RT ProExec
INSIGHTS

VOLUME XVIV ISSUE 3 SUMMER 2019

TRIBUNE EXECUTIVES MUST CONTRIBUTE PERSONAL ASSETS TO $200 MILLION SETTLEMENT

Billionaire Sam Zell and other former executives of the bankrupt Tribune Company have reached a $200 million deal to settle the bankruptcy trustee's adversarial claims against them arising out of the disastrous 2007 leveraged buyout (LBO) of the company. According to press reports about the settlement, the $200 million settlement amount, which is still subject to bankruptcy court approval, will "significantly" exceed the company's remaining D&O insurance. The settlement amount in excess of the remaining insurance is to be split among the various individual defendants.

The bankruptcy and subsequent adversarial proceeding both arose out of the December 2007 LBO in which Zell and other investors took the Tribune Company private. The Tribune Company owns or owned the Chicago Tribune, the Los Angeles Times, and a number of other media properties. The LBO transaction resulted in an enormous debt load for the company. The transaction timing was poor as the global financial crisis arose only months after the deal was completed. Within a year of the LBO, the company filed for bankruptcy.

In 2010, the bankruptcy trustee initiated an adversarial proceeding against former Tribune CEO Dennis FitzSimmons, Zell, and eventually, a total of approximately 50 other former Tribune executives. The trustee's complaint sought damages from the defendants for a variety of alleged violations, including breaches of fiduciary duty; unjust enrichment (based on payments made to certain of the defendants in connection with the LBO as well as incentive compensation payments made to certain of the executives); illegal dividends; as well as certain other preference payments and fraudulent conveyances.

Following years of litigation, in late 2018, the Federal District Court judge presiding over the adversarial proceeding directed the parties (including the company's D&O insurers) to mediation. In March 2019, the parties reached an agreement in principle to settle the adversarial proceeding; the agreement was subsequently reduced to a settlement agreement, and on May 31, 2019, the bankruptcy trustee filed a motion for court approval of the settlement.

According to the bankruptcy trustee's motion for settlement approval, the company's D&O insurers and the individual defendants agreed to settle the adversarial claims for a total of $200 million. According to the motion, "the total Settlement Payment is significantly in excess of the available insurance." Pursuant to a schedule in the Settlement Agreement, there were fourteen (14) D&O Insurers on the D&O Program, with several D&O insurers participating twice at varying attachment points.

In exchange for the payment, the defendants (and the insurers) are to receive complete releases. Interestingly, the settlement agreement also includes releases for certain other individual defendants who otherwise would have been entitled to the protection of the now-exhausted D&O insurance proceeds. The settlement agreement excludes from the releases a variety of other parties (including, for example, various advisors to the LBO transaction).

CONTACT

Agents and brokers, for more information contact your local RT Specialty broker:

RT Specialty
180 North Stetson Avenue
Suite 4600
Chicago, IL 60601
(312) 784-6001

RT ProExec

ABOUT THE AUTHOR

This article was prepared by Kevin M. LaCroix, Esq. of RT ProExec. Kevin has been advising clients concerning directors' and officers' liability issues for nearly 30 years. Prior to joining RT ProExec, Kevin was President of Genesis Professional Liability Managers, a D&O liability insurance underwriter. Kevin previously was a partner in the Washington, D.C. law firm of Ross Dixon & Bell.

According to the settlement agreement, "The Settling Defendants will be responsible for allocating individual responsibility for the Settlement Payment between and among the D&O Insurers and between and among the Settling Defendants." According to our review, there is nothing in the settlement agreement specifying how much the D&O insurers (collectively or individually) will contribute to the settlement, or how much the individuals (collectively or individually) will contribute.

The bankruptcy and the adversarial litigation resulted from what clearly was a disastrous transaction. The ultimate settlement of the adversarial proceeding is noteworthy in a number of respects, and not simply because of its massive size. Any D&O claim settlement that reaches nine figures is noteworthy, but this one is particularly noteworthy – as we are not aware of very many (if any) bankruptcy trustee claims that have reached this level.

As it relates to the liabilities of corporate directors and officers, the most noteworthy aspect of this settlement is that the individual defendants are being called upon to contribute to the settlement out of their own personal assets. It is not clear from publicly available settlement documents how much the individuals are contributing. Further, whatever the individuals are contributing collectively, the aggregate amount is going to be split up among a large number of individuals.

The most important takeaway from this situation is that the settlement amount significantly exceeds the limits remaining under the D&O program. It is not as if the Tribune Company did not purchase a meaningful amount of insurance. The list of insurers on the D&O Program suggests that the company purchased a very significant amount of insurance. As defense costs erode the available D&O limits, there can be little doubt that one of the reasons the $200 million settlement so "significantly" exceeded the remaining amount of insurance is that years of defending complex litigation substantially depleted the D&O program's limits. While defending complex D&O suits will always erode the available insurance, this practical consequence of mounting a vigorous defense is particularly noteworthy where, as here, the depletion of the insurance limits ultimately leads to the individuals being required to contribute towards the settlement out of their own personal assets.

D&O insurance buyers, as well as their attorneys and insurance brokers, have always wrestled with the appropriate limit of liability for D&O programs. For public companies, the focus is often on market capitalization performance and peer purchasing patterns. For private companies, limit purchasing decisions are made based on total asset and revenue levels, capital raises, employee counts and retirement plan assets. As this settlement starkly illustrates, leverage must also be taken strongly into consideration when forecasting the appropriate level of D&O limits. Debt-holders are generally not litigious until things go really wrong, but when things do go wrong, the exposures can be catastrophic. With the U.S. economy in a record expansion, and corporate debt levels at historic highs, it is very important to factor debt levels into the conversation when deciding on D&O program limits. From a cost/benefit perspective, buying adequate limits now can reduce the potential of directors and officers making personal contributions to a settlement in the future.

CONTACT

Agents and brokers, for more information contact your local RT Specialty broker:

RT Specialty
180 North Stetson Avenue
Suite 4600
Chicago, IL 60601
(312) 784-6001