

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Can a Bankruptcy Court Grant a Stay Pending an Appeal from a District Court or BAP to a Court of Appeals?

Contributing Editor:

Henry M. Karwowski
Trenk, DiPasquale, Webster, Della Fera
& Sodono PC; West Orange, N.J.
hkarwowski@trenklawfirm.com

It is clear that a bankruptcy court has, under Bankruptcy Rule 8005, the authority to grant a stay of a judgment or order or other relief pending an appeal to a district court or bankruptcy appellate panel. What is not so clear is whether a bankruptcy court has authority to grant a stay pending a further appeal to a court of appeals, or whether a stay pending an appeal to a district court or appellate panel continues during a further appeal to a court of appeals. Surprisingly, few courts have addressed the issue. Their conclusion is that bankruptcy courts do not have such authority.

Not surprisingly, their conclusion relies on an analysis of the analogous issue of whether a district court in a non-bankruptcy civil proceeding can grant a stay pending resolution of a petition for *certiorari*. Accordingly, this article briefly addresses whether a district court can grant a stay pending a petition for *certiorari*, and concomitantly whether a bankruptcy court can grant a stay pending appeal from a district court or appellate panel to a court of appeals.¹

Can a District Court Grant a Stay Pending Resolution of a Petition for Certiorari?

Most courts have held that a district court lacks authority to grant a stay pending resolution of a petition for *certiorari*.² Several factors support their conclusion.

¹ This article does not address appeals certified for direct appeal to a court of appeals under 28 U.S.C. § 158(d). A bankruptcy court presumably has power under Bankruptcy Rule 8005 to grant a stay pending a direct appeal to a court of appeals.

² See, e.g., *United States v. Lentz*, 352 F.Supp.2d 718, 726 n.17 (E.D. Va.) (citing cases), *cert. denied*, 544 U.S. 979 (2005).

About the Author

Henry Karwowski is a shareholder of Trenk, DiPasquale, Webster, Della Fera & Sodono PC in West Orange, N.J., is an adjunct professor at Seton Hall School of Law in Newark, N.J., and is the author of New Jersey Bankruptcy Rules Annotated.



Henry M. Karwowski

First, § 2101(f) of title 28, the governing statute, provides in relevant part that “[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court

Second, courts have long held that as a matter of principle, and without regard to § 2101(f), the power of a district court to grant a stay pending a writ of *certiorari* terminates when the court of appeals issues its mandate.⁶

Third, a district court lacks authority to grant a stay pending a writ of *certiorari* if the applicant has already sought and failed to obtain from the circuit court a stay of its mandate. Indeed, to hold otherwise would violate the circuit court’s mandate.⁷

Fourth, a court of appeals, as compared to a district court, is in a better position to determine whether the applicant satisfies the standard for granting a stay pending a writ for *certiorari*, particularly in a case in which the appellate court has

Feature

on writ of *certiorari*, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of *certiorari* from the Supreme Court.”³ It further provides in relevant part that “[t]he stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court.”⁴ Courts have interpreted § 2101(f) to provide that only a court of appeals or a Supreme Court justice can grant a stay pending a writ of *certiorari*.⁵

³ 28 U.S.C. § 2101(f).

⁴ *Id.*

⁵ See, e.g., *Lentz*, 352 F.Supp.2d at 725-26. See also *Cementos Guadalupe S.A. v. United States*, 727 F.Supp. 614, 616-19 (Cl. Int'l Trade 1989) (citing Federal Rule of Appellate Procedure 41, which governs the stay of a circuit court’s mandate, and related authority for proposition that “where a district court arguably has the power to grant an injunction staying execution of a judgment pending a petition for *certiorari*, absent extraordinary circumstances, the court of appeals is the appropriate forum to hear the application”).

reversed or modified the district court’s determination. The standard involves a two-step process in which the court first determines whether a balance of the equities and the risk of irreparable injury favor a stay, and if so, whether the Supreme Court would likely grant *certiorari*.⁸

Finally, cases in which a court held that a district court can grant a stay pending a writ of *certiorari* are less

⁶ See, e.g., *Gander v. FMC Corp.*, 733 F.Supp. 1346, 1347 (E.D. Mo. 1990) (citing *Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 177 (1922)).

⁷ See, e.g., *Lentz*, 352 F.Supp.2d at 726-27 (denying defendant’s motion for stay of trial pending writ of *certiorari* because circuit court had already denied defendant’s request for stay of mandate pending filing of *certiorari* petition and contrary decision on motion would allow district court to improperly revisit circuit court’s implied ruling that defendant had failed to demonstrate that *certiorari* petition presented substantial question and that good cause for stay existed).

⁸ See, e.g., *Studiengesellschaft Kohle v. Novamont Corp.*, 578 F.Supp. 78, 80 (S.D.N.Y.) (district court lacked jurisdiction to grant stay of judgment pending disposition of writ of *certiorari*), *cert. denied*, 464 U.S. 939 (1983).

than persuasive. For instance, in *Keyes v. United States Fid. & Guar. Co.*,⁹ the court opined that 28 U.S.C. § 350, the predecessor of § 2101(f), authorized a district court to grant a stay pending application for a *writ of certiorari*. The language in § 350, however, was identical to the language in § 2101(f).¹⁰ As noted, courts have interpreted § 2101(f) to provide that only an appellate court or a Supreme Court justice can grant a stay pending a *writ of certiorari*. Also, in *Keyes*, the court held that despite its interpretation of § 350, the stay applicants were still nevertheless required to seek a stay from the appellate court because that court had already entered an initial stay. Thus, the court's statement regarding a district court's authority to grant a stay constitutes mere dictum.¹¹ Next, in *Filardo v. Foley Bros. Inc.*, the court ordered a stay of execution of a judgment pending an application for review, by *certiorari*, of a determination of the state court of appeals.¹² Although the court noted that an application for such relief should ordinarily be made to the court of appeals or a Supreme Court justice, the court, citing § 350, held that it could grant the application because the mandate had already been filed with the lower court.¹³ Such reasoning is inconsistent with the *Gander* line of authority cited above. Last, in other cases in which a court determined, either expressly or implicitly, that a district court can grant a stay pending a *writ of certiorari*, the court in each case failed to provide any analysis in support of its determination.¹⁴

Can a Bankruptcy Court Grant a Stay Pending Appeal to a Court of Appeals?

Of the few courts to address the issue, each has held that a bankruptcy court lacks the authority to grant a stay

pending a bankruptcy appeal from a district court or appellate panel to a court of appeals.¹⁵ The factors supporting a district court's lack of authority to grant a stay pending a *writ of certiorari* likewise support the proposition that a bankruptcy court lacks authority to grant a stay pending an appeal from a district court or appellate panel to a court of appeals. In fact, the statute governing bankruptcy appeals can be read to require a similar analysis.¹⁶

For instance, the language of the applicable Bankruptcy Rule suggests that only a district court or bankruptcy appellate panel itself, or the court of appeals, may stay the judgment of the district court or panel. Bankruptcy Rule 8017(b) provides, in relevant part, that "[o]n motion and notice to the parties to the appeal, the district court or the bankruptcy appellate panel may stay its judgment pending an appeal to the court of appeals."¹⁷ Further, Bankruptcy Rule 8017(c) provides that "[t]his rule does not limit the power of a court of appeals or any judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."¹⁸ The rule does not refer to a bankruptcy court's authority to grant a stay. In contrast, Bankruptcy Rule 8005 expressly authorizes a bankruptcy court to grant a stay of its own order or judgment pending appeal to a district court.¹⁹

In fact, Bankruptcy Rule 8017(b) provides further: "If before the expiration of a stay...there is an appeal to the court of appeals by the party who obtained the stay, the stay shall continue until final disposition by the court of appeals."²⁰ Some courts have held, on the basis of this language, as well as practical considerations and the interests of clarity and efficiency, that the filing of a notice of appeal to an appellate court divests the district court of jurisdiction to grant a stay pending appeal under Rule 8017(b).²¹ Thus, a district court or appellate panel arguably has authority to grant a stay only in the period before the filing of the appeal to the court of appeals. It stands to reason that

a bankruptcy court cannot have more authority than a district court or panel to grant a stay.

Second, a district court, in adjudicating an appeal from a bankruptcy court, does not issue a mandate. Rather, in order to apprise the bankruptcy court of its ruling, the district court merely transmits, under Bankruptcy Rule 8016(b), notice of the entry of its judgment to the bankruptcy court clerk.²² One could argue that just as the power of a district court to grant a stay pending a *writ of certiorari* terminates upon issuance of the circuit court's mandate, the power of a bankruptcy court to grant a stay pending appeal terminates even earlier—immediately upon transmission of notice of the entry of the district court's judgment.

Third, a bankruptcy court should not have authority to grant a stay pending appeal when a higher court has already denied such a stay. In order to avoid the risk of interfering with the underlying appellate ruling, the bankruptcy court arguably should not have authority to grant a stay even if the applicant has not yet applied to a higher court for a stay.²³

Fourth, a district court or appellate panel is in a better position than a bankruptcy court to determine whether the applicant satisfies the standard for granting a stay pending appeal to a court of appeals, particularly in a case in which the district court or panel has reversed or modified the bankruptcy court's determination. Indeed, although the right to appeal to a court of appeals is automatic and it does not require an examination of whether review is likely,²⁴ a district court or panel, having just adjudicated the appeal, is still better suited to determine whether a balance of the equities and the risk of irreparable injury favor a stay. Also, a district court or panel can better assess the probable costs incurred in the appeal to the district court or panel, the probable costs of

⁹ 44 F.Supp. 723, 724 (S.D. Fla. 1942).

¹⁰ *Novamont*, 578 F.Supp. at 79-80 (citing § 350 and *Keyes*, 44 F.Supp. at 724).

¹¹ *Keyes*, 44 F.Supp. at 724.

¹² 78 N.Y.S.2d 689, 689-90 (Sup. Ct. 1948).

¹³ *Id.*

¹⁴ See, e.g., *Fid. & Deposit Co. of Maryland v. Davis*, 127 F.2d 780, 781 (4th Cir. 1942); *Oceanic Steam Nav. Co. v. Watkins*, 188 F. 909 (2d Cir.), cert. denied, 223 U.S. 723 (1911); *Frommert v. Conkright*, 639 F.Supp.2d 305, 307-8 (W.D.N.Y. 2009); *Allapattah Servs. Inc. v. Exxon Corp.*, 2005 WL 5660477 at *1 (S.D. Fla. Feb. 1, 2005); *Teamsters Pen. Trust Fund of Phila. & Vicinity v. Littlejohn*, 34 F.Supp.2d 285, 287 (E.D. Pa. 1998).

¹⁵ See, e.g., *In re Howell-Robinson*, 2008 WL 5076975 at *2 (Bankr. D. D.C. July 30, 2008) (stay of district court order affirming bankruptcy court order pending appeal must be sought from district or circuit court, and thus granting trustee's motion to enforce bankruptcy court order but without prejudice to debtor's right to seek stay in district or circuit court); *Lindner & Assocs. PC v. Richards (In re Richards)*, 241 B.R. 769, 772-76 (Bankr. D. D.C. 1999) (denying motion to extend stay pending appeal to include appeal of district court order affirming bankruptcy court order). See also *Culwell v. Texas Equip. Co. (In re Texas Equip. Co.)*, 283 B.R. 222, 230-31 (Bankr. N.D. Tex. 2002) (noting that recent opinions suggested that bankruptcy court's stay pending appeal does not apply throughout appellate process and that bankruptcy court's stay does not stay judgment of higher courts).

¹⁶ *Richards*, 241 B.R. at 774 (citing 28 U.S.C. § 158(c)(2), which provides, in relevant part, that "[a]n appeal [from a bankruptcy court] shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts").

¹⁷ Fed. R. Bankr. P. 8017(b).

¹⁸ Fed. R. Bankr. P. 8017(c).

¹⁹ Fed. R. Bankr. P. 8005.

²⁰ Fed. R. Bankr. P. 8017(b).

²¹ See, e.g., *Iron Mt. Corp. v. AWC Liquidation Corp. (In re AWC Liquidation Corp.)*, 292 B.R. 239, 243 (D. Del. 2003) (district court lacked jurisdiction to entertain motion to stay pending bankruptcy appeal to circuit court after appeal had been filed, and that such motion was more properly directed to circuit court); *In re One Westminster Co.*, 74 B.R. 37, 38 (D. Del. 1987) (district court lacked jurisdiction to entertain motion for stay pending bankruptcy appeal because appellant had failed to move district court for stay before it had filed appeal to circuit court). But see *W.R. Grace & Co. v. Libby Claimants (In re W.R. Grace & Co.)*, 2008 WL 5978951 at **3-7 (D. Del. Oct. 28, 2008) (district court retained jurisdiction to order stay pending bankruptcy appeal even after appeal had been taken), *aff'd*, 591 F.3d 164 (3d Cir. 2009), cert. denied, 2010 WL 2481384 (2010).

²² *In re Capitol Hill Group*, 330 B.R. 1, 3-4 (Bankr. D. D.C. 2005) (noting that "device of a mandate does not even exist in the case of a district court's judgment disposing of an appeal from a bankruptcy court," and thus, holding that absence of mandate did not bar bankruptcy court's enforcement of district court's ruling).

²³ *Richards*, 241 B.R. at 775.

²⁴ *Id.* at 776.

an appeal to a court of appeals and the probable duration of that appeal.²⁵

Finally, although one can argue that a bankruptcy court should have authority to grant a or continue a stay pending an appeal of a district court or panel order affirming its own order, because such stay would presumably not interfere with the appellate court's mandate, and that authority to grant a stay should be circumscribed only when the district court or panel has reversed or modified the bankruptcy court's order, courts and parties alike would benefit from a clear rule providing that the district court or panel has the authority, regardless of its disposition of the bankruptcy court's decision, to grant a stay of its judgment pending appeal to a court of appeals.²⁶

Conclusion

A bankruptcy court likely lacks authority to grant or continue a stay pending a bankruptcy appeal from a district court or bankruptcy appellate panel to a court of appeals. ■

Reprinted with permission from the ABI Journal, Vol. XXX, No. 4, May 2011.

The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 13,000 members, representing all facets of the insolvency field. For more information, visit ABI World at www.abiworld.org.

²⁵ *Id.* at 775.

²⁶ *Id.* at 775-76.