



Aug 28, 2024

Categories:

[Publications](#)

Authors:

[Jared M. Tully](#)

[Blake N. Humphrey](#)

Stays Pending Appeal: The Status Quo's Best Friend

When it doesn't end in settlement, litigation will inevitably end with winners and losers. That is, one side will obtain a favorable outcome or ruling, while the other side does not. Often, the aggrieved party will seek review of the trial court's decision in an appellate court. When filing an appeal, the aggrieved party may ask, "Why can't this decision just be postponed until after my appeal is resolved?" Enter the concept of a stay pending appeal.

In modern day appellate practice, the quintessential "stay pending appeal" plays a pivotal role in ensuring that a reviewing court has the opportunity to engage in meaningful deliberations. When a party seeks a "stay" of a lower court's decision pending appeal, they are essentially asking the appellate court to halt enforcement of the ruling until the appeal can be decided on the merits. Ultimately, a stay is considered an "extraordinary remedy" for which the moving party bears a heavy burden. *See Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973).

Over time, federal courts have developed a robust body of case law regarding when a stay pending appeal is appropriate. As Chief Justice Roberts explained in *Nken v. Holder*,

It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942), and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.*, at 9–10 (footnote omitted). A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

See 556 U.S. 418, 421 (2009) (cleaned up). To guide this general analysis, the U.S. Supreme Court has advised courts to consider the following four factors in deciding whether to stay a lower court's ruling pending the outcome of the appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors . . . are the most critical." *Id.*

The four *Nken* factors underscore the value of maintaining fairness and justice within the judicial system. First off, a primary reason for seeking a stay is to preserve the status quo. In many cases, when a trial court issues a ruling or judgment, that decision might lead to substantial changes in or alterations to the parties' behavior or conduct. Staying enforcement of the decision preserves the status quo and gives the appellate court time to decide the issues. Additionally, a stay also promotes fairness by protecting the aggrieved party from any harm caused by the ruling and otherwise accounts for injury to the non-moving (or non-aggrieved) party. This ensures that *both parties'* rights are not compromised while the appeal is being considered. Finally, this test ensures that the public's interest is accounted for in determining whether to stay a ruling pending appeal.

Of course, a stay of a ruling or judgment is not the only type of stay available—during the pendency of an interlocutory appeal, for example, a party can seek a stay of the district court's underlying (and otherwise ongoing) proceedings pending the appeal. See *Landis v. North American*, 299 U.S. 248, 254 (1936). As courts have recognized in this context, "Application for an appeal does not automatically stay proceedings in the district court; a stay pending appeal will only exist if the district judge or the Court of Appeals shall so order." See *Graham v. Dhar*, 2020 WL 8184344 (S.D. W. Va. Aug. 28, 2020). When considering this type of stay request, courts consider three factors: "(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." See *Johnson*

v. DePuy Orthopaedics, Inc., 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012).

Sometimes, a stay of the district court's proceedings pending an interlocutory appeal is automatic. Recently, in the context of the Federal Arbitration Act (FAA), the Supreme Court recognized that, when a federal district court denies a party's motion to compel arbitration under the FAA, the lower court "must stay its proceedings" while the appeal is ongoing. See *Coinbase, Inc. v. Bielski*, 559 U.S. 736, 738 (2023). As the Supreme Court explained, "Absent an automatic stay of district court proceedings, Congress's decision in § 16(a) [of the FAA] to afford a right to an interlocutory appeal would be largely nullified." *Id.* at 743. More specifically, "[i]f the district court could move forward with pre-trial and trial proceedings while the appeal on arbitrability was ongoing, then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost—even if the court of appeals later concluded that the case actually had belonged in arbitration all along." *Id.*

Suffice it to say, when you are pursuing an appeal, it is wise to consider whether it is appropriate to seek a stay pending that appeal. As a practical point, keep in mind that Federal Rule of Appellate Procedure 8(a)(1)(A) provides that a party seeking a stay "must ordinarily move first in the district court" for "a stay of the judgment or order of a district court pending appeal." Like many rules, this is one with exceptions. For instance, without moving the district court, a party can seek a stay from the appellate court if it can show that either "moving first in the district court would be impracticable," or "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." See Fed. R. App. P. 8(a)(2)(A)(i)–(ii).

At its core, the concept of a stay pending appeal ensures fairness and justice within the legal system. It allows the appellate court to review the case without forcing the aggrieved party to comply with a potentially erroneous judgment. This is especially important in cases where the lower court's ruling is controversial or where there are significant legal questions at stake.

Frost Brown Todd's appellate advocates have a proven track record of success in appeals involving questions of first impression, bet-the-company judgments, and decisions that shape the rules under which our clients will operate well into the future. For more information, please contact the authors or any attorney with the firm's [Appellate Practice Group](#).

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.