

The Hidden Risks and Benefits of Requesting a Stay Pending Appeal

By Erik R. Zimmerman

Suppose that you are appealing a judgment that will injure your client while the appeal is pending. For example, the trial court may have entered an injunction that requires an immediate and costly change in your client's conduct. You are therefore considering whether to ask the appellate court to stay the judgment until it rules on the merits of your appeal. The question is how to balance the potential benefits and risks of making such a request.

It goes without saying that obtaining a stay is difficult. Although the nomenclature varies by jurisdiction—you would file, for example, a “motion for stay pending appeal” in the Fourth Circuit, Fed. R. App. P. 8, and a “petition for a writ of supersedeas” in the North Carolina Court of Appeals, N.C. R. App. P. 8, 23—the governing standards are largely uniform. You must establish, *inter alia*, that you are likely to succeed on the merits and that your client would suffer irreparable harm absent a stay. *See, e.g.*, 16A Charles Alan Wright et al., Federal Practice & Procedure § 3954 (4th ed.); *Meares v. Town of Beaufort*, 667 S.E.2d 244, 254 (N.C. Ct. App. 2008). These requirements are demanding, and it is particularly challenging to satisfy them due to the page constraints for stay requests. *See* Fed. R. App. P. 27(d)(2) (limiting motions to 20 pages, and replies to 10 pages).

Even so, a stay motion might initially seem to have substantial upside and little or no downside. The benefit is clear: If granted, the stay would foreclose any harm to your client while the appeal is pending. And the risk might seem small or even nonexistent: Although your client will suffer harm while the appeal is pending if the stay is denied, the client would have suffered that same harm if you had not moved for a stay at all.

On reflection, however, the analysis is more complicated. In theory, a loss on the stay motion could make it more difficult to succeed on the merits of the appeal, which would leave your client in a *worse* position than if you had not moved for a stay in the first place. If this long-term risk of losing the appeal outweighs the short-term benefit of obtaining a stay, a stay motion is far less attractive.

There are at least two ways in which defeat on a stay motion might make success on the merits of the appeal more difficult. First, the court might deny the stay by issuing an opinion that concludes that you are unlikely to succeed on the merits, or even that your position lacks merit altogether. Such a ruling could theoretically become law of the case and bind the merits panel. *See Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997). And even if the opinion is not strictly law of the case, the merits panel still might defer to the reasoning of the panel that denied the stay. *See* 18B Charles Alan Wright et al., Federal Practice & Procedure § 4478.5 (2d ed.).

Second, even if the court does not issue an opinion, its ruling on the stay motion could still color the outcome on the merits if the same panel decides both the stay motion and the merits. If the members of the merits panel have already rejected your stay mo-

tion, they might be locked into their initial view of the case, and the path of least resistance could be to rule against you a second time.

By the same token, these downsides could become upsides if the court *grants* your stay motion. If the court enters a stay via an opinion that addresses the merits, or if the same panel members who granted a stay will also rule on the merits, you might be more likely than otherwise to succeed in the appeal.

In practice, the significance of these risks and benefits varies from jurisdiction to jurisdiction because courts differ in their treatment of stay motions. For example, some courts (including the Third, Fifth, Sixth, Seventh, and Eighth Circuits) have issued opinions on stay motions within the past several years. Others (including the D.C. and Federal Circuits) do not appear to have done so. Moreover, some courts (including the D.C. Circuit) have held that rulings by motions panels are law of the case. Others (including the Third, Seventh, Ninth, and Tenth Circuits) have held that they are not, but have granted some measure of deference to those rulings. And courts are free to determine for themselves whether the panel that decided the stay motion should also decide the merits of the appeal.

The remainder of this article examines the practices of the Fourth Circuit and the North Carolina Court of Appeals in ruling on stay motions. A review of the recent data suggests that there is little correlation between defeat on a stay motion and defeat on the merits of the appeal in either jurisdiction. It therefore appears that the theoretical downsides of seeking a stay are unlikely to materialize in these courts. On the other hand, the limited available data are at least consistent with the conclusion that success on a stay motion has the potential upside of improving the chances of success on the merits. Thus, the first-order analysis seems to be roughly correct in these courts: Moving for a stay offers substantial benefits with little corresponding risk.

I. Fourth Circuit

The first potential risk described above—that a court might deny a stay by issuing an opinion that could have either law-of-the-case effect or persuasive value at the merits stage—is unlikely to materialize in the Fourth Circuit. That is because it is extremely rare for the Fourth Circuit to issue an opinion when disposing of a stay motion. Instead, the court typically issues an order that states in a single sentence that the stay is granted or denied, without providing any explanation. The language of a recent order is representative: “Upon review of submissions relative to the motion for stay pending appeal, the court denies the motion.” Order, *7-Eleven, Inc. v. Chamberlain*, No. 15-354 (4th Cir. Dec. 8, 2015). Because these orders contain no reasoning, it is unlikely that the merits panel would treat them as controlling or even persuasive authority for the conclusion that the appeal lacks merit.

Two caveats are appropriate. First, the Fourth Circuit does not *always* issue an order that lacks reasoning when ruling on a stay motion. But when I reviewed Westlaw and PACER for rulings on stay motions in civil cases within the past five years, I found only three orders in which the Fourth Circuit departed from its usual practice. Two of those orders contained minimal reasoning—the first stated that the moving party had improperly failed to request a stay from the district court in the first instance, Order, *Enovative Techs., LLC v. Leor*, No. 15-1154 (4th Cir. May 5, 2015), and the second listed the stay factors and stated that the moving party had not made a “strong showing” on any of them, Order, *Johnson v. Westlake*, No. 11-2356 (4th Cir. Jan. 5, 2012). The third order, in contrast, extensively analyzed the merits of the case. But it did so because the stay ruling effectively decided the merits of the appeal, which presented an election issue that was scheduled to become moot soon thereafter. See Order, *Perry v. Judd*, No. 12-1067 (4th Cir. Jan. 17, 2012). These examples suggest that the Fourth Circuit’s reasoning in stay orders, if any, is conclusory unless exceptional circumstances are present.

Second, when lightning strikes and the Fourth Circuit does explain its reasoning for denying a stay, there is some risk that its reasoning will have law-of-the-case effect. The Fourth Circuit has held that a jurisdictional ruling by a motions panel does not bind the merits panel, *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d 395, 397 n.1 (4th Cir. 1995), but has not ruled out the possibility that a *merits* ruling by a motions panel could do so. Due to its nearly uniform practice of issuing one-line orders that do not address the merits, however, this risk is remote.

The second potential risk described above—that the same judges might decide both the stay motion and the merits, and therefore might be predisposed to affirm if they have already denied a stay—could be more of a concern in the Fourth Circuit. The court’s Internal Operating Procedures state that, although “there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to a hearing panel,” “[e]very effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a preargument motion or prior appeal in the matter.” 4th Cir. I.O.P.-34.1.

The Fourth Circuit’s practice is consistent with this policy. On PACER, I found 46 civil cases from the past five years in which the Fourth Circuit denied a stay motion and subsequently ruled on the merits, and in which the panels for both rulings were identified. In 23 cases, there was perfect overlap between the panels that ruled on the stay motion and the merits. In 3 cases, two judges overlapped. In 16 cases, one judge overlapped. And in 4 cases, no judges overlapped. Thus, in about 91 percent of these cases, there was at least some overlap between the stay panel and the merits panel. And in about 57 percent of the cases, a majority of the judges who ruled on the stay motion also ruled on the merits.

It is not clear, however, that this overlap had a meaningful effect on the outcome of the appeals. If there were such an effect, one might expect to find that, the greater the overlap in a given case, the greater the likelihood that the court would rule against the appellant on the merits after it denied a stay. But the data from the past five years suggest that this influence is small, to the extent it exists at all. In the 26 cases in which two or three panel members

overlapped, the Fourth Circuit ruled in the appellant’s favor (by reversing or vacating, at least in part) in 3 cases—about 12 percent. In the 20 cases in which one or no panel members overlapped, the court ruled in the appellant’s favor in 4 cases—about 20 percent. The court was therefore slightly less likely to rule in the appellant’s favor on the merits after denying a stay when a majority of the panel members overlapped. That result might be some cause for caution, but it is difficult to conclude that the extent of the overlap had a strong bearing on the outcome of the appeal, particularly due to the small sample size.

In any event, setting aside the question of panel overlap, the overall reversal rates in the Fourth Circuit do not show any correlation between stay denials and adverse merits rulings. I found 54 civil cases from the past five years in which the Fourth Circuit denied a stay motion and subsequently ruled on the merits. The court ruled in favor of the appellant in 8 of those cases—about 15 percent. In comparison, in all civil cases over the past several years, the Fourth Circuit ruled in favor of the appellant less than 8 percent of the time. See Jerry Hartzell, *Probability of Success on Appeal: Reversal Rates for the Fourth Circuit and the North Carolina Courts of Appeals*, Trial Briefs 30, 32 (Apr. 2014), <http://goo.gl/qq8t89>. In other words, in civil cases from the past five years in which the Fourth Circuit denied a stay motion, it was *more* likely to rule for the appellant on the merits than if it had not ruled on a stay motion at all. I doubt that stay denials are truly associated with greater success on the merits—this result is instead likely a statistical artifact. Regardless, these data do not show any significant risk that a stay denial makes it more *difficult* to succeed on the merits.

To paint a complete picture, it is also helpful to consider cases in which the Fourth Circuit *granted* a stay pending appeal and subsequently ruled on the merits. The Fourth Circuit did so in only 8 civil cases over the past five years. In 6 of these cases, there was perfect overlap between the stay panel and the merits panel. In 1 case, two panel members overlapped, and in the other, one panel member overlapped. The court subsequently ruled in the appellant’s favor on the merits in 5 of the cases—about 63 percent. Although this sample is small, these data are at least consistent with two conclusions: When the Fourth Circuit grants a stay, (1) the same panel members are likely to rule on the merits, and (2) the court is far more likely to rule in the appellant’s favor on the merits than in the typical case. That does not mean that the ruling on the stay motion helps to *cause* the merits panel to rule for the appellant. But the data at least leave open that possibility.

II. North Carolina Court of Appeals

The results in the North Carolina Court of Appeals are similar to those in the Fourth Circuit. When ruling on a supersedeas petition, the seemingly uniform practice of the North Carolina Court of Appeals is to issue a per curiam order stating that supersedeas is granted or denied, without providing any reasoning. One characteristic order stated: “The petition and motion filed in this cause on the 17th of March 2014 and designated ‘Petition for Writ of Supersedeas and Motion for Temporary Stay’ are denied.” Order, *Dillard v. Dillard*, No. 14-304 (N.C. Ct. App. Mar. 19, 2014). Thus, even though an opinion that provides reasoning for denying a supersedeas petition could have law-of-the-case effect, *see, e.g., State*

v. Thomsen, 776 S.E.2d 41, 47-48 (N.C. Ct. App. 2015), the risk that the court will issue such an opinion is negligible.

There is also little evidence that overlap between the petition panel and the merits panel in the North Carolina Court of Appeals presents a risk that the merits panel will be predisposed to rule against the appellant after denying a supersedeas petition. The North Carolina Court of Appeals does not have a stated policy of assigning the merits of the appeal to the same judges who decided a supersedeas petition. Nor is there any evidence of overlap in practice because the court does not identify the judges who rule on supersedeas petitions. The orders instead state only that the grant or denial of the petition was entered “[b]y order of the Court.” *E.g.*, Order, *Dillard v. Dillard*, No. 14-304 (N.C. Ct. App. Mar. 19, 2014). Of course, some overlap between the petition and merits panels is inevitable, but there is no evidence that such overlap occurs in a systematic fashion.

There is also little evidence that any overlap between panels affects the outcome on the merits. I was unable to conduct an exhaustive review of rulings on supersedeas petitions from the past several years using the electronic docket for the North Carolina Court of Appeals. Instead, I searched Westlaw for merits opinions in civil cases in which the court noted that it had earlier denied a supersedeas petition. I found 7 such opinions from the past five years. The court ruled in favor of the appellant on the merits in 2 of those cases—about 29 percent. That reversal rate is comparable to the Court of Appeals’ reversal rates in all cases in recent years—about 25 percent to 30 percent. *See* Hartzell, *supra*, at 33. Again, the sample size is small. But these numbers do not suggest that the denial of a supersedeas petition makes the Court of Appeals more likely to rule against the appellant on the merits.

The data in the North Carolina Court of Appeals, like the data

in the Fourth Circuit, also suggest that an appellant might be more likely to succeed on the merits if it first succeeds on a supersedeas petition. I found 11 merits opinions in civil cases from the past five years in which the Court of Appeals noted that it had earlier granted a supersedeas petition. The court ruled in favor of the appellant on the merits in 5 of those cases—about 45 percent. That reversal rate was higher than the court’s overall reversal rate of 25 percent to 30 percent. This result, albeit far from conclusive, is at least consistent with the proposition that success on a supersedeas petition has the upside of improving the chances of success on the merits of the appeal.

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In sum, a review of recent practice in the Fourth Circuit and the North Carolina Court of Appeals fails to show any serious risk that defeat on a stay motion will place a client in a worse position than forgoing a stay motion altogether. At the same time, the limited data on cases in which stays have been granted are consistent with the possibility that success on a stay might enhance the likelihood of success on the merits of the appeal.

To be sure, practice also confirms that succeeding on a stay is a long shot. The Fourth Circuit granted only about 10 percent of stay motions in civil cases that I found on PACER from the past five years. It appears that the North Carolina Court of Appeals grants a similarly small percentage of supersedeas petitions. *See* N.C. Admin. Office of the Courts, *2013-14 Statistical and Operational Report 9* (stating that, from July 2013 to June 2014, the Court of Appeals granted about 10 percent of all “petitions”), <http://goo.gl/S1WWIL>. Even so, if your client has a colorable argument for a stay, it appears that there is little downside in practice to asking for a stay in these courts, and that there may be a considerable upside.

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