148, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009) (holding that a bankruptcy court order becomes final "on direct review" by the district court); *Okla. State Treasurer v. Linn Operating, Inc. (In re Linn Energy, L.L.C.)*, 927 F.3d 862, 866 (5th Cir. 2019) (describing final bankruptcy orders as "orders that are affirmed upon direct review, or ... not appealed or contested").

4 The Delaware Trustee has the power and authority to accept legal process served on the Claimant Trust in Delaware and to execute and file any required certificates with Delaware's Office of the Secretary of State.

5 Appellants and Highland Capital agree that the Claimant Trust is authorized to indemnify the parties indemnified under the Litigation Sub-Trust Agreement, who are also beneficiaries under the Indemnity Sub-Trust.

6 The Reorganized LP Agreement, which lists this requirement, was incorporated by reference into the Plan.

7 For this reason, Appellants' arguments regarding the irrevocability of the Claimant Trust's $25 million in funding to the Indemnity Sub-Trust are without merit. Even so, the funds are not irrevocable. Once all indemnification rights—which are senior priority obligations to distributions to the Claimant Trust's beneficiaries—have expired, the funds are transferred back to the Claimant Trust.

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United States Court of Appeals, Fifth Circuit.

In the MATTER OF ROMAN CATHOLIC CHURCH OF the ARCHDIOCESE OF NEW ORLEANS Debtor,
James Adams; Jackie Berthelot; Theodore Jackson; Eric Johnson, Appellants,
v.
Roman Catholic Church of the Archdiocese of New Orleans, Appellee.

No. 22-30539
|
FILED May 13, 2024

Synopsis

Background: The United States Bankruptcy Court for the Eastern District of Louisiana removed four claimants from official committee of unsecured creditors for attorney's disclosure of sensitive and confidential information, and dismissed and sanctioned attorney. Removed claimants appealed. The United States District Court for the Eastern District of Louisiana, Greg G. Guidry, J., 2022 WL 3575287, dismissed their appeal. Judge Guidry recused himself. Removed claimants moved to vacate order dismissing their appeal and its corresponding judgment. The District Court, Barry W. Ashe, J., 652 B.R. 138, denied motion. Removed claimants appealed.

Holdings: The Court of Appeals, Jones, Circuit Judge, held that:

[1] de novo review meant that judge's failure to recuse earlier constituted harmless error;

[2] substituted judge did not abuse his discretion when denying motion to vacate recused judge's order dismissing appeal and its corresponding judgment;

[3] public's confidence in judicial process was not undermined by substituted district judge's denial of motion to vacate order by recused district judge dismissing appeal and its corresponding judgment; and

[4] claimants removed sua sponte from official committee of unsecured creditors, without notice and hearing or formal request from party in interest, for attorney's disclosure of sensitive and confidential information, did not suffer injury to any legally protected interest, and therefore they did not have standing to contest removal.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Order or Judgment.

West Headnotes (8)

[1] **Bankruptcy** Conclusions of law; de novo review
Bankruptcy Clear error
The bankruptcy court's factual findings are reviewed for clear error, and its legal conclusions and mixed questions of fact and law are reviewed de novo.

[2] **Federal Courts** Altering, amending, modifying, or vacating judgment or order; proceedings after judgment
Court of Appeals reviews district court's ruling on motion for relief from judgment for abuse of discretion. Fed. R. Civ. P. 60(b)(6).

[3] **Bankruptcy** Harmless error
De novo review of appeal from substituted district judge's denial of motion, by claimants removed by bankruptcy court from official committee of unsecured creditors for attorney's disclosure of sensitive and confidential information, to vacate order dismissing appeal and its corresponding judgment, by recused district judge, meant that judge's failure to recuse earlier constituted harmless error. 28 U.S.C.A. § 455.

[4] **Bankruptcy** Dismissal; hearing
Substituted judge did not abuse his discretion when denying motion, by claimants removed by bankruptcy court from official committee of unsecured creditors for attorney's disclosure of

sensitive and confidential information, to vacate order dismissing appeal and its corresponding judgment, by recused district judge, after concluding that there was no risk of injustice in case sanctioning attorney due to recused judge's order in case removing claimants, weighing in favor of finding that judgment did not have to be vacated for violation of statute governing disqualification of justices, judges, or magistrate judges, since attorney's appeal turned, ultimately, on bankruptcy court's imposition of sanctions on attorney and whether attorney was afforded procedural due process rights when bankruptcy court sanctioned him, and removal case turned primarily on whether claimants had standing to challenge their removal from committee, and cases were not mutually dependent such that disposition of one would necessarily control disposition of other. U.S. Const. Amend. 5.

1 Case that cites this headnote

[5] **Bankruptcy** Dismissal; hearing

Public's confidence in judicial process was not undermined by substituted district judge's denial of motion, by claimants removed by bankruptcy court from official committee of unsecured creditors for attorney's disclosure of sensitive and confidential information, to vacate order by recused district judge dismissing appeal and its corresponding judgment; public was placed on notice of recused judge's reasons from news reports and substituted judge's published opinions, and extensive public interest in bankruptcy at issue did not inherently justify vacating recused judge's order.

[6] **Bankruptcy** Creditors' and equity security holders' committees and meetings

Claimants removed sua sponte by bankruptcy court from official committee of unsecured creditors, without notice and hearing or formal request from party in interest, for attorney's disclosure of sensitive and confidential information, did not suffer injury to any legally protected interest, and therefore they did not have standing to contest removal, since statutory procedures for appointing members of creditors committee did not guarantee right to any member to remain on committee and evidentiary record justifying their removal was well settled and well known to claimants and all other parties by time bankruptcy court removed claimants from committee. U.S. Const. art. 3, § 2, cl. 1; 11 U.S.C.A. § 1102.

[7] **Federal Civil Procedure** In general; injury or interest

To establish injury in fact, as required for standing, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

1 Case that cites this headnote

[8] **Bankruptcy** Creditors' and equity security holders' committees and meetings

Lack of proper notice and hearing under Bankruptcy Code section governing creditors' and equity security holders' committees cannot violate legally protected interest when there is no underlying right to remain on creditors committee, and when ultimate outcome of proceeding would have been the same. 11 U.S.C.A. § 1102(a)(4).

***402** Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:22-CV-1738, Barry W. Ashe, Greg Gerard Guidry, U.S. District Judges

Attorneys and Law Firms

Soren E. Gisleson, Esq. (argued), Herman Herman & Katz, L.L.C., New Orleans, LA, John Henry Denenea, Jr., Shearman-Denenea, L.L.C., Richard Charles Trahant, Metairie, LA, for Appellants.

Mark Alan Mintz (argued), Samantha Oppenheim, Robert Patrick Vance, Esq., Jones Walker, L.L.P., New Orleans, LA, for Appellee.

Before King, Jones, and Oldham, Circuit Judges.

Opinion

Edith H. Jones, Circuit Judge:

Appellants are former members of the Official Committee of Unsecured Creditors ("Committee"), appointed as part of the Chapter 11 bankruptcy proceedings initiated by the Roman Catholic Archdiocese of New Orleans ("Archdiocese"). Appellants contend that their removal from the Committee by the bankruptcy court was unlawful, and that the district court erred in denying their motion to vacate the judgment because the district judge who was originally assigned their appeal should have recused himself earlier. We conclude that the district court did not err in declining to vacate the judgment, and the Appellants lack standing under Article III to prosecute this appeal. AFFIRMED.

BACKGROUND

The Archdiocese sought Chapter 11 bankruptcy relief on May 1, 2020, "largely in response to numerous lawsuits brought against it in state court alleging sexual abuse by priests or lay persons employed or supervised by the Archdiocese and complicity of the Archdiocese in that abuse."[1] About three weeks afterward, the United States Trustee ("Trustee") appointed the Committee. *Id.* at 805. At the time of the relevant events in this case, the Committee was composed of six of the more than 450 abuse claimants. *Id.* The Committee, as a single unit and with the bankruptcy court's approval, is represented by the law firms of Locke Lord LLP and Pachulski Stang Ziehl & Jones LLP. *Id.* But individual members of the committee retained their respective state-court counsel to advise them on their individual claims against the Archdiocese and its bankruptcy estate and to assist them in fulfilling their duties as Committee members. *Id.* Until June 7, 2022, Richard C. Trahant served as counsel or co-counsel to four of the six individual members of the Committee—the four ***403** Appellants in this case. *In re Roman Cath. Church of Archdiocese of New Orleans*, 652 B.R. 138, 145–46 (E.D. La. 2023) [hereinafter "*Adams Ashe Opinion*"].

Because of the sensitive nature of the tort claims at the heart of the Archdiocese's bankruptcy, in August 2020,[2] the bankruptcy court adopted a protective order negotiated by the Archdiocese and the Committee governing the use and disclosure of confidential materials. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 806. In December 2021, the Archdiocese produced certain materials it designated as confidential. These included documents related to the Archdiocese's Internal Review Board's evaluation of decades-old abuse allegations against a specific priest who had neither been included on the Archdiocese's previously published "Credibly Accused List" nor named in a proof of claim filed in the bankruptcy case. *Adams Ashe Opinion*, 652 B.R. at 143. Within days of receiving this information, Trahant, who specializes in litigating clergy sexual abuse cases, sent a text message to his cousin, the principal of a high school where the priest worked. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 807–08. Trahant's text message mentioned the priest's name. Trahant later admitted that he did so to ensure that his cousin would infer that the priest had been accused of sexual abuse, and to ensure that the priest would not be allowed to return to work at the high school. *Id.* at 808. Trahant had further conversations with his cousin in January 2022, during which he disclosed the nature of the allegations against the priest, which he had learned about through the confidential documents produced by the Archdiocese. *Id.* Thus, Trahant's awareness of the allegations against the priest was entirely a product of his representation of the Appellants—a status that gave him access to confidential documents in a sensitive legal proceeding.

The day after Trahant first texted his cousin, Trahant emailed a journalist, listing the priest's name in the subject line, identifying the priest's place of employment in the body, and urging the journalist to "keep him on your radar." *Id.* at 808. Less than three weeks after Trahant reached out to the journalist, the journalist published an online newspaper article disclosing the priest's name and details about the allegations against him. The article also disclosed information about the Archdiocese's Internal Review Board investigation and disposition of clergy abuse claims. All of this information was previously non-public. *Id.*

The Archdiocese responded to the leak by filing a sealed motion to compel the Committee to investigate the source of the breach. *Adams Ashe Opinion*, 652 B.R. at 143. The Archdiocese also asked the bankruptcy court to conduct an evidentiary hearing to consider imposing sanctions for the apparent violation of the protective order. *Id.* In April 2022, a series of status conferences and informal discovery between the Archdiocese and the Committee identified Trahant as the leaker. *Id.* This included discovery responses from the high school confirming that Trahant had contacted his cousin, and a declaration from Trahant in which he admitted revealing

the information to his cousin and the journalist. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 809. In his declaration, Trahant asserted his belief that protecting minors was a legitimate compelling reason that justified the disclosure.[3] *Id.* The bankruptcy ***404** court, now aware of these additional facts, appointed the Trustee to perform an independent investigation into the wrongful disclosure of the protected material. *Adams Ashe Opinion*, 652 B.R. at 143. As Judge Ashe's district court opinion in this case noted,

> [t]he bankruptcy court was concerned not only with enforcing its own Orders, but with the timing of such breach and the negative impact that violation would have on the functioning of the Committee, the rights of parties in interest in the bankruptcy process, and the ability of the parties in this case to proceed in good faith in the upcoming mediation of claims asserted against the estate.

Id. at 143–44 (internal quotation omitted). On June 3, 2022, after a nearly six-month long investigation, the Trustee filed its statement of position under seal, attaching 78 sworn declarations, 18 transcripts of sworn Rule 2004 examinations, and various other documents. *Id.* at 144. Judge Ashe's district court opinion described Trahant's deposition by the Trustee as follows:

> Trahant was adamant in his deposition that he did not believe his actions violated the protective order, but he also testified contradictorily that he felt restricted by it. He admitted, however, that he did not move for relief from the protective order to report what he claims were potential crimes, nor did he use the protective order's mechanism for challenging the Archdiocese's "confidential" designation of the documents it produced.

Id. at 144–45. Four days after receiving the Trustee's Report, the bankruptcy court issued its June 7, 2022, order finding that Trahant knowingly and willfully violated the protective order he was bound by and aware of. *Id.* at 145. The bankruptcy court's order noted its "duty to protect the integrity of the bankruptcy process and enforce its own Orders," and found that Trahant's willful breach of the protective order "clearly disqualifies him from further receiving Protected Material in this case and participating in any confidential Committee proceedings, including meetings, deliberations, and mediation." *Id.* The bankruptcy court's June 7 order went on to discuss the Committee members' position in light of their attorney's misbehavior:

> [A]s personal counsel to individual Committee members, Trahant and his team of co-counsel received confidential information from the Debtor. The Court acknowledges that individual Committee members may retain the attorney of their choosing to represent their personal interests in this chapter 11 case and have chosen Trahant and his group. This Court certainly has no intention of invading the attorney-client privilege to modulate the communications between those Committee members and their attorneys; indeed, any attempt to regulate or stop the flow of information or candor that must exist between a client and her attorney is not only a futile endeavor, but would offend a fundamental facet of effective legal representation. Thus, an impasse has been reached.
>
> This Court must nevertheless act to protect against disruption of the bankruptcy process, to guard the rights of all parties in interest, and, most immediately in light of the current posture of this case, to preserve the trust in the confidentiality of mediation. Given Trahant's willful breach and disregard of this Court's Protective Order and the dynamics present on the Committee, the Court is ***405** forced to impute Trahant's actions to those of his clients on the Committee and finds cause for their removal from the Committee.

Thus, the bankruptcy court ordered the Trustee to remove Trahant's four clients, the Appellants here, from the Committee "to prevent an abuse of process and to ensure adequate representation of creditors." The court rested its authority on Sections 105(a) and 1102(a)(4) of the Bankruptcy Code. *See* 11 U.S.C. §§ 105(a), 1102(a)(4). The June 7 order went on to state that the bankruptcy court would "issue a separate Order to Show Cause to determine appropriate sanctions for Trahant's disclosure of confidential

information in violation of this Court's Protective Order." Trahant and Appellants separately appealed the June 7 order without seeking leave to file an interlocutory appeal. The appeals from both Trahant and his clients were allocated to Judge Greg Guidry. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 812. In the meantime, the Trustee appointed three new Committee members who were also abuse claimants, bringing its membership total to five.

The Archdiocese filed a motion to dismiss the appeal, arguing that the Appellants lacked standing to appeal the June 7 order and that the district court lacked jurisdiction to hear the interlocutory appeal given the lack of exceptional circumstances. On August 11, 2022, Judge Guidry granted the Archdiocese's motion to dismiss the appeal, concluding that that the Appellants lacked standing to appeal their removal from the Committee because they identified no direct and adverse impact on their pecuniary interests that flowed from the bankruptcy court's order. Judge Guidry further rejected the Appellants' argument that they were "sanctioned" by the removal, in which instance the more lenient Article III or sanctions standing test would apply to their case. [4]

Bankruptcy court proceedings against Trahant, however, continued. In August 2022, the bankruptcy court held a show-cause/contempt hearing. *Id.* at *7. Two months later, the bankruptcy court issued an opinion and order imposing a $400,000 sanction on Trahant for his knowing and willful breach of the protective order. *Id.* at *9. This amount was just over half of the $760,884.73 in attorney's fees and costs that the Archdiocese and Committee incurred in investigating and dealing with the breach of the protective order. *Id.* [5]

Trahant's clients, meanwhile, appealed to the Fifth Circuit, but after the case was fully briefed and set for argument, Judge Guidry entered an order of recusal in Trahant's consolidated appeals in April 2023. Judge Guidry informed the parties in Trahant's cases that the Committee on the Codes of Judicial Conduct had opined that he was not required to recuse because of his prior donations to and service on the board of Catholic charities that were not parties to the Archdiocese's bankruptcy case. But Judge Guidry decided to recuse voluntarily in Trahant's appeals after the Associated Press published a widely reprinted article suggesting that Judge Guidry could not be impartial because of his prior association with Catholic charities. *Id.* at *10.

Within days, Trahant's clients moved to vacate Judge Guidry's August 11, 2022, order in their case and disqualify him. Judge Guidry recused himself shortly after ***406** this court stayed the appeal pending resolution in the district court.

District Judge Ashe was reassigned a number of appeals stemming from the Archdiocese's bankruptcy. On June 21, 2023, Judge Ashe denied the Appellants' Rule 60(b)(6) motion to vacate the removal order, while also denying their motion to access the sealed Trustee Report from June 2022. *See Adams Ashe Opinion*, 652 B.R. at 141–42. Appellants appealed this order. The same day, Judge Ashe also issued an order holding that because Judge Guidry's failure to recuse earlier was harmless error, he (Ashe) would not vacate the prior orders in Trahant's consolidated appeals. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 831.

Both of the Appellants' appeals in this court were consolidated, and a further round of briefing followed on whether Judge Guidry's failure to recuse earlier was harmless error.

STANDARD OF REVIEW

[1] **[2]** "We apply the same standard of review as did the district court: the bankruptcy court's factual findings are reviewed for clear error; its legal conclusions and mixed questions of fact and law, *de novo*." *In re Mercer*, 246 F.3d 391, 402 (5th Cir. 2001) (en banc). We review the district court's ruling on the Rule 60(b)(6) motion for abuse of discretion. *Roberts v. Wal-Mart La., L.L.C.*, 54 F.4th 852, 854 (5th Cir. 2022).

ANALYSIS

Because Judge Guidry's failure to recuse himself was harmless error, Judge Ashe did not err in denying the Appellants relief under Rule 60(b)(6). Further, the Appellants lack Article III standing to appeal their removal from the Committee; Judge Guidry did not err in dismissing their appeal.

A. Judge Guidry Recusal

[3] The Supreme Court affirms that 28 U.S.C. § 455, which governs judicial recusals, "does not, on its own, authorize the reopening of closed litigation." *Liljeberg v. Health Servs. Acquisition Corp*, 486 U.S. 847, 863, 108 S. Ct. 2194, 2204, 100 L.Ed.2d 855 (1988). But as this court has noted:

> In the § 455(a) context, however, the Supreme Court has held that Rule 60(b)(6) relief be analyzed according to these three factors: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."

Roberts, 54 F.4th at 854 (quoting *Liljeberg*, 486 U.S. at 864, 108 S. Ct. at 2205).

A review of the law and facts makes clear that the district court did not abuse its discretion in denying the Appellants' Rule 60(b)(6) motion. [6]

***407** On the first *Liljeberg* factor, Judge Ashe did not err in concluding that the availability of review before this court eliminated any risk of injustice from declining to vacate the judgment under Rule 60(b)(6). In the unique procedural posture of bankruptcy appeals, our review of Judge Guidry's underlying order is conducted under the same standards used by the district court. *In re ASARCO, L.L.C.*, 650 F.3d 593, 600 (5th Cir. 2011). Such essentially duplicative review is available to Appellants *regardless* of Judge Ashe's ruling on the Rule 60(b)(6) motion. This duality eliminates the risk of injustice. Decades ago, this court held that where the merits of a ruling would be subject to de novo review—such as a summary judgment ruling—"the parties are guaranteed a fair, impartial review of the merits of the ruling," and that "[i]n cases where we would otherwise affirm such a ruling, little would be gained by vacating and remanding with instructions that it be essentially reinstated." *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 485–86 (5th Cir. 2003) (quoting *In re Cont'l. Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990)). This precedent of our court compels our resolution of the first factor, rather than contrary precedent from the Federal Circuit. [7]

[4] On the second *Liljeberg* factor, Appellants contend the district court created injustice to the *Trahant* case by failing to vacate Judge Guidry's order. Appellants claim that there will continue to be injustice in one or both cases if they are not resolved together, and that the district court's reliance on the facts and record in the *Trahant* appeal demonstrated as much. Not so. The *Trahant* appeal turns, ultimately, on the bankruptcy court's imposition of sanctions on Trahant and whether Trahant was afforded procedural due process rights when the bankruptcy court sanctioned him. In contrast, this case primarily turns on whether the Appellants have standing to challenge their removal from the Committee.

Moreover, these cases are not mutually dependent such that the disposition of one would necessarily control the disposition of the other. Specifically, the Appellants' removal from the Committee was the product of Trahant's misconduct, not theirs. If Appellants terminated their attorney-client relationship with Trahant tomorrow, they and their new lawyer(s) could request their re-appointment to the Committee by the Trustee. The outcome of that request could then moot or significantly modify the relevant issues in this appeal. Judge Ashe did not abuse his discretion in concluding that there was no risk of injustice in the *Trahant* case due to Judge Guidry's order in this case.

[5] Finally, Judge Ashe did not err in his analysis of the third *Liljeberg* factor. Appellants assert that Judge Guidry's order undermines public confidence in the judicial process because his silence as to the reasons for his recusal has engendered much public speculation. This is fallacious. The public was placed on notice of Judge Guidry's reasons from news reports and Judge Ashe's published opinions. Further, extensive public interest in the Archdiocese's bankruptcy does not inherently justify vacating Judge Guidry's order. As Judge Ashe's opinion states, there is a countervailing risk, which this Circuit has noted, to "mindlessly vacat[ing]" a recused ***408** judge's rulings—especially where that ruling rested on sound legal reasoning. *See Patterson*, 335 F.3d at 486.

B. Standing.

Until 1978, bankruptcy appellate standing was governed by a statute that stated: "*A person aggrieved* by an order of a referee may... file with the referee a petition for review...." *In re Coho Energy, Inc.*, 395 F.3d 198, 202 (5th Cir. 2004) (emphasis added) (quoting 11 U.S.C. § 67(c) (1976) (repealed 1978)). "Congress expressly removed this provision when it enacted the Bankruptcy Code in 1978." *Matter of Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt.*), 74 F.4th 361, 366 (5th Cir. 2023). Nonetheless, various of this court's opinions, relying largely on a footnote's worth of dicta in a 1994 opinion, [8] have continued to apply the "person aggrieved" standard for appeals from bankruptcy courts. Not only that, but the courts have described this as a higher and "more exacting" standard for evaluating standing in bankruptcy appeals than in cases arising under Article III. *Id.; see also Matter of Dean* (*In re Dean*), 18 F.4th 842, 844 (5th Cir. 2021); *Matter of Technicool Sys., Inc.* (*In re Technicool*),

896 F.3d 382, 385 (5th Cir. 2018); *Fortune Nat. Res. Corp. v. U.S. Dep't of Interior*, 806 F.3d 363, 366 (5th Cir. 2015); *In re Coho Energy, Inc.*, 395 F.3d at 202. [9]

In light of the statutory change, the ground for imposing this superseded gloss on the provisions governing bankruptcy appeals to district courts and courts of appeals is uncertain at best. *See* 11 U.S.C. §§ 158(a), 158(d)(2); *see also In re Cap. Contracting Co.*, 924 F.3d 890, 896 (6th Cir. 2019). Indeed, this court's "exacting" "person aggrieved" test may be incompatible with the Supreme Court's decision in *Lexmark*, which cast doubt on the role of prudential standing rules in federal courts. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1386, 188 L.Ed.2d 392 (2014); *see also In re GT Automation Grp., Inc.*, 828 F.3d 602, 605 n.1 (7th Cir. 2016).

[6] But even if we were to assume, arguendo, that the "narrower" bankruptcy appellate standing test did not apply and that Article III standing controls this appeal, the outcome would be the same. Appellants cannot show that the bankruptcy court's order removing them from the Committee injured a legally protected interest. Specifically, they were not in any way "sanctioned," and no creditor has a "right" to serve or continue serving on a Creditors Committee.

[7] "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016), (quotation marks omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)), *as revised* (May 24, 2016). Here, the Appellants have failed to demonstrate an injury to any legally protected interest. The statutory procedures for appointing members of a Creditors Committee do not guarantee any member the right to *remain* on the Committee. Instead, ***409** Section 1102 of the Bankruptcy Code, which authorizes the formation of Creditors' and Equity Security Holders' Committees, states that the United States Trustee shall appoint an Official Committee of Unsecured Creditors and other committees "as the United States Trustee deems appropriate." 11 U.S.C. § 1102(a)(1). The provision goes on to specify the procedures that should be taken to remove a committee member:

> On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders.

Id. § 1102(a)(4). It is undisputed that the bankruptcy court issued the June 7 Order sua sponte, without notice and hearing or a formal request from a party in interest. Nonetheless, if there is a right to be removed from a committee according to the procedures specified under Section 1102(a)(4), it is distinct from the right to serve on the committee in the first place. [10]

[8] We hold that a lack of proper notice and hearing under Section 1102(a)(4) cannot violate a legally protected interest when there is no underlying right to remain on a Creditors Committee, and when the ultimate outcome of the proceeding would have been the same. Here, Trahant had admitted to violating the protective order, the Appellants had participated in the Trustee's investigation and testified under oath, and the Trustee had already submitted its report after a comprehensive investigation to the bankruptcy court. The Appellants were clearly on notice that Trahant's continued representation of them, and his open violation of the protective order, would have significant consequences for the course of the bankruptcy case. But Appellants chose to continue retaining him as their counsel, and the court's action was geared towards protecting their choice of counsel. In short, by the time the bankruptcy court removed Appellants from the Committee, the evidentiary record justifying their removal was well settled and well known to the Appellants and all other parties. That the bankruptcy court did not reveal the full contents of the Trustee's report, which dealt with extremely sensitive information that the bankruptcy court had designed specific procedures to protect, does not change this analysis.

In addition, this case is readily distinguishable from constitutionally-footed due process cases, where courts have identified a legally protected property interest requiring a pre-deprivation hearing. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495, 84 L.Ed.2d 494 (1985) (holding that a public employee must be provided with "some kind of hearing" before termination); *Goldberg v. Kelly*, 397 U.S. 254, 263–64, 90 S. Ct. 1011, 1017–18, 25 L.Ed.2d 287 (1970) (holding

that the government may not terminate welfare benefits without providing a pre-termination evidentiary hearing). Appellants have not pointed to any authorities suggesting that there is any right to serve on a Creditors Committee, nor have they identified any property rights that have been negatively affected by their removal from the Committee. Their substantive rights as creditors in the bankruptcy ***410** case have not been impaired in any way by their removal from the Committee.

Further, in removing the Appellants from the Committee, the bankruptcy court did not personally sanction them. Removal did not flow from their individual conduct, but from the conduct of an attorney they could fire at any time. That distinguishes this case from *In re Cleveland Imaging & Surgical Hospital, L.L.C.*, 26 F.4th 285, 295 (5th Cir. 2022). In *Cleveland*, the bankruptcy court levied over $40,000 in sanctions against parties for a bad-faith violation of an automatic stay. *Id.* The sanctioned parties' property rights in assets outside the bankruptcy were curtailed by the sanctions order. Here, however, Appellants have lost nothing. Finally, the bankruptcy court's order did not amount to an "injunction" granting them standing to appeal the bankruptcy court's order, and the Appellants do not have separate standing as ex-committee members. [11]

In sum, Judge Ashe did not abuse his discretion in denying the Appellants' Rule 60(b)(6) motion, and the Appellants lacked standing to appeal from the bankruptcy court to the district court. Accordingly, the district court's orders and judgment are AFFIRMED for the reasons stated in this opinion. [12]

All Citations

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Footnotes

1 *In re Roman Cath. Church of Archdiocese of New Orleans*, 678 F. Supp. 3d 797, 804 (E.D. La. 2023) (footnote omitted) [hereinafter "*Trahant Ashe Opinion*"]. This opinion, which is integrally related to this case but is not the subject of this appeal, involves the motions for rehearing and motions to vacate filed by the Appellants' attorney, Mr. Trahant, as they relate to the bankruptcy court's sanction against him. In that opinion, Judge Ashe denied Trahant's motions for rehearing and motion to vacate, but withdrew Judge Guidry's March 27, 2023, opinion that affirmed the bankruptcy court.

2 The protective order has been amended as needed but remained in place as of June 2023. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 806.

3 Counsel for the Committee reached out to the Archdiocese's counsel on January 4, 2022, with concerns about the continued service of the priest as a chaplain at a local high school. In response, the Archdiocese's counsel contacted the Archdiocese and learned that the priest was on extended medical leave and consequently had no contact with minors at the school. *Trahant Ashe Opinion*, 678 F. Supp. 3d at 806.

4 Below, we affirm Judge Guidry's conclusion that Appellants lacked standing, but we do so on different grounds.

5 Trahant's appeal of the bankruptcy court's sanction against him is pending in this court in case number 23-30466.

6 We reject the Appellants' argument that they were entitled to de novo review by the district court. This circuit recently held in a similar case that another district judge did not err in applying the harmless error standard to another Rule 60(b)(6) motion based on Section 455. *See Roberts*, 54 F.4th at 855. Appellants' alternative arguments that they were entitled to de novo review by the district court because their due process rights were violated also fail. *See United States v. Brocato*, 4 F.4th 296, 301 (5th Cir. 2021) ("If a failure to recuse constitutes a due process violation, such error is not subject to harmless-error review."). Appellants argue that

their due process rights were violated because Judge Guidry's dismissal sanctioned them without notice and a hearing. This is wrong. First, as elaborated below, the bankruptcy court's removal of the Appellants from the Committee was not a sanction. Second, any procedural due process errors committed by the *bankruptcy court* cannot be bootstrapped into Judge Guidry's failure to recuse and the *Liljeberg* analysis as applied to him.

7 *See Shell Oil Co. v. United States*, 672 F.3d 1283, 1294 (Fed. Cir. 2012) (holding that "a judge's failure to recuse does not automatically constitute harmless error whenever there is *de novo* review on appeal").

8 *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 210 n.18 (5th Cir. 1994).

9 This would appear to put our court in conflict with at least the Eleventh Circuit. *See In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1325 n.3 (11th Cir. 2014); *see also In re Schubert*, No. 21-3969, 2023 WL 2663257, at *2–*3 (6th Cir. Mar. 28, 2023) (insinuating that the "person aggrieved" test had likely been overruled by the Supreme Court).

10 Further, even if the Bankruptcy Court did give short shrift to the procedural requirements of Section 1102(a)(4), its order specified that it was also acting pursuant to its powers under Section 105(a) of the Bankruptcy Code in order to "prevent an abuse of process and to ensure adequate representation of creditors." 11 U.S.C. § 105(a).

11 The authorities cited by the Appellants for that argument relate to the standing of the *Committee*—not its *individual members*, and certainly not its *former* members. *See In re Dow Corning Corp.*, 212 B.R. 258, 264 (E.D. Mich. 1997); *S. Pac. Transp. Co. v. Voluntary Purchasing Grps., Inc.*, 227 B.R. 788, 791–92 (E.D. Tex. 1998); *The Off. Comm. of Unsecured Creditors of W. Pac. Airlines, Inc. v. W. Pac. Airlines, Inc.* (*In re W. Pac. Airlines, Inc.*), 219 B.R. 575, 578 (D. Col. 1998); *Masters, Mates & Pilots Plans v. Lykes S.S. Co.* (*In re Lykes Bros. S.S. Co.*), 200 B.R. 933, 936 (M.D. Fla. 1996).

12 Accordingly, we DENY the Appellees' motion to dismiss the appeal and DENY the Appellants' motions to view and obtain sealed documents and to unseal the entire appellate record.

End of Document

Faculty

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ruptcy Award and the Robert L. Gernon Award for Outstanding Contribution to CLE, as well as the NCBJ Excellence in Education Award. Judge Norton received her B.A. in French and art history Phi Beta Kappa and *summa cum laude* from Kansas University in 1981, and her J.D. from the Kansas University Law School in 1984, where she was associate editor of its law review.

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