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APPELLATE PRACTICE: MOTIONS

'Stay' for Awhile: CPLR 5519(c)Stay Applications in the First Department

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THE FOCUS of this article is applications to the Appellate Division, First Department, pursuant to CPLR 5519(c), for a stay of enforcement of a judgment or order pending an appeal from the judgment or order when a stay is not automatically granted pursuant to the provisions of CPLR 5519(a) or (b).[1] More particularly, we will focus on what is nearly always the first step in the process: an "emergency" application to a single justice—who is called the "duty judge" in the First Department—for an interim stay of enforcement of the judgment or order at issue.[2]

Practitioners interested in a trenchant analysis of the relevant case law should read no further. After all, there are virtually no decisions from the First Department or, for that matter, from the other three departments, explaining why these applications are granted or denied. Rarer still, to the point of being non-existent, are published written decisions from individual justices explaining why they have granted or denied an interim stay. The dearth of decisions is understandable. Unlike the statutes governing other forms of injunctive relief—temporary restraining orders and preliminary injunctions[3]—CPLR 5519(c) does not specify any criteria governing the issuance of a stay. Thus, as one of the rare First Department decisions on point makes clear, "the granting of stays pending appeal…is, for the most part, a matter of discretion."[4] Moreover, stay applications are highly fact sensitive and the volume of appeals the Appellate Division must decide on the merits leaves precious little time for decisions explicating the rationale for determining stay applications under CPLR 5519(c).

The highly fact-sensitive nature of CPLR 5519(c) applications and the Appellate Division's broad discretion make it impracticable to attempt to shed much light on what arguments are likely to be of particular importance in persuading either the duty judge or a full panel of the court to grant or deny relief under CPLR 5519(c). Nonetheless, a couple of points can be made. The respondent who has powerful arguments that the appellant both has little chance of success on the merits and cannot make a plausible showing of irreparable injury, should not be filled with confidence that the application will be denied. The apparent absence of any concrete injury to the respondent if an interim stay is granted can be decisive. When denying an interim stay would moot the appeal (because, for example, the appellant already will have been constrained to do what the order requires before the full panel can decide the motion), an interim stay may be granted largely because the duty judge believes that such an outcome-determinative decision should await a full panel of the court. The key here is that the traditional standards governing the issuance of a temporary restraining order and a preliminary injunction do not govern. That is not to say, however, that they are of little importance. Even if the issuance of a stay is essential to preserving the court's jurisdiction to hear the appeal, when the appeal is palpably without merit, the appellant should not be surprised if her client does not receive its appellate day in court by the denial of a stay, regardless of whether a powerful showing of irreparable injury has been made.

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Accordingly, our focus is on the nuts and bolts of CPLR 5519(c) applications in the First Department, the department with which we have the most experience. Although this review of the nuts and bolts will be of greater interest to practitioners who have not previously ventured into 27 Madison Ave. to make or oppose a CPLR 5519(c) application, attorneys with more experience in these applications may find something new and helpful in our review.

First Things First

We begin with what, as noted above, is usually, but not invariably, the first step in the application process—the so-called "emergency" application to the duty judge for an interim stay of enforcement of the judgment or order. If granted, the stay is an interim one in the sense that it remains in place until a full panel of the court decides the application and issues an order granting or denying the stay. With one exception noted below, regardless whether an interim stay is granted or denied, a briefing schedule will be established with dates fixed for the submission of opposition and reply papers. Interestingly, CPLR 5519(c) contains no language authorizing a single justice (or, in the case of stay applications to the Court of Appeals, a single judge of that court) to issue an interim stay.[5] In any event, the long-standing availability of an interim stay from a single justice reflects two realities: (1) §5519(c) applications may present necessitous circumstances; and (2) during the time it would take for a full panel to be assembled, the appellant could suffer serious and perhaps irreparable injury (e.g., a meritorious appeal could become moot if the order requires the appellant to comply with its assertedly erroneous terms in the interim).

When counsel for the appellant has prepared her motion papers (which should include at a minimum the notice of motion, notice of appeal, the written judgment or order from which the appeal is taken, any written decision by the trial court, and an affirmation or memorandum stating the relevant facts and arguments in support of the stay application) she simply goes to the First Department and fills out a form that elicits the basic facts of the case and the name and contact information for opposing counsel. Before going to the court, however, the appellant must give notice of the application to the opposing party or parties.[6] Although no particular notice period is required, unreasonably short notice may result in the application being heard at a later time.[7] The application may be made on any day of the week, even on weekends or legal holidays if the appellant can surmount the formidable obstacles of

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contacting a First Department justice by telephone and persuading him or her that the application cannot wait until the next business day.

Getting Heard

Assuming, as is typical, the application is opposed, all counsel are present and the application is made on a day in which the court is in session, the next and critical step is that counsel argue their respective positions before a seasoned court attorney whose full-time job is to handle stay applications.[8] This step is critical because the attorneys may never appear before the duty judge. The duty judge changes daily (except during the summer recess, when the duty judge changes weekly). Some justices always or regularly invite counsel into chambers to hear their arguments; others commonly do not or rarely hear counsel in their chambers, and decide the interim stay application on the basis of a review of the moving papers and the oral report of the court attorney. When the duty judge does not hear counsel's arguments in chambers, the party opposing the stay application can be at a relative disadvantage, because they rarely, if ever, see the appellant's motion papers until the day the application is made and commonly do not come to the First Department with any written opposition papers, let alone opposition papers addressing the appellant's specific arguments.

Opposing counsel, however, can seek to minimize and perhaps negate this disadvantage. As noted, in accordance with the briefing schedule that is set after the application for an interim stay is decided, the respondent can file opposition papers that will be reviewed in due course by the full panel.[9] But nothing prevents counsel who expects that her adversary will be making an application under CPLR 5519(c) from coming to the First Department with an affirmation or memorandum of law responding to the arguments counsel anticipates the appellant will make. And opposing counsel, of course, need not see the appellant's moving papers to marshal whatever arguments can be made on a subject that always is of considerable importance to the duty judge—the extent to which her client will or may be injured if an interim stay is granted. The submission of such an affirmation or memorandum, moreover, does not affect the respondent's right to thereafter file opposition papers addressing the specific arguments advanced in the appellant's moving papers.

Appellants making and respondents opposing CPLR 5519(c) stay applications should be aware of the scope of the duty judge's authority. In addition to granting or denying an interim stay, the duty judge can, among other things: Set the briefing schedule and return date of the motion; "mark" the motion as expedited, which will cause it to be submitted to and decided by the full panel more expeditiously; and condition the grant of an interim stay on the appellant's perfecting the appeal promptly and setting the term of the court during which the appeal will be heard. Whether counsel for either party should request the duty judge (either directly or through the court attorney) to take any of these actions raises strategic considerations that are beyond the scope of this article. Attorneys often will need to make these calls on the fly by seeking to gauge how well his or her argument is going before the court attorney or duty judge. On the plus side, obtaining an expedited appeal can be quite helpful to the prevailing party, given the lengthy period allotted to perfect the appeal. On the other hand, if the respondent requests that the duty judge condition the grant of an interim stay on the appellant perfecting the appeal promptly, that certainly will increase the chance both that the interim stay will be granted and that the full panel will grant the application.[10]

The duty judge is no more likely than any other justice of the First Department to be a member of the panel that decides whether to grant a stay pending the determination of the appeal; the composition of the panel is determined administratively, without regard to who ruled on the application for an interim stay. Obviously, however, who the duty judge is on a given day can be very important. If the appellant knows in advance who the duty judge will be, she can review any decisions by that justice that bear on the merits and shape her arguments accordingly. Can the appellant know in advance who the duty judge will be? Because the First Department does not disclose in advance who the duty judge will be (and will not disclose who the duty judge is if the appellant calls the clerk's office on the day she plans to seek an interim stay), the answer may seem to be no.

Before going to the court, the appellant must **give notice of the application** to the opposing party or parties. Although no particular notice period is required, unreasonably **short notice** may result in the application being heard at a **later time**.

The savvy practitioner, however, knows that the answer is a qualified yes. If the appellant informs opposing counsel that she plans to seek an interim stay on, for example, Tuesday afternoon or Wednesday morning and is ready to proceed on either day, counsel (or a paralegal) can go to the First Department on Tuesday morning and frequently can find out who the duty judge is that day. Assuming, as is generally the case, that at least one interim stay application is being made, counsel can ask one or both of the attorneys involved in that application to let her know who the duty judge is after they either appear before the duty judge or receive a copy of the signed order granting or denying the interim stay application. If counsel thinks the duty judge that day is more likely than other justices to be favorably inclined toward her position, she can notify opposing counsel that she will be making the application at 2:00 p.m. If counsel is less sanguine upon learning who the duty judge is, she may decide that she is better off waiting until the next day, even though she will not then know who the duty judge will be that day. And during the summer recess when the duty judge changes weekly, the appellant has a greater opportunity to learn who the duty judge will be. Of course, however, the appellant may have little room to maneuver if the terms of the order sought to be stayed require that the stay application be made as soon as possible.

Final Steps

One final subject should be briefly addressed. If a stay pending appeal is granted and the judgment or order thereafter is affirmed or modified, the respondent should serve the appellate court's order on the appellant, with notice of its entry, as soon as possible. That is because CPLR 5519(c) provides that the stay automatically continues for five days after such service upon the appellant. If the appellant takes an appeal (i.e., files a notice of appeal) or moves for permission to appeal to the Court of Appeals, the stay will continue automatically only if the appeal is taken or leave to appeal is sought before the expiration of the five-day period. Even when the appellant promptly so acts, CPLR 5519(c) permits the respondent to move in the Court of Appeals for an order vacating the stay. And when the appellant promptly so acts by moving in the Appellate Division for leave to appeal to the Court of Appeals, the respondent has another avenue of recourse: a cross motion to vacate the stay.

1. The cases in which a stay is automatically granted, provided only the appellant serves upon the adverse party a notice of appeal or an affidavit of intention to move for permission to appeal, include cases in which the appellant is the state or a political subdivision of the state (CPLR 5519(a)(1)), the judgment or order directs the payment of a sum of money and an appropriate undertaking is given (CPLR 5519(a)(2)) and the judgment or order directs the conveyance of real property and an appropriate undertaking is given (CPLR 5519(a)(6)).

2. An interim stay will either not be sought—or not be acted on if it is—when there is ample time for a panel of the First Department to decide the stay application before the appellant is required to act in conformity with the judgment or order from which the appeal is taken.

3. See CPLR 6301, 6313

4. *Matter of Grisi v. Shainswit*, 119A.D.2d 418, 421 (1st Dept. 1986)

5. By contrast, CPLR 5704(a) expressly provides that "[t]he appellate division *or a justice thereof* may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to the appellate division" (emphasis added).

6. See §600.2(a)(7) of the Rules of the Appellate Division, First Department.

7. If opposing counsel is not present despite having been given sufficient notice, the court attorney will call opposing counsel. If the circumstances warrant, the application may be heard in the absence of opposing counsel. The court attorney, however, may communicate to the duty judge the substance of opposing counsel's grounds for opposing the application.

8. During the summer recess, other court attorneys perform this function on a rotating basis.

9. Of course, if the denial of an interim stay application renders the appeal moot, no opposition can or need be filed as the application will not be referred to a panel of the court.

10. Although the duty judge has the authority to condition the stay on the posting of an undertaking, they are virtually never required. Although space constraints preclude any effort to explain their rarity in any depth, a central consideration is the authority of the duty judge to take other actions, such as expediting the determination of the application by a full panel and expediting the appeal itself.