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ALERT

SHOULD I STAY OR SHOULD I GO? THE THIRD CIRCUIT EXPLAINS HOW COURTS SHOULD BALANCE CLASHING STAY FACTORS

By Bruce P. Merenstein

The United States Court of Appeals for the Third Circuit recently issued a rare opinion addressing the analysis courts should undertake when considering a request to stay a trial court judgment or order pending appeal. The four-part test for evaluating a stay request is well-established. Courts consider: (1) whether the party seeking a stay has made a strong showing of likely success on appeal; (2) whether the applicant will be irreparably injured if a stay is not granted; (3) whether issuance of the stay will substantially injure other parties in the case; and (4) where the public interest lies. But most appellate rulings on stay requests consist of short, non-precedential orders granting or denying the stay without any analysis. The court therefore used this recent decision to explain how the four-part test should be applied.

The Decision

In re Revel AC, Inc., No. 15-1253 (Sept. 30, 2015), was a bankruptcy proceeding in which the debtor, a casino owner, sought to sell its property free and clear of any leases, including one with a night club that operated on the casino's property. The club owner objected to the loss of its possessory interest in a portion of the casino property, but the bankruptcy court rejected its claim, as well as a request to stay the court's order approving the

sale of the property. The district court similarly rejected the club owner's stay request.

The club owner immediately appealed, and, just nine days after the appeal was docketed, the Third Circuit reversed, ordering that the portion of the sale order pertaining to the club owner's lease be stayed pending appeal. Almost nine months later, the court issued its opinion explaining its ruling.

Applying the Stay Factors

The court explained that, while courts must consider and balance all four of the stay factors, the first two—likelihood of success on appeal and irreparable harm that could befall the appellant without a stay—are the most critical to the analysis. And of those two, the most important factor is the first: without a showing that the appellant has a good chance of prevailing on appeal, even the possibility of severe, irreparable harm will not warrant a stay.

The court held that the applicant must show that its likelihood of success is significantly better than negligible, but not necessarily greater than 50%. In other words, to meet the threshold requirement of a strong showing of likely success on appeal, the applicant need not demonstrate that victory is more likely than not, but simply that it has significantly greater than a negligible chance of

prevailing. The second factor, by contrast, typically requires the applicant to show that irreparable harm is not only possible, but likely, if a stay is not granted.

If a party seeking a stay fails to meet *either* of these first two criteria, the court held, a stay should be denied. Where these two factors are both present, however, a court should proceed to a balancing test that considers all four factors.

As part of this balancing test, the second and third factors are considered in tandem in a weighing of the equities—that is, a comparison of the severity and redressability of any harms that the opposing parties are likely to suffer if a stay is granted or denied. The fourth factor is then added to the equation, pushing the equities a little further toward whichever result—granting or denying the stay—the public interest favors.

Ultimately, courts must apply a sliding scale in which a stronger showing of likely success on appeal lessens the showing of irreparable harm needed for the stay. Indeed, even where the equities favor the party opposing a stay, a very strong showing of likely success on appeal may be sufficient to warrant a stay. Conversely, where the likely irreparable harm to the movant is substantial, the showing of possible success on appeal need not be as great (though it still must be significantly greater than negligible).

Applying these standards to the *Revel* case, the court held that the club owner was entitled to a stay because the balance of harms to the parties (and the public) tilted slightly in favor of the club owner, while its likelihood of success on appeal was substantial—the court found that it was “all but assured.”

The Stay Test Following *Revel*

The Third Circuit’s rare precedential opinion discussing application of the stay test clarifies certain points that, as the court’s opinion explains, have sometimes confused and confounded both federal courts and litigants. The court explained the relative importance of the various factors, which ones are absolutely essential to obtaining a

stay, and how all four factors should ultimately be balanced. Discussion of the *Revel* decision is now likely to occupy a prominent place in parties’ stay disputes within the Third Circuit, thanks to the court’s much-needed and detailed analysis of this frequently litigated issue. ♦

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