

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 55. Appeals Generally (Refs & Annos)

McKinney's CPLR § 5519

§ 5519. Stay of enforcement

Effective: April 4, 2020

[Currentness](#)

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; provided that where a court, after considering an issue specified in question four of [section seventy-eight hundred three](#) of this chapter, issues a judgment or order directing reinstatement of a license held by a corporation with no more than five stockholders and which employs no more than ten employees, a partnership with no more than five partners and which employs no more than ten employees, a proprietorship or a natural person, the stay provided for by this paragraph shall be for a period of fifteen days; or

2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or

3. the judgment or order directs the payment of a sum of money, to be paid in fixed installments, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party shall pay each installment which becomes due pending the appeal and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay any installments or part of installments then due or the part of them as to which the judgment or order is affirmed; or

4. the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of an officer designated by the court of original instance to abide the direction of the court to which the appeal is taken, or an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will obey the direction of the court to which the appeal is taken; or

5. the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken; or

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or

7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.

(b) Stay in action defended by insurer. If an appeal is taken from a judgment or order entered against an insured in an action which is defended by an insurance corporation, or other insurer, on behalf of the insured under a policy of insurance the limit of liability of which is less than the amount of said judgment or order, all proceedings to enforce the judgment or order to the extent of the policy coverage shall be stayed pending the appeal, and no action shall be commenced or maintained against the insurer for payment under the policy pending the appeal, where the insurer:

1. files with the clerk of the court in which the judgment or order was entered a sworn statement of one of its officers, describing the nature of the policy and the amount of coverage together with a written undertaking that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the insurer shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed, to the extent of the limit of liability in the policy, plus interest and costs;

2. serves a copy of such sworn statement and undertaking upon the judgment creditor or his attorney; and

3. delivers or mails to the insured at the latest address of the insured appearing upon the records of the insurer, written notice that the enforcement of such judgment or order, to the extent that the amount it directs to be paid exceeds the limit of liability in the policy, is not stayed in respect to the insured. A stay of enforcement of the balance of the amount of the judgment or order may be imposed by giving an undertaking, as provided in paragraph two of subdivision (a), in an amount equal to that balance.

(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

(d) Undertaking. On an appeal from an order affirming a judgment or order, the undertaking shall secure both the order and the judgment or order which is affirmed.

(e) Continuation of stay. If the judgment or order appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the court to which the appeal was taken. If an appeal is taken, or a motion is made for permission to appeal, from such an order before the expiration of the five days, the stay shall continue until five days after service of notice of the entry of the order determining such appeal.

or motion. When a motion for permission to appeal is involved, the stay, or any other stay granted pending determination of the motion for permission to appeal, shall:

(i) if the motion is granted, continue until five days after the appeal is determined; or

(ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.

(f) Proceedings after stay. A stay of enforcement shall not prevent the court of original instance from proceeding in any matter not affected by the judgment or order appealed from or from directing the sale of perishable property.

(g) Appeals in medical, dental or podiatric malpractice judgments. In an action for medical, dental or podiatric malpractice, if an appeal is taken from a judgment in excess of one million dollars and an undertaking in the amount of one million dollars or the limit of insurance coverage available to the appellant for the occurrence, whichever is greater, is given together with a joint undertaking by the appellant and any insurer of the appellant's professional liability that, during the period of such stay, the appellant will make no voidable transaction as described in article ten of the debtor and creditor law, the court to which such an appeal is taken shall stay all proceedings to enforce the judgment pending such appeal if it finds that there is a reasonable probability that the judgment may be reversed or determined excessive. In making a determination under this subdivision, the court shall not consider the availability of a stay pursuant to subdivision (a) or (b) of this section. Liability under such joint undertaking shall be limited to voidable transactions made by the appellant subsequent to the execution of such undertaking and during the period of such stay, but nothing herein shall limit the liability of the appellant for voidable transactions pursuant to article ten of the debtor and creditor law or any other law. An insurer that pays money to a beneficiary of such a joint undertaking shall thereupon be subrogated, to the extent of the amount to be paid, to the rights and interests of such beneficiary, as a judgment creditor, against the appellant on whose behalf the joint undertaking was executed.

Credits

(L.1962, c. 308. Amended L.1963, c. 532, § 37; L.1965, c. 744, § 1; L.1975, c. 70, § 1; L.1979, c. 239, § 1; [L.1988, c. 184, § 5](#); [L.1988, c. 493, § 1](#); [L.2019, c. 580, § 4](#), [eff. April 4, 2020](#).)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Richard C. Reilly

2020

C5519:4 Court Ordered Stay

As noted under this heading in the main volume, in considering whether to grant or limit a stay under subdivision (c), the court's discretion is the guide. For a review of case law applying the court-ordered stay, and factors considered by a court in exercising its discretion, see [Schaffer v. VSB Bancorp, Inc.](#), 68 Misc.3d 827, 129 N.Y.S.3d 252 (Sup. Ct. Richmond County 2020).

2019

C5519:2 Automatic Stay

Under this heading in the main volume it is noted that the Third and Fourth Departments have held that the stay under CPLR 5519(a) applies strictly to the enforcement of the judgment or order appealed from. Subsequently, the Second Department handed down a series of decisions that took the same position; and in 2009, the First Department appeared to align itself with the other three.

In *Tax Equity Now NY LLC v. City of New York et al.*, (173 A.D.3d 464 [2019]), the First Department has now made clear that the “automatic stay does not extend to matters that are the ‘sequelae’ of granting or denying the relief.” The Court “disavow[ed]” its prior decision in *Eastern Paralyzed Veterans Assn. v. Metropolitan Transp. Auth.*, (79 A.D.2d 516 [1980]) “to the extent it suggests otherwise.” That case had held that a notice of appeal from a denial of a motion to dismiss had stayed the order, relieving the Transportation Authority from its obligation to answer pending the determination of its appeal.

Paragraph 6

Under Paragraph 6, involving real property which the appellant or moving party is in possession or control of but has been directed to convey or deliver, an undertaking is required: that the appellant or moving party will not commit any waste; and that if the judgment or order appealed from is affirmed, the responding party shall be paid for the use and occupancy of the property.

Matter of City of New York, (62 Misc.3d 974 [Kings County 2019]), notes that a “showing of merit is not required by CPLR 5519(a)(6).” “The only role for the court under CPLR 5519(a)(6) is to set the amount of an undertaking.”

In that case, the Court appears skeptical of the appeal--concluding that “there is no apparent basis for” it. The Court then sets a substantial undertaking amount, in excess of \$1,000,000.

Beyond the significant undertaking imposed by the Court, however, it should be noted that protection from an automatic stay in an apparently meritless appeal may also be found in CPLR 5519(c). That subsection authorizes a court from or to which an appeal is taken to “vacate, limit or modify any stay imposed by subdivision (a) ... except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).”

PRACTICE COMMENTARIES

by Richard C. Reilly

Mr. Reilly notes that Commentaries for this section were previously prepared by Professor David Siegel. See the Preface for an explanation of the relationship between Professor Siegel's Commentaries and the present ones.

Generally

C5519:1. Stay on Appeal, Generally.

Subdivision (a)

C5519:2. Automatic Stay.

Subdivision (b)

C5519:3. Stay Where Liability Insurer Defended.

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C5519:4. Court Ordered Stay.

Subdivision (d)

C5519:5. Undertaking re Further Appeal.

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C5519:6. Continuing Stay Through Second Appeal.

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C5519:7. Trial Court's Powers Despite Stay.

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C5519:8. Special Stay in Medical Malpractice Actions.

Generally

C5519:1. Stay on Appeal, Generally.

CPLR 5519 governs the stay on appeal. This is a stay designed to prevent the winner of the judgment or order below from enforcing it while the loser prosecutes an appeal.

If there were no provision for such a stay, a judgment, such as one for money only, could be collected by a victorious plaintiff by use of the enforcement devices of Article 52 notwithstanding that an appellate court might then overturn the judgment and dismiss the plaintiff's action. That would in turn necessitate restitution, see [CPLR 5523](#), but there would be no guarantee that the plaintiff, having collected the judgment, would not have squandered the proceeds. If the plaintiff should be insolvent, the defendant's restitution judgment would be valueless. A stay of enforcement avoids that prospect.

The several subdivisions of CPLR 5519 apply whether a judgment or order is involved. A judgment terminates an action or special proceeding and usually embodies the disposition calling for enforcement under Article 51 (if a non-money judgment) or Article 52 (if a money judgment). But an order may also require enforcement. Article 51 is addressed to both categories of disposition. And while Article 52 is addressed to "judgments" in terms, [CPLR 2222](#)

permits any order calling for the payment of money to be docketed in the manner of a judgment, thereby invoking Article 52 for its enforcement and making a stay of enforcement just as needful as when a judgment is involved.

Subdivision (a) of CPLR 5519 governs the automatic stays--those that result without court order when an undertaking is furnished or some specific act is performed. Subdivision (b) also involves an automatic stay, this one in tort cases involving liability insurers.

If an automatic stay is not available in the particular case under either of the first two subdivisions of CPLR 5519, an application can be made to the court under subdivision (c) for a discretionary stay.

Subdivisions (d) and (e) govern when a second appellate step is taken, the latter offering a stay for the brief period in which to start the second step and then extending the stay through the entire second stage once the step is taken.

Subdivision (f) permits the trial court to proceed with respect to any matter not affected by the stay.

Subdivision (g), which was added by amendment in 1988, is a special provision governing stays in medical malpractice actions.

Subdivision (a)

C5519:2. Automatic Stay.

Subdivision (a) of CPLR 5519 contains the principal “automatic” stays on appeal, i.e., those that result without a court order. If the step required in the paragraph applicable to the particular situation is taken, the stay will result upon the appellant's service of a notice of appeal, or, in a case in which the appeal requires permission, upon the service of an “affidavit of intention to move” for such permission.

In the first situation, the appeal of right, the stay then obtains throughout the appeal. In the second, the appeal by permission, the stay obtains until the motion for permission is determined. If permission is granted, the entry of the granting order constitutes the equivalent of the service of a notice of appeal, [CPLR 5515\(1\)](#), and thus continues the stay throughout the pendency of the appeal.

Paragraph 1

Paragraph 1 is the only paragraph in subdivision (a) under which the stay results based solely on the identity of the appellant. It involves governmental appellants and dispenses with any undertaking or other commitment such as are found under all the other paragraphs of subdivision (a).

Doubt sometimes arises about whether a given official qualifies as a governmental “officer or agency” entitled to the paragraph 1 stay. See, e.g., *Ronan v. Levitt*, 73 Misc.2d 35, 341 N.Y.S.2d 176 (Sup.Ct., Albany County, 1973), *affirmed* 42 A.D.2d 10, 344 N.Y.S.2d 624 (3d Dept. 1973). If the respondent (assume it is the plaintiff) proceeds to enforce the judgment or order on the premise that the appellant (the defendant below) lacks appropriate paragraph 1 status, the appellant can move for a court-ordered stay under subdivision (c) of CPLR 5519. The court can resolve the issue on that motion, granting a stay in its discretion should it decide that the appellant is not entitled to an automatic one under paragraph 1 of subdivision (a).

A question sometimes arises under paragraph 1 about just how much gets stayed when the appeal is taken. Is it just the enforcement of the judgment or order appealed from, as the statute recites, or is it all further proceedings in the action?

Although there had been an apparent split between the appellate divisions on this issue, the question now appears to have been resolved.

The Third and Fourth Departments were the first to hold that the stay applies strictly to the enforcement of the judgment or order appealed from. See, e.g., *Walker v. Delaware & Hudson R.R. Co.*, 120 A.D.2d 919, 503 N.Y.S.2d 173 (3d Dept. 1986), and *Spillman v. City of Rochester*, 132 A.D.2d 1008, 518 N.Y.S.2d 475 (4th Dept. 1987).

In each of the cited cases the municipality had moved either to dismiss or for summary judgment, and in each the motion was denied. When the municipality appealed, it contended that the mere taking of the appeal stayed all further proceedings in the action and would stay the trial itself were it about to come on. The plaintiffs wanted to get on with pretrial proceedings and/or the trial while the appeal pended, and thus moved to vacate the “automatic” stay of CPLR 5519(a) to assure that they could. (The municipality was refusing to proceed.)

In each case the court denied the motion as “unnecessary,” noting that since the trial of the case is not a proceeding to “enforce” the appealed order, it is not stayed while the appeal pends.

Subsequently, the Second Department, handed down a series of decisions that took the same position as the Third and Fourth Departments. *Shorten v. City of White Plains*, 216 A.D.2d 344, 631 N.Y.S.2d 519 (1995); *Pokoik v. Dep't of Health Services*, 220 A.D.2d 13, 641 N.Y.S.2d 881 (1996); *Schwartz v. N.Y.C. Housing Auth.*, 219 A.D.2d 47, 641 N.Y.S.2d 885 (1996).

In *Pokoik*, the Second Department provided a major discourse on the scope of the CPLR 5519(a)(1) stay. *Pokoik* stressed that it is only the “enforcement” of the judgment or order on which the automatic stay operates. In particular, the court distinguished between executed and merely executory determinations.

A determination that can be considered executed merely upon the “promulgation” of the judgment or order, i.e., merely upon its entry and filing, needs no further enforcement. Hence, should it be appealed by the municipality, no stay of anything results. The classic example is, again, a municipality's appeal from something like the denial of its motion for summary judgment. This kind of disposition is “executed” upon mere entry. The status quo had no summary judgment and the order denying the motion keeps the status quo. Hence mere entry of the order denying the summary judgment “executes” the disposition. There is nothing to “enforce” and hence nothing to stay under CPLR 5519(a)(1).

In *Schwartz*, the Second Department also addressed the possible sources of a discretionary stay of further pretrial proceedings when, because of the “executed” nature of the disposition, no automatic stay is available under paragraph 1 of CPLR 5519(a). On that score the court held that such a stay may not be sought under subdivision (c) of CPLR 5519, but will lie only under the court's inherent power, if it lies anywhere. Otherwise, it may be sought under CPLR 2201, but only from the trial court.

In *All American Crane Service, Inc. v. Omran*, 58 A.D.3d 467, 871 N.Y.S.2d 106 (1st Dept. 2009), the First Department appeared to align itself with the other three departments.

The longwinded “provided that” clause in paragraph 1, added in 1988, made only a modest alteration of the automatic stay in cases in which the license of a small corporation or partnership has been revoked after an administrative hearing. The amendment's premise is that the license has been restored by the supreme court in an Article 78 proceeding overturning the revocation, but that the respondent (the governmental entity that revoked the license) has appealed the judgment--invoking the automatic stay of CPLR 5519(a)(1) and thereby reinstating the revocation of the license pending the appeal.

The clause provides that the automatic stay in that situation shall last only 15 days, thus restoring the license after that time unless the respondent takes the initiative of applying for a court-ordered stay under subdivision (c) of CPLR 5519.

Ultimately, the clause is just a shift in the initiative. Before the 1988 amendment, the licensee had to move (to vacate the automatic stay) if it wanted the license restored during the appeal's pendency. Under the amendment, the respondent (the governmental agency) gets a free stay for only 15 days and after that time it, rather than the licensee, must make a motion to continue the stay or the stay dies (and the license pops back to life while the appeal pends).

Paragraph 2

One of the most common of the automatic stays is that provided by paragraph 2 of subdivision (a), involving the ordinary money judgment. Here the appellant's giving of an undertaking is the requirement that earns the automatic stay. The condition of the undertaking is that the appellant will, should there be an affirmance, pay the judgment.

The appellant relying on the automatic stay of paragraph 2 should not dally in furnishing the required undertaking. Even a short delay can bring on a substantial and wholly avoidable expense, as illustrated in *Martin v. Consolidated Edison Co. of N.Y. Inc.*, 146 Misc.2d 756, 552 N.Y.S.2d 827 (Sup.Ct., Kings County, 1990), affirmed 177 A.D.2d 548, 576 N.Y.S.2d 290 (2d Dept. 1991), where the extra cost was incurred for poundage, the percentage that a sheriff is entitled to for levying execution on a judgment. (Poundage can come due with no property at all passing through the sheriff's hands, which is what happened in *Martin*.)

In the *Martin* case, the defendant, a public utility, appealed well within the time to appeal, and filed the undertaking needed to secure the automatic stay, but apparently only after or concurrently with the sheriff's levy of an execution the plaintiff had delivered before the stay became operative. The levy in the case required nothing more than the service on a garnishee of a copy of the execution, and the poundage became due upon the levy. The result was the sheriff's entitlement to poundage of some \$5,000, and the defendant's liability for all of it.

The warning is that dispatch is needed in putting into place the automatic stay, which is accomplished by the filing of the undertaking. If this is done expeditiously, the stay can become operative before the plaintiff can get an execution into the hands of the sheriff, or in any event before the sheriff is able to levy it.

Several of the other paragraphs of subdivision (a) also require an undertaking as the condition, or as part of the condition, for a stay; all of them, in fact, except paragraph five, reference an undertaking.

In each such instance the requirement is that the undertaking be "given." If the step taken by the appellant, whether she delivers the undertaking to the respondent or commits herself to do so, satisfies the respondent, so that the latter refrains from enforcing the judgment, there will be no problem. If the undertaking is tendered to the respondent, but refused, it can be filed with the clerk of the court of original jurisdiction; and if the undertaking satisfies the requirement of the particular paragraph its filing should make the stay operative. CPLR 2505; see also *Rhoades v. Adelman*, 145 N.Y.S.2d 766 (Sup.Ct., N.Y. County, 1955).

If a problem subsists, an application can always be made to the court to resolve it. Such authority is implicit in subdivision (c) of CPLR 5519 and in CPLR 2508. (Article 25 of the CPLR governs undertakings in general, and in some detail, and should be perused before taking to court any matter concerned with undertakings.)

In most of the instances in which an undertaking is required by one of the paragraphs of subdivision (a), the amount of it must be fixed by the court. Under paragraph 2, however, involving the ordinary money judgment, the amount of the judgment fixes the amount of the undertaking.

Paragraph 4

Under paragraph 4, involving a judgment that directs the delivery of personal property, the appellant has the option of placing the property in neutral custody or furnishing an undertaking to obey whatever direction the appellate court may ultimately make in respect of the property.

Sanction for Abuse of Automatic Stay

An interesting issue concerning the automatic stay that a municipality gets when it appeals arose in *Matter of Troy Police Benevolent and Protective Ass'n*, 223 A.D.2d 995, 636 N.Y.S.2d 499 (3d Dept. 1996). Can the taking of a completely groundless appeal by a municipality, just to secure the automatic stay, be made the subject of a sanction?

It can, indeed, held the *Troy* case. It falls under the frivolity rule, Rule 130-1, which authorizes a sanction of up to \$10,000 for a frivolous litigation practice. The sanction imposed in *Troy* was only \$1,000, and under the circumstances it may seem almost an indulgence.

In *Troy* there had been an arbitration in which the police won an award against the city and then got it confirmed in court. The city appealed the confirmation judgment and then so delayed perfecting the appeal that the respondent--the winner--had to take that initiative. Even then the city was not ready and more months, half a year, passed before it was.

When the appeal finally went through, the appellate division found that the city had raised "no issue" about the correctness of the lower court judgment. Instead, writes Judge Mercure, the city just "boldly" cited its "financial condition" as a reason for these tactics. The court rejected the excuse and imposed the sanction.

Subdivision (b)

C5519:3. Stay Where Liability Insurer Defended.

Subdivision (b) governs a stay of enforcement in a tort action defended by the defendant-tortfeasor's liability insurer and won by the plaintiff at trial level. It applies when the judgment exceeds the amount of the policy. (If the policy exceeds the judgment, apparently applicable are the usual procedures of paragraph 2 of subdivision (a) to obtain an automatic stay.)

An insurer invoking subdivision (b) waives any defenses it might have had against its insured on the policy. It can urge on the appeal only such objections as the insured could urge.

The stay that results from the carrying out of subdivision (b)'s requirements operates only on the part of the judgment that is within the coverage of the policy. To the extent of any excess no stay results. One of the requirements of subdivision (b), therefore, is that the insurer notify its insured about this, so that the insured can then take steps to obtain its own undertaking, under paragraph 2 of subdivision (a), so as to secure a stay for the balance.

An old case, *Murphy v. Mandon Realty Co.*, 171 Misc. 521, 12 N.Y.S.2d 350 (Sup.Ct., N.Y. County), *affirmed* 257 A.D. 805, 12 N.Y.S.2d 365 (1st Dept. 1939), held that an insurer who furnishes an undertaking for the insured part of the judgment must make it the undertaking of a different insurer. Precluding an insurer from being its own surety is a questionable result, however, and the case has subsequently been questioned. See *Kreitzer v. Chamikles*, 107 Misc.2d 398, 434 N.Y.S.2d 123 (Sup.Ct., N.Y. County, 1980). Given the presumed solvency of insurers duly licensed to sell their wares in New York, and the regulation to which they are subject, one insurer would seem as good as another.

Often an insurer finds the requirements of subdivision (b) not worth the bother, and just furnishes an ordinary undertaking, under paragraph 2 of subdivision (a), covering its part of the judgment. This is of course permissible.

Subdivision (c)

C5519:4. Court Ordered Stay.

If the case does not fit under any of the automatic stay provisions contained in the earlier subdivisions, the appellant can move for a stay under subdivision (c).

The motion for the stay may be made in either the original or appellate court. When the stage involved is a second appellate step, as from appellate division to Court of Appeals, the motion may be made to either of the appellate courts or to the court of original jurisdiction.

Also confirmed by subdivision (c) is the court's power to vacate, limit, or modify one of the automatic stays of subdivision (a) or (b) as well as any obtained by earlier application under subdivision (c). The exception is the stay involving a governmental appellant under paragraph 1 of subdivision (a), which can be vacated or modified only by the court to which the appeal is now on its way.

In considering whether to grant a stay under subdivision (c), the court's discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party.

The stay can also be made conditional. It can be conditioned, for example, on the prompt prosecution of the appeal, perhaps requiring that the appeal be noticed for a particular term or, depending on the calendar practice of the appellate court, for a particular day. Since the granting of the stay is discretionary under subdivision (c), the court can impose conditions if the stay is granted.

Subdivision (d)

C5519:5. Undertaking re Further Appeal.

If an appellate court affirms a judgment, the paper with which it does so will be an order of affirmance. See [CPLR 5522\(a\)](#); 5512. If a further appeal is to be taken, it will be taken from that order. Subdivision (d) clarifies that such undertaking as was given to obtain the stay during the first appeal, and which secured the original judgment or order appealed from, will also be deemed to secure the appellate order of affirmance if that should now be appealed to a higher court.

Suppose that the damages aspect of a judgment is found valid on an appeal, and is retained, but that a new trial is ordered on the issue of liability. Will an undertaking given to secure the old judgment be deemed to secure the new one as well if, after the second trial again finds liability, the plaintiff (respondent) again has judgment for the old sum? The Court of Appeals says “no;” the old undertaking does not apply. [La Rocco v. Federal Ins. Co.](#), 35 N.Y.2d 806, 362 N.Y.S.2d 461, 321 N.E.2d 551 (1974).

Subdivision (e)

C5519:6. Continuing Stay Through Second Appeal.

Subdivision (e) of CPLR 5519, like subdivision (d), involves the situation in which a second appeal is to be taken.

Subdivision (d) clarified the applicability of an undertaking, if one is involved. Subdivision (e) seeks to extend to the second appeal any stay applicable during the first. It applies where the first appellate court has affirmed or modified the judgment or order appealed. (If it has reversed, there is no longer a judgment or order to enforce and no stay is necessary.)

Pursuant to CPLR 5519(e), when a respondent serves on the appellant a copy of the order determining the appeal in the first appellate court any stay that had been obtained pursuant to CPLR 5519 pending the appeal will continue for five days after that service. If the appellant then serves and files its notice of appeal to the second appellate court within that five-day period, the stay applicable during the first appeal is then extended without a gap until the final determination of the second appeal.

If the second appeal needs court permission, the motion for permission should be made within the five-day period.

Originally, subdivision (e) did not contain sufficient instruction in appeal-by-leave cases, but a 1979 amendment clarified things, confirming the Legislature's intention to also offer the automatic continuation of a first-appeal stay when the second appeal requires permission. The amendment also clarified what happens to the stay in the aftermath of an application for leave to appeal.

If the motion for leave is granted, it is now contemplated that there is to be another full appeal. Paragraph (i) thus continues the first-level stay through the entire second-level appeal, until five days after that appeal is determined. (If that appeal has reversed and undone the judgment or order that was appealed, there is nothing further to stay. If it has affirmed, enforcement will be stayed only for five days after the termination of the appeal, after which the prevailing party can go about enforcement--i.e., invoke the procedures of Article 52 of the CPLR, etc.).

If the motion for leave is denied, the stay, governed now by paragraph (ii), will last only until five days after the party who moved for leave (the would-be appellant) has been served with a copy of the order denying leave, with notice of entry. With the lifting of that stay, the judgment or order becomes enforceable.

The five-day continuation of the stay in these instances gives the loser, as on a money judgment, a chance to arrange for payment and thereby avoid other expenses, such as poundage. See the *Martin* case discussed in Commentary C5519:2 above.

In addition, in instances where two motions for leave to appeal may be permissible--such as in Court of Appeals practice where a motion for leave to appeal to the Court of Appeals can first be made to the appellate division, and then, if that does not succeed, before the Court of Appeals itself (see [CPLR 5602\(a\)](#))--the five-day extension of the stay, after the denial of leave by the appellate division, affords the movant an opportunity to make the second motion to the Court of Appeals. The making of that second motion during the five-day period following the denial of the first one enables the movant to avoid any hiatus in which, because of the absence of a stay, the judgment (or order) creditor can steal in the stay.

These automatic continuances of the stay apply, according to the amendment, to "the stay, or any other stay granted pending determination of the motion for permission to appeal." This language has a specific purpose. The words "the stay" could, in the complex context of CPLR 5519(e), be taken to refer to only such stay as automatically results at the conclusion of the first level of appeal. The additional language makes sure that the automatic continuance will apply even if no stay at all was outstanding during the first appeal. For example, assume:

The plaintiff (P) has won judgment at trial and the defendant (D) appeals it to the appellate division. D has obtained no stay and none was outstanding at any time during the appellate division appeal, which results in an affirmance. The

dispositive appellate order is such that it requires leave to appeal to the Court of Appeals. [CPLR 5602](#). D moves for leave, and, while the motion is pending, P for the first time makes threatening noises about enforcing the judgment. D promptly moves the appellate division for a stay--all of this while D's motion for leave to appeal is still pending--and the stay is granted.

This stay is the product of a specific grant by the appellate division during the pendency of the motion for leave to appeal rather than the automatic continuation of a stay that came about earlier. No matter; the provisions of paragraphs (i) and (ii) of CPLR 5519(e) apply to it.

There was for a time a question about whether the second-appeal stay of subdivision (e) would apply if the first-appeal stay was a discretionary one under subdivision (c) rather than an automatic one under subdivision (a) or (b). The Court of Appeals has indicated that subdivision (e) applies to all of them. [DFI Communications, Inc. v. Greenberg](#), 41 N.Y.2d 1017, 395 N.Y.S.2d 639, 363 N.E.2d 1384 (1977).

Continuing Stay in Favor of Municipality

In a situation involving a municipality's automatic stay, it has been held that it does not suffice for a municipality seeking to take a second appeal to merely serve an affidavit of an *intention* to move for leave, such as would suffice to secure an automatic stay if the initial appeal (from the trial judgment) required leave. Subdivision (e) of CPLR 5519 and the opening paragraph of subdivision (a) have different requirements in that respect, to which this distinction traces. See the discussion at pp.2-3 of Issue 36 of Siegel's Practice Review.

The issue arose, for example, in the Appellate Division, Second Department, in [Town of Orangetown v. Magee](#), 216 A.D.2d 343, 631 N.Y.S.2d 41 (1995), in which the plaintiff town was the municipality against whom the defendant had prevailed on a counterclaim. When the five days of CPLR 5519(e) expired in *Orangetown* (without a motion for leave being made, but with the municipality having served an affidavit of intention to move for permission to appeal) the Appellate Division held that the stay expired. As a result, there was nothing to hold up the restraining notices that had been served on the municipality's bank (as garnishee), and the notices were reactivated.

Municipalities received a big break from the New York Court of Appeals, however, in [Summerville v. City of New York](#), 97 N.Y.2d 427, 740 N.Y.S.2d 683, 767 N.E.2d 140 (2002).

Summerville dealt with the question of what happens when a gap does arise--when the municipality does not act promptly and the automatic second-step stay of CPLR 5519(e) expires? Is the municipality reduced to the status of non-municipal appellants, who get no automatic stay and have to post a bond to get one or else seek a discretionary stay from the court by motion under CPLR 5519(c)? Or does a municipality get a brand new automatic stay whenever it gets around to taking the follow-up appellate step, even though that step is taken after expiration of the five days?

The Court of Appeals says the latter is the rule: The municipality gets an automatic stay appended afresh to the second step--a motion for leave to appeal in the *Summerville* case (which, incidentally, was ultimately denied on the merits.)

What, then, is the consequence of allowing a "gap" to arise? "Its effect," says the court, "is to leave the governmental appellant vulnerable in an appropriate case to enforcement of the judgment during the lapse."

The practitioner, in the course of negotiating some of these technical niceties, should not overlook that if some urgency warrants it, any of the CPLR 5519 stays can be vacated or modified by the court pursuant to subdivision (c), which would also authorize the granting of a second-appeal stay in the event that an automatic one is not applicable under subdivision (e).

Subdivision (f)

C5519:7. Trial Court's Powers Despite Stay.

The trial court usually follows a hands-off policy during an appeal in which a stay of enforcement is outstanding. But enforcement aside, the trial court retains some powers in the case even when a final judgment is the subject of the appeal.

The trial court should be able, for example, to entertain a motion for a new trial on the ground of newly discovered evidence under [CPLR 5015\(a\)\(2\)](#), or a motion to reargue on the basis of an intervening change in the law, which the appellate court itself would be likely to apply were it to reach the merits of the appeal. See [Siegel, New York Practice, 5th Ed., § 254](#).

As noted in Commentary C5519:2 above, there will occasionally be some question about just how much gets stayed when a stay on appeal takes effect. Is it just the enforcement of the judgment or order appealed from, as the statute recites, or is it all further proceedings in the action? See the cited Commentary.

Perishables are always subject to prompt disposition. In this respect subdivision (f) is a reminder.

Subdivision (g)

C5519:8. Special Stay in Medical Malpractice Actions.

A 1988 amendment added subdivision (g) to CPLR 5519, applicable in medical, dental, and podiatric malpractice actions.

It applies where a judgment for the plaintiff in such an action exceeds one million dollars and provides that if an appeal is taken by the defendant and an undertaking is given either for one million dollars or the amount of the defendant's malpractice insurance (whichever is greater), the appellate court shall stay enforcement proceedings during the appeal if it finds "a reasonable probability that the judgment may be reversed or determined excessive."

One possibility under the amendment is that it could permit a bonding of a million dollars or less to stay enforcement of a judgment that may be quite in excess of that, but there are peculiarities in the statute's incidentals.

Apparently the only condition of the undertaking, and of the "joint undertaking" that the defendant and its malpractice insurer are required to furnish, is that the defendant "will make no fraudulent conveyance without fair consideration," see [Debtor and Creditor Law § 273-a](#), during the stay; and liability under any such undertakings is limited to a showing that such fraudulent conveyances were made during that time.

An insurer called upon to pay out under this subdivision (g) category of undertaking is subrogated to the right of the payee, presumably the malpractice plaintiff (now judgment creditor), and has a claim against the insured (now judgment debtor) for the amount paid.

The appellate court, in considering whether to grant such a stay, is directed by the statute not to consider whether a stay might be available under either subdivision (a) or (b) of CPLR 5519.

The subdivision (a) stay is the automatic one that runs in favor of a governmental unit taking an appeal; the solvency of the unit, or its ability to pay through the taxing power, is deemed the respondent's security, making a bond unnecessary.

The subdivision (b) stay, on the other hand, involves a simple undertaking--much simpler than this subdivision (g) enactment. It is an undertaking to pay the judgment if the judgment is affirmed on appeal.

The insurer's right to subrogation and the interplay of the (b) and (g) stays, pose some questions.

If the insurance coverage equals or exceeds the amount needed for the bond under subdivision (g)--is for the whole \$1 million if the judgment is for at least that--and the judgment is affirmed on appeal, the insurer would be required to pay the judgment--absent any kind of valid disclaimer ground, and assuming there is none--based on the insurance policy it issued to the physician/insured, independent of the subdivision (g) bond. As to such a judgment within the policy limits, there is no subrogation--i.e., the insurer has no right to recover back from the insured the amount paid.

The function of the insurer's right to subrogation under subdivision (g), therefore, appears to be geared to a case in which the malpractice insurance policy is for less than \$1 million, so that the insurer can end up with a liability (1) under the policy for its face amount and (2) on the subdivision (g) bond for the rest. Take this example:

Assume the malpractice insurance is for \$300,000. The judgment is for \$1 million. The subdivision (g) bond is given and makes the insurer and insured liable for any [Debtor and Creditor Law § 273-a](#) transfers. Assume there are such, and the property transferred--assume it is more than \$1 million worth--is placed out of reach of the judgment creditor, who now invokes the undertaking.

For the first \$300,000 of the \$1 million, the insurance policy applies and the insurer must pay the \$300,000 to the creditor with no recourse against the insured. (The \$300,000 is on the policy, not the bond.) For the remaining \$700,000, however, the subdivision (g) bond is invoked and under it the insurer is required to pay the creditor the remaining \$700,000. There would be subrogation as to that amount, and the insurer would have a claim against the insured for the \$700,000.

LEGISLATIVE STUDIES AND REPORTS

The Second Report to the Legislature, discussing this section, states that this section consolidates all of the provisions of the civil practice act relating to stays of execution pending appeals or determinations on applications for permission to appeal. It is similar to [New Jersey rule 1:4-6](#) in that it gives the court complete control over stays. Situations in which a stay may be secured without a court order are enumerated in subd. (a), and subd. (c) permits an appropriate court to grant a stay in a situation not covered by subd. (a) and to modify any stay. The power of the courts to modify an automatic stay obtained under §§ 594 to 598 and 601 of the civil practice act is unclear although there appears to be inherent power equivalent to that explicitly granted by subd. (c). Cf. [Carter v. Hodge](#), 150 N.Y. 532, 44 N.E. 1101 (1896); [Genet v. Delaware & H. Canal Co.](#), 113 N.Y. 472, 21 N.E. 390 (1889); [Kager v. Brenneman](#), 52 App.Div. 446, 65 N.Y.S. 129 (1st Dep't 1900), *aff'd*, 165 N.Y. 674, 59 N.E. 1124 (1901); 11 N.Y.Jud.Council Rep. 292-93 (1945).

The Revisers also state that this section is not applicable where a statute provides specific limitations on stays. E.g., [McKinney's Alco.Bev.Control Law § 121](#); cf. [Yacht Club Catering, Inc. v. Bruckman](#), 276 N.Y. 44, 11 N.E.2d 345 (1937).

The Advisory Committee has recommended that actions in ejectment not be used to collect rent. Therefore, that provision of § 574 of the civil practice act which prevents a summary proceeding from being brought based on non-payment of rent when an action in ejectment based on non-payment has resulted in a stayed judgment is omitted as unnecessary.

Subd. (a) of this section is applicable to stays pending both the determination of an appeal and the determination of a motion for permission to appeal. It does not apply to a determination of an intermediate appellate court which directs restitution. [Lamport v. Smedley](#), 157 A.D. 442, 142 N.Y.S. 350 (1st Dep't 1913), provides an example of such a situation. In this case, the Appellate

Division reversed a judgment of the Supreme Court pursuant to which stock certificates and cash were delivered to the plaintiff and directed that both be returned to be defendant. Upon the delivery into court of the certificates and the giving of an undertaking for the cash in accordance with §§ 594 and 595 of the civil practice act, the plaintiff secured an order of the Supreme Court staying the execution of the judgment entered upon the determination of the Appellate Division, pending an appeal to the Court of Appeals. On an appeal by the defendant from the stay order, the Appellate Division held that the Supreme Court had no power to grant it, because §§ 594 and 595 of the civil practice act relate to “an original judgment or order for the delivery of property or the payment of a sum of money, and not to an order or judgment on appeal for the restitution of property, the delivery of which by one party to another pending the action has been erroneously required.” The Revisers comment that although the quoted language suggests that the stay provisions only apply to an original judgment, the decision must be restricted to the restitution situation, for when an intermediate appellate court reverses a judgment for the defendant and directs entry of judgment or order for the plaintiff, the stay provisions are applicable and the defendant may secure a stay without a court order if the judgment or order falls within one of the enumerated classes.

The Lamport case involved an original judgment which required two acts by the defendant--delivery of the certificates and payment of money. In such a situation, it would seem that a court order would be necessary for a stay because the judgment is not one for “money only.” Of course, a stay could be secured without a court order for a judgment requiring either of the acts alone. In this section, the word “only” has been omitted from subpars. 2 and 3 of this subdivision and subpar. 7 has been added to permit a stay without a court order where the judgment appealed from requires the doing of two or more acts and stays could have been secured of judgments requiring each of the acts alone under subpars. 2 through 6.

Subpar. 1 of this subdivision, which is taken from C.P.A. §§ 570 and 571, is intended to encompass all of the persons and bodies specifically enumerated in those sections.

Sections 594 through 598 of the civil practice, from which subpars. 2 through 6 of this subdivision are taken, as well as §§ 573, 798-a, 599, 600, 601 and 615 of the civil practice act, were amended in 1945 upon the recommendation of the Judicial Council. See [11 N.Y.Jud.Council Rep. 273-93 \(1945\)](#). The Revisers note that one of the purposes of the amendments was to make it clear that the undertaking for costs required by § 593 of the civil practice act on an appeal to the Court of Appeals is necessary for a stay. This undertaking is eliminated as a prerequisite for a stay in the CPLR.

Subpars. 2 and 3 of this subdivision are from C.P.A. § 594. The words “from a judgment for a sum of money” have been omitted since the words “directs the payment of a sum of money” are broad enough to include them. Sections 594-598 of the civil practice act all use the term “judge” and “court or judge” indiscriminately when speaking of the power to fix the sum of the undertaking. The CPLR uses the term “court” since it is contemplated that a judge will be authorized to do many of the acts which are specified to be done by the court.

Subpar. 4 of subd. (a) of this section comes from §§ 595 and 596 of the civil practice act. This subparagraph permits a chattel to be placed in the custody of a court official, in contrast to § 596 of the civil practice act. The Second Report states that there “is no reason why the party seeking a stay should not be given this alternative. Cf. Civ.Prac.Act, art. 66 (Action to recover a chattel).” If such deposit will create administrative problems, the court may make an appropriate order. See subdivision (c) of this section. The words “to abide the direction of the court to which the appeal is taken” are added to parallel subpar. 5.

Subpars. 5 and 6 are derived from §§ 597 and 598 of the civil practice act, respectively. Section 598 has been shorted and changed in substance. Under § 598 of the civil practice act, the undertaking must provide for the payment of the value of the use and occupation of the real property when the judgment or order is affirmed or the appeal is dismissed only if there is a deficiency upon sale. The Revisers comment that there is no reason to limit the undertaking to this one situation; this subdivision provides for the payment of the value of use and occupation whenever the appellant or moving party remains in possession or control of the property. Cf. Nev.R.Civ.P. 73(d)(4). The words “with interest and costs, and all expenses chargeable against the proceeds of the sale” have been eliminated as unnecessary. These sums would have to be charged against the proceeds of the sale in computing the deficiency.

Subd. (b) of this section is the counterpart of § 568-a of the civil practice act, substantially unchanged.

Subd. (c) of this section, which is patterned after C.P.A. § 598-a, gives the power to modify a stay secured under subd. (a), as well as the power to grant a stay in a case not covered by subd. (a), to the court from or to which the appeal is taken and the court of original instance. The Revisers note in the Second Report to the Legislature that this substantially conforms with the civil practice act (see C.P.A. §§ 598-a, 613, 615, 626, 634, 634-a) except as to stays pending the determination of an application for permission to appeal from a determination of the Appellate Term, where only the Appellate Division is permitted to grant a stay. See [Stern v. Barrett Chemical Co.](#), 124 App.Div. 377, 108 N.Y.S. 811 (1st Dep't 1908); [Bruce-Webster v. Abbott](#), 69 Misc. 309, 125 N.Y.S. 635 (Sup.Ct.App.T. 1910).

The Revisers also used the words “limited stay” in this subdivision and state that “although the particularized provisions of sections 568 and 568-a are eliminated, the limited stays permitted under them may still be granted.”

In the final draft of this subdivision, the Revisers added the words “except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a)” to accord more closely with the law in New York which provides for an unconditional stay where appeal is taken by the state, a municipal corporation or certain public offices. See C.P.A. §§ 570, 571. Cf. [City of Utica v. Hanna](#), 249 N.Y. 26, 162 N.E. 573, 574 (1928); [People ex rel. Ames v. Judson](#), 59 Misc. 538, 112 N.Y.S. 408 (Sup.Ct.1908). To prevent unnecessary hardship to a private party, the court to which the appeal is taken is given power to protect him. Cf. [Wuttke v. O'Connor](#), 202 Misc. 550, 115 N.Y.S.2d 852 (Sup.Ct.1952).

The limitation placed by § 615 of the civil practice act on the power to stay a money judgment or order on an appeal to the Appellate Division was eliminated by the Revisers, as was § 599-a of the civil practice act because of the broad language of this subdivision.

Subd. (d) is derived from § 599 of the civil practice act. See [11 N.Y.Jud.Council Rep. 289-290 \(1945\)](#).

Subd. (e) of this section consolidates part of the first sentence of § 573 of the civil practice act with the last sentence of § 161 of the civil practice act. The Revisers note in the Second Report to the Legislature that since any further appeal will be taken from the order of the appellate court (see § 5512) the stay continues for five days from service of notice of entry in that court rather than in a lower court.

The last sentence of § 161 of the civil practice act was added to this subdivision in 1959 and in its discussion in the Third Report, the Revisers comment that the provision has been generalized to cover subsequent appeals to the Appellate Division from an appellate term or to the United States Supreme Court from the Court of Appeals. “Since enforcement of the judgment is stayed by the second undertaking, and a suit on the first undertaking is also stayed under the present provision, both parties are protected.” This subdivision accomplishes the objective more directly, however, by providing that the same undertaking will stay enforcement during both appeals. It thus avoids the problem which arises where different sureties are used, each of whom demands collateral.

Subd. (f) of this section is taken from C.P.A. §§ 573 and 601 (1st par.). In the Second Report to the Legislature, the Revisers state that the reference to depositing the proceeds of sale of perishable property in court has been omitted as unnecessary since the court order directing the sale will contain appropriate directions for the disposition of the proceeds.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 331.

3rd Report Leg.Doc. (1959) No. 17, p. 422.

4th Report Leg.Doc. (1960) No. 20, p. 236.

5th Report Leg.Doc. (1961) No. 15, p. 655.

6th Report Leg.Doc. (1962) No. 8, p. 525.

[Notes of Decisions \(272\)](#)

McKinney's CPLR § 5519, NY CPLR § 5519

Current through L.2026, chapters 1 to 312. Some statute sections may be more current, see credits for details.

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