



## How Courts in the Second Circuit Decide on a Stay Pending Appeal in Bankruptcy Actions

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### Introduction

Absent a stay, an appeal may be mooted by actions taken while the appeal is pending.<sup>1</sup> The Federal Rules of Bankruptcy Procedure permit a court to grant “a stay of a judgment, order, or decree” pending an appeal.<sup>2</sup> The purpose of a stay “is to preserve the status quo pending appeal and to protect the rights of all parties in interest.”<sup>3</sup> The standard for a grant or denial of a stay under Bankruptcy Rule 8007 has historically differed among courts, with some favoring the “judicial discretion” test and others opting for the “preliminary injunction” test, depending on the nature of the stay.<sup>4</sup>

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<sup>1</sup> See *In re Adelpia Commc'ns Corp.*, 361 B.R. 337, 348 (S.D.N.Y. 2007) (“The Second Circuit has held that ‘when, during the pendency of an appeal, events occur that would prevent the appellate court from fashioning effective relief, the appeal should be dismissed as moot.’” (quoting Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (*In re Chateaugay Corp.*), 988 F.2d 322, 325 (2d Cir.1993)); 11 NORTON BANKRUPTCY LAW AND PRACTICE § Fed. R. Bankr. P. 8007 editors’ comment (Hon. William L. Norton Jr. & William L. Norton, III eds., 3d ed. 2021).

<sup>2</sup> FED. R. BANKR. P. 8007(a).

<sup>3</sup> *In re Neisner Bros., Inc.*, 10 B.R. 299, 300 (Bankr. S.D.N.Y. 1981).

<sup>4</sup> Compare *id.* (adopting the preliminary injunction test), and *In re Smith*, 34 B.R. 144, 146 (Bankr. D. Vt. 1983) (same), with *In re Turner*, 207 B.R. 373, 375 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (applying the four-part preliminary injunction test).

This memorandum explores the various ways the Second Circuit’s bankruptcy appellate panel (“B.A.P.”), district courts, and bankruptcy courts<sup>5</sup> consider applications for stays pending appeal. Part I discusses two tests, the “judicial discretion” and the “preliminary injunction” test, that the courts in the Second Circuit may use, and then how each factor of the preliminary injunction test is analyzed. Part II discusses the two approaches courts in the Second Circuit adopt under the preliminary injunction test (whether or not all four factors must be satisfied) and how the courts weigh each of the four factors, regardless of the approach taken.

## **I. Comparing the Judicial Discretion Test to the Preliminary Injunction Test**

### ***A. The Judicial Discretion Test may be Applied to Non-Injunctive Stays***

The judicial discretion test may be used when requested relief is related to “regulating the process of and procedure,” of the case, as opposed to relief akin to preliminary injunctions.<sup>6</sup> For example, in the 1981 case, *Neisner*, the appellant sought a stay from an order issued by the Bankruptcy Court for the Southern District of New York, which denied his objections to certain claims, thereby causing disbursements to be made on those claims.<sup>7</sup> In considering the stay, the same court labeled the request for relief as “non-injunctive” and applied the more lenient standard of judicial discretion.<sup>8</sup> When applying this standard, courts are only required to use their

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<sup>5</sup>A motion for a stay, “may be made in the court where the appeal is pending.” FED. R. BANKR. P. 8007(b)(1). “The motion for relief in the district court, BAP, or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.” *Id.* advisory committee’s note to 2014 amendments. If the motion is made in the district court, it “functions as an appellate court in reviewing judgments rendered by bankruptcy courts.” *In re Adelpia*, 361 B.R. at 346.

<sup>6</sup> 11 NORTON BANKRUPTCY LAW AND PRACTICE, *supra* note 1; *see In re Neisner*, 10 B.R. at 300 (applying the judicial discretion test in consideration of the appellant’s request for “non-injunctive” relief). *But see In re Smith*, 34 B.R. at 146 (applying the judicial discretion test even though the nature of the stay was injunctive).

<sup>7</sup> *See* 10 B.R. at 300.

<sup>8</sup> *Id.* (“Such non-injunctive related relief does not require that any stricter standards be applied to an application for a stay pending appeal other than that of judicial discretion exercised to protect the rights of all parties in interest.”).

sound judicial discretion and to “protect the rights of all parties in interest.”<sup>9</sup> However, courts may instead opt for the preliminary injunction test, regardless of the non-injunctive nature of the stay.<sup>10</sup> Indeed, courts in the Second Circuit appear to have exclusively used the preliminary injunction test regardless of the nature of the stay, following the Second Circuit’s 1993 decision in *Hirschfeld v. Bd. of Elections in New York*, 984 F.2d 35 (2d Cir. 1993).<sup>11</sup>

### ***B. Courts Adopting the Preliminary Injunction Test Analyze Four Factors***

In *Hirschfeld*, the Second Circuit enumerated four factors to be considered in motions for stays pending appeal:

- (1) whether the movant will suffer irreparable injury absent a stay,
- (2) whether a party will suffer substantial injury if a stay is issued,
- (3) whether the movant has demonstrated “ ‘a substantial possibility, although less than a likelihood, of success’ ” on appeal, and
- (4) the public interests that may be affected.<sup>12</sup>

These prongs are the same four factors considered for a preliminary injunction.<sup>13</sup>

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<sup>9</sup> *Id.* (granting the stay even though “the retention of the funds by the disbursing agent present[ed] no threat to the claimants, but a disbursement . . . might, albeit improbably, cause harm to the debtor”).

<sup>10</sup> See *In re Friedberg*, No. 91 CIV. 7490 (JFK), 1991 WL 259038, at \*2 (S.D.N.Y. Nov. 25, 1991) (considering the four factors of the preliminary injunction test for a stay pending appeal of an order appointing a trustee).

<sup>11</sup> See, e.g., *In re Turner*, 207 B.R. 373, 375 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (adopting the test enumerated in *Hirschfeld*); *In re Brown*, No. 18-10617 (JLG), 2020 WL 3264057, at \*5 (Bankr. S.D.N.Y. June 10, 2020) (same); *In re Sphere Holding Corp.*, 162 B.R. 639, 642 (E.D.N.Y. 1994) (same).

<sup>12</sup> *Hirschfeld v. Bd. of Elections in New York*, 984 F.2d 35, 39 (2d Cir. 1993) (quoting *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985)). Although the standard enumerated in *Hirschfeld* was applied in the context of a non-bankruptcy procedure and under Rule 8A of the Federal Rules of Appellate Procedure, the relevant bankruptcy rule—8007—was adapted from Rule 8A. See FED. R. BANKR. P. 8007 advisory committee’s note to 2014 amendments (“This rule is derived from former Rule 8005 and F.R.App.P. 8.”); *Hirschfeld*, 984 F.2d 35. Therefore, this standard has been adopted for stays pending appeal of bankruptcy matters. See, e.g., *In re Turner*, 207 B.R. at 375.

<sup>13</sup> See *In re Sphere Holding*, 162 B.R. at 642 (“In order to obtain a stay from a Bankruptcy Court order the appellant must make the same showing normally required for a preliminary injunction or stays of other kinds of orders.” (quoting *In re Hi-Toc Development Corp.*, 159 B.R. 691, 692 (S.D.N.Y. 1993)).

**i. Irreparable Harm: Sometimes Equitable Mootness is Enough to Satisfy This Prong**

A showing that the movant will suffer irreparable injury without the stay is the “principal prerequisite for the issuance of a stay pursuant to Bankruptcy Rule 8007, and such harm must be neither remote nor speculative, but actual and imminent.”<sup>14</sup> Irreparable harm may be considered in the context of financial harm to the movant. For example, courts have considered creditors collecting monies owed from the movant or foreclosure of a movant’s property to constitute irreparable harm to the movant.<sup>15</sup>

Mootness may also constitute harm. However, courts are split as to whether the irreparable injury prong may be satisfied by a showing that the appeal would be moot absent a stay.<sup>16</sup> The majority of federal courts find that mootness, standing alone, is not enough.<sup>17</sup> Several courts in the Second Circuit have diverged from the majority view, recognizing that the loss of

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<sup>14</sup> *In re Brown*, 2020 WL 3264057, at \*6 (internal quotation marks omitted); *see In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 681–82 (Bankr. S.D.N.Y. 2016) (finding the hypothetical and remote harm of a potential order confirming the debtors' proposed plan of reorganization too remote to satisfy this prong); *see also In re Turner*, 207 B.R. at 376 (finding although appellants would be evicted from their home absent a stay, they did not intend to stay in the home when they filed chapter 7 and, therefore, would not be harmed).

<sup>15</sup> *See Green Point Bank v. Treston*, 188 B.R. 9, 11 (S.D.N.Y. 1995) (finding completion of foreclosure proceedings could cause considerable harm to the debtors); *In re Sphere Holding*, 162 B.R. at 644 (concluding the debtor would suffer irreparable harm absent a stay because its major creditors would move to collect the debt); *cf. In re Turner*, 207 B.R. at 376 (concluding that, although appellants will be evicted from their home absent a stay, this did not constitute harm because they intended to sell their home).

<sup>16</sup> *See In re Adelpia Commc’ns Corp.*, 361 B.R. 337, 347 (S.D.N.Y. 2007) (“Courts are divided, and the Second Circuit has not yet spoken, on the issue of whether the risk that an appeal may become moot in the absence of a stay pending appeal satisfies the irreparable injury requirement.”).

<sup>17</sup> *Id.* at 347 (“A majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm.”).

the right to appeal is a “quintessential form of prejudice.”<sup>18</sup> Still, some courts find that a showing of mootness is enough to prove only *some* irreparable injury.<sup>19</sup>

In considering what situations would render an appeal moot, courts must consider the relief requested in the context of the type of bankruptcy case filed. For example, if the movant requests a stay of an order confirming a chapter 11 reorganization plan, courts in the Second Circuit have recognized that “substantial consummation” of that plan while the case is pending appeal, would render the appeal moot.<sup>20</sup> Alternatively, where a movant asks for stay of an order expunging a claim in a chapter 7 liquidation case, courts have recognized full administration of the estate requires several steps and harm is unlikely if the Trustee is still searching for assets.<sup>21</sup> Furthermore, in chapter 13 cases involving foreclosure, courts “have gone to unusual lengths to provide the debtor with an opportunity to be heard on these motions,” because of the danger in rendering an appeal moot.<sup>22</sup>

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<sup>18</sup> *Id.* (quoting *In re Country Squire Assocs. of Carle Place*, 203 B.R. 182, 183 (2nd Cir. BAP 1996)) (concluding the irreparable injury prong was satisfied because there was “a very strong likelihood that any appeal would be moot” without the stay); see *Daly v. Germain (In re Norwich Historic Pres. Tr., LLC)*, No. 3:05CV12(MRK), 2005 WL 977067, at \*3 (D. Conn. Apr. 21, 2005) (assuming appellant “has satisfied the irreparable harm prong of the four-part test because of the concern that the lack of a stay will moot his appeal”). *But see In re Sabine Oil*, 548 B.R. at 681 (noting that the majority of courts find risk of mootness insufficient, but declining to decide on this issue).

<sup>19</sup> See *In re Gen. Motors Corp.*, 409 B.R. 24, 31 (Bankr. S.D.N.Y. 2009).

<sup>20</sup> See *In re Adelphia*, 361 B.R. at 347; see also *In re Sabine Oil*, 548 B.R. at 681 (finding mootness was not proven because Committee will have a full opportunity to voice objections to proposed reorganization plan before its confirmation).

<sup>21</sup> *In re Brown*, No. 18-10617 (JLG), 2020 WL 3264057, at \*6–7 (Bankr. S.D.N.Y. June 10, 2020) (concluding movant failed to show irreparable harm because it was unlikely the Trustee would find and fully distribute her claimed assets to creditors before the appeal’s resolution).

<sup>22</sup> *Green Point Bank v. Treston*, 188 B.R. 9, 11 (S.D.N.Y. 1995).

## ii. Injury to the Movant in the Absence of a Stay Must Outweigh Injury to Non-Movants if the Stay is Granted

To overcome any potential harm to non-movants if the stay is granted, the movant must show “the balance of harms tips in favor of granting the stay.”<sup>23</sup> To assess the “balance of harms,” courts compare the potential harm that would be suffered by non-movants if the stay is granted to the potential harm that would be suffered by the movant if the stay is denied.<sup>24</sup> Therefore, if the movant failed to show irreparable harm in the first prong, the balance of harms automatically does not weigh in his or her favor.<sup>25</sup>

There are several avenues courts explore in considering the balance of harms against non-moving parties. The weight attributed to parties’ potential harm may be considered in light of how parties might have mitigated harm to themselves.<sup>26</sup> Courts also recognize harm to the non-moving party may be financial or something more intangible, and such harm may be imparted to more than just creditors.<sup>27</sup> For example, in *General Motors*, the Bankruptcy Court for the Southern District of New York noted that a grant of the stay would drag out the bankruptcy case and force G.M. to liquidate, therefore causing “the loss of consumer confidence” and “the death of a company.”<sup>28</sup>

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<sup>23</sup> *In re Brown*, 2020 WL 3264057, at \*7 (quoting *In re Adelpia*, 361 B.R. at 349).

<sup>24</sup> *See id.*; *Green Point Bank*, 188 B.R. at 12 (finding the movant’s injury was not irreparable and was counterbalanced by the secured creditor’s potential injury if the foreclosure sale was to be stayed).

<sup>25</sup> *See, In re Turner*, 207 B.R. 373, 376 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (finding the appellant would not suffer any harm absent the stay, and thus, the harm suffered by the purchasers of the property would be greater); *In re Brown*, 2020 WL 3264057, at \*7 (finding that, despite appellant’s argument that creditors would gain at her expense, she failed to demonstrate any risk of harm to herself and, therefore, this factor could not weigh in her favor).

<sup>26</sup> *See In re Tower Auto., Inc.*, No. 05-10578 ALG, 2006 WL 2583624, at \*3 (Bankr. S.D.N.Y. June 28, 2006) (discussing that, “[i]n analyzing the balance of the harms, the [appellant] Committee’s own action and inaction is telling” because it delayed seeking a stay until the eve of settlement consummation); *see also In re Adelpia* 361 B.R. at 354 (finding the potential financial harm to non-movants didn’t weigh against the stay because a bond could protect them).

<sup>27</sup> *See In re Gen. Motors Corp.*, 409 B.R. 24, 32 (Bankr. S.D.N.Y. 2009) (finding irreparable injury to G.M.’s creditors, employees, retirees, dealers and suppliers).

<sup>28</sup> *Id.* at 32–33.

Furthermore, harm to non-moving parties should be considered in the context of the chapter of the bankruptcy case. For example, this factor is particularly difficult to satisfy in chapter 11 and chapter 13 reorganization cases “because courts are reluctant to stay the enforcement of an order pending its appeal if this delay could thwart efforts to confirm a plan.”<sup>29</sup> Harms to non-moving and third parties, resulting from the postponement of chapter 11 reorganization proceedings, include: “(i) lost strategic opportunities; (ii) difficulty in recruiting and retaining talent for the Debtor; (iii) incurrence of administrative and professional expenses; (iv) placing plan settlements in jeopardy; and (v) exposing the equity to be granted to non-moving creditors to market volatility and other risks.”<sup>30</sup>

**iii. To Show Substantial Possibility of Success on Appeal, Movants Need Only Show Plausibility and Should not Rely on Previous Arguments Made to the Bankruptcy Court**

In analyzing the third factor in the preliminary injunction test, the Second Circuit requires that the movant show “substantial possibility, although less than a likelihood, of success on appeal.”<sup>31</sup> Substantial possibility may be defined as somewhere in between “possible and probable,” landing in the realm of plausibility.<sup>32</sup>

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<sup>29</sup> 8 NORTON BANKRUPTCY LAW AND PRACTICE, *supra* note 1, at § 170:81; *see In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 683 (Bankr. S.D.N.Y. 2016) (finding that certain harms may befall the debtor-appellee if their chapter 11 case is stayed); *In re Adelpia*, 361 B.R. at 342 (recognizing “[t]he inability to consummate the Plan resulting from a stay of that order could cause the estates to incur more than a billion dollars in additional costs or could even cause the Plan to collapse”); *Green Point Bank*, 188 B.R. at 12 (finding the non-movant would be harmed from “continued delay” of a sale in a chapter 13 case).

<sup>30</sup> *In re Sabine Oil*, 548 B.R. at 683.

<sup>31</sup> *Hirschfeld v. Bd. of Elections in New York*, 984 F.2d 35, 39 (2d Cir. 1993) (internal quotation marks omitted) (quoting *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985)).

<sup>32</sup> *In re Brown*, No. 18-10617 (JLG), 2020 WL 3264057, at \*7–8 (Bankr. S.D.N.Y. June 10, 2020) (internal quotation marks omitted) (quoting *In re Sabine Oil*, 548 B.R. at 683–84) (finding it was not *plausible* that the debtor’s ex-wife, claiming her share of marital assets in a chapter 7 bankruptcy action, could demonstrate on appeal that she relied on the debtor’s fraudulent disclosures in settling her divorce).

The intermediate “substantial possibility” standard illustrates the Second Circuit’s desire to protect credible claims but eliminate frivolous ones.<sup>33</sup> Some courts in the Second Circuit have adopted a more relaxed standard requiring only that a “substantial case on the merits” be presented when there’s a serious legal question *and* equity favors granting the stay.<sup>34</sup>

Despite the Second Circuit’s more relaxed approach, this factor is particularly difficult to satisfy because an argument often must be made in the first instance, to the bankruptcy court that has already ruled against the applicant.<sup>35</sup> Moreover, even appellants who submitted the motion for a stay in a different court, such as the district court, will be unsuccessful in satisfying this prong if they continue to rely on their previously unsuccessful arguments.<sup>36</sup>

Another consideration in analyzing success on appeal concerns the standard of review on appeal. The court ruling on the stay might consider the standard the appellate court will use when reviewing the claims, such as: abuse of discretion, clear error, or de novo review.<sup>37</sup> For example,

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<sup>33</sup> *In re Turner*, 207 B.R. 373, 376–79 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (finding the chapter 13 case, which was filed while movant’s chapter 7 case was still open, was “likely null and void from its inception” and unlikely to succeed on appeal).

<sup>34</sup> *In re Adelpia*, 361 B.R. at 349 (quoting *LaRouche v. Kezer*, 20 F.3d 68, 72–73 (2d Cir.1994)) (“[T]he movant need not always show a ‘probability of success’ on the merits . . .”).

<sup>35</sup> *See In re Gen. Motors Corp.*, 409 B.R. 24, 26, 30 (Bankr. S.D.N.Y. 2009) (reviewing its previous decision when considering a stay pending appeal of that decision); 8 NORTON BANKRUPTCY LAW AND PRACTICE, *supra* note 1, at § 170:79 (“[T]his showing is always a difficult one, because it is to be made in the first instance to the court who has by definition ruled against the applicant.”).

<sup>36</sup> *See In re Brown*, 2020 WL 3264057, at \*8–9 (relying on the trial court’s rationale for denying appellants claim); *In re Sabine Oil*, 548 B.R. at 683–84 (finding appellants failed this prong because they failed to cite new case law in support of arguments previously presented to and rejected by the same court in which they are now moving for the stay); *Daly v. Germain (In re Norwich Historic Pres. Tr., LLC)*, No. 3:05CV12(MRK), 2005 WL 977067, at \*4 (D. Conn. Apr. 21, 2005) (concluding the movant failed to show substantial possibility of prevailing on appeal where he “merely repeat[ed] his assertion, previously pressed in the Bankruptcy Court”).

<sup>37</sup> *See In re Metiom, Inc.*, 318 B.R. 263, 270–71 (S.D.N.Y. 2004) (“[T]he Court finds that there is no substantial possibility that the Bankruptcy Court *abused its discretion* in refusing to set aside the Rule 2004 examination, and hence that there is no substantial possibility that ePlus’s appeal will succeed.” (emphasis added)); *In re Sphere Holding Corp.*, 162 B.R. 639, 643 (E.D.N.Y. 1994) (stating “in order for debtor to succeed on the merits, it will have to demonstrate on appeal that Judge Holland abused his discretion in dismissing its Chapter 11 case”). This consideration of the standard of review on appeal should not be confused with a district court’s overall obligation to review a bankruptcy court’s finding of

in *Sphere Holding*, the Eastern District Court of New York concluded that the debtor seeking injunctive relief from his creditors would likely prevail on the merits of his appeal because he could show the bankruptcy court abused its discretion in dismissing his chapter 11 case after only three months, which was not an unreasonable delay in the context of that case.<sup>38</sup>

#### **iv. The Public Interest Favors Expedient Litigation Over the Possibility of Mootness on Appeal**

A stay must not be inconsistent with the public’s interest.<sup>39</sup> Reminiscent of the equitable mootness doctrine considered in the “irreparable harm” prong, courts have also noted “there is undoubtedly a public interest in giving litigants the ability to appeal.”<sup>40</sup> Equitable mootness is particularly salient where parties object to a distribution plan, because distribution of the settlement award would deprive appellants of right to review that plan.<sup>41</sup> Courts have also recognized that the public interest does not favor a stay when the appellants have failed to show their appeal would be moot absent a stay.<sup>42</sup>

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fact for clear error and reviewing the bankruptcy court’s conclusion of law de novo when considering a stay pending appeal. See *In re Adelpia*, 361 B.R. at 346.

<sup>38</sup> 162 B.R. at 643–44.

<sup>39</sup> See e.g., *id.* at 642 (“Therefore, in order for debtor to receive the injunctive relief requested, he must satisfy this court that . . . the granting of the relief sought is not contrary to public policy.” (first citing *In re Hi–Toc Development Corp.*, 159 B.R. 691, 692 (S.D.N.Y.1993); then citing *In re Cretella*, 47 B.R. 382, 383–84 (E.D.N.Y.1984))); 8 NORTON BANKRUPTCY LAW AND PRACTICE, *supra* note 1, at § 170:82 (“A stay will not be granted if an injunction of enforcement of the order on appeal would be inconsistent with the public interest.”).

<sup>40</sup> *In re Gen. Motors*, 409 B.R. at 32.

<sup>41</sup> See *In re Adelpia*, 361 B.R. at 349–50 (recognizing the possibility of mootness when ruling on a stay of a confirmation order in a chapter 11 reorganization case).

<sup>42</sup> *In re Brown*, No. 18-10617 (JLG), 2020 WL 3264057, at \*10 (Bankr. S.D.N.Y. June 10, 2020) (finding the public interest would not be harmed because the appellant “failed to demonstrate that there is any likelihood that her appeal will be mooted if the stay is not granted”); *In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 684 (Bankr. S.D.N.Y. 2016) (finding appellant failed to show public interest favors the stay in part because “[appellant] has not established the existence of any current threat of equitable mootness”).

Moreover, what courts consider “the public” in “public interest” reaches far beyond just creditors.<sup>43</sup> For example, in *General Motors* the court recognized the sweeping potential harm of a stay on a sales order, which would in effect cause G.M. to liquidate, and therefore harm the entire North American auto industry, increase future resulting bankruptcies filed by G.M.’s suppliers, and cause hardship to G.M. employees losing healthcare.<sup>44</sup>

Public interest also favors expedient litigation, finality in litigation, and successful reorganization.<sup>45</sup> Therefore, courts will reject a stay where the appellant has repeatedly failed to meet his or her obligations under bankruptcy law.<sup>46</sup> Even where the court concedes there is a public interest in preserving claims for appeal, this concern may be outweighed by the need for expedient administration, particularly where success on appeal is unlikely.<sup>47</sup>

## **II. Courts Disagree on Whether all Four Factors of the Preliminary Injunction Test must be Established, but Agree Each Factor may be Weighed Differently**

Courts differ as to whether each factor of the preliminary injunction test must be established to grant a stay, or whether factors may be balanced against each other so that inability to prove

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<sup>43</sup> See *In re Gen. Motors*, 409 B.R. at 33 (considering the injury to employees, retirees, dealers, and suppliers if the company were to liquidate as a result of a stay).

<sup>44</sup> *Id.*

<sup>45</sup> See e.g., *In re Brown*, 2020 WL 3264057, at \*10 (“The public interest favors compliance with court orders and timely resolution of litigation.”); *In re Sabine Oil*, 548 B.R. at 368 (considering whether “the potential benefits of the litigation outweigh the costs, monetary and otherwise, to the Debtors’ reorganization”).

<sup>46</sup> See *In re Turner*, 207 B.R. 373, 379 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (finding a stay was not in the public’s interest because appellants failed to take action against the foreclosure sale, failed to file a chapter 7 petition, and tried to seek bankruptcy protection twice to delay the foreclosure sale); *Green Point Bank v. Treston*, 188 B.R. 9, 12 (S.D.N.Y. 1995) (concluding it was in the public interest to deny the request because the debtor had attempted to indefinitely delay the foreclosure of his property).

<sup>47</sup> See *In re Metiom, Inc.*, 318 B.R. 263, 272 (S.D.N.Y. 2004) (finding expedient administration more important in a case where the non-party appellant was unlikely to succeed on appeal); see also *In re Brown*, 2020 WL 3264057, at \*10 (rejecting the argument that “the public interest in ‘expedient administration of bankruptcy proceedings’ is outweighed by the right of parties to appellate review”).

one is not dispositive to the appellant’s motion.<sup>48</sup> Courts in the Second Circuit are split as to which approach to take.<sup>49</sup> Regardless of the approach taken, the burden on the party seeking relief is heavy.<sup>50</sup> Stays pending appeal are granted in limited circumstances only.<sup>51</sup> Courts adopting either view have noted “satisfactory evidence on all four criteria” should be shown.<sup>52</sup>

#### ***A. Courts in the Second Circuit Follow both the Majority and Minority Approaches***

The majority of federal courts require the movant satisfy all four factors of the preliminary injunction test.<sup>53</sup> Courts in the Second Circuit adopting this view, state that “[f]ailure to satisfy one prong of this standard for granting a stay will doom the motion.”<sup>54</sup> This is such a divisive issue that some courts have declined to address which view they would adopt when the stay should be denied under either approach.<sup>55</sup>

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<sup>48</sup>Kenneth S. Leonetti & Euripides Dalmanieras, *Procedural Issues In Bankruptcy Appeals*, 5 *Bankr. Litig. Comm.*, *ABI Comm. News* 219, 230 (2008),

<https://foleyhoag.com/people/attorneys/~media/21BF7BC131CB48ABA17E4542B70C3D82.ashx>.

<sup>49</sup> See *In re Brown*, 2020 WL 3264057, at \*5 (recognizing both tests have been used in courts in the Second Circuit); *In re Albicocco*, No. 06-CV-3409 (JFB), 2006 WL 2620464 at \*1, n.2 (E.D.N.Y. Sept. 13, 2006) (recognizing conflicting case law in courts in the Second Circuit on the appropriate standard).

<sup>50</sup> See e.g., *In re Brown*, 2020 WL 3264057, at \*5.

<sup>51</sup> *Id.*

<sup>52</sup> *In re Turner*, 207 B.R. 373, 375 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (internal quotation marks omitted) (quoting *In re Bijan–Sara Corp.*, 203 B.R. 358, 360 (2d Cir. B.A.P. 1996)) (adopting the rule that the movant must satisfy all four criteria); *In re Gen. Motors Corp.*, 409 B.R. 24, 33 (Bankr. S.D.N.Y. 2009) (adopting the balancing approach).

<sup>53</sup> Leonetti & Dalmanieras, *supra* note 48, at 230.

<sup>54</sup> *In re Turner*, 207 B.R. at 375 (citing *In re Bijan–Sara*, 203 B.R. at 360); see *In re Tower Auto., Inc.*, No. 05-10578 ALG, 2006 WL 2583624, at \*1 (Bankr. S.D.N.Y. June 28, 2006) (adopting the rule that all four prongs must be satisfied); *Daly v. Germain (In re Norwich Historic Pres. Tr., LLC)*, No. 3:05CV12(MRK), 2005 WL 977067, at \*4 (D. Conn. Apr. 21, 2005) (same); *In re Metiom, Inc.*, 318 B.R. 263, 271 (S.D.N.Y. 2004) (same); *Green Point Bank v. Treston*, 188 B.R. 9, 12 (S.D.N.Y. 1995) (same).

<sup>55</sup> See *In re Brown*, 2020 WL 3264057, at \*5 (“The Court declines to determine whether Jennifer is required to satisfy all four factors of the four-part test in order to succeed on her Stay Motion. . . . Debtor’s Stay Motion must be denied—under both tests.”); *In re Albicocco*, No. 06-CV-3409 (JFB), 2006 WL 2620464 at \*1, n.2 (E.D.N.Y. Sept. 13, 2006) (declining to decide on a standard because the stay should be denied even under the more generous standard).

The minority of federal courts allow the four preliminary injunction factors to be balanced against each other, so that success on the other factors may compensate for failure on one.<sup>56</sup> In 1997, in *Turner*, the Second Circuit BAP held that the failure to satisfy any prong will cause the motion to fail, but in 2009, in *General Motors*, the Bankruptcy Court for the Southern District of New York recognized “the Circuit and more recent cases have engaged in a balancing process with respect to the four factors, as opposed to adopting a rigid rule.”<sup>57</sup> Following the *General Motor* decision, courts throughout the Second Circuit have increasingly cited its proposition that a balancing approach should be taken.<sup>58</sup> Under the balancing approach, if one prong fails, it must either be “disregarded or be considered to weigh against granting a stay.”<sup>59</sup>

***B. The Weight Courts Attribute to Each Factor May Differ Regardless of the Approach Adopted***

The Second Circuit recognized that “the degree to which a factor must be present varies with the strength of the other factors, meaning that more of one [factor] excuses less of the other.”<sup>60</sup> Although all four factors must be satisfied in the majority view, the weight attributed to each factor may differ.<sup>61</sup> For example, courts in the Second Circuit adopting the rigid all-factors-satisfied standard have often weighed the potential substantial injury to non-moving parties, if the stay is granted, against the potential irreparable injury to the moving party, if the stay is not granted.<sup>62</sup>

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<sup>56</sup> Leonetti & Dalmanieras, *supra* note 48, at 230.

<sup>57</sup> 409 B.R. at 30.

<sup>58</sup> See e.g., *In re Sabine Oil*, 548 B.R. 674, 681 (Bankr. S.D.N.Y. 2016); *In re Simpson*, No. 17-10442, 2018 WL 1940378, at \*3 (Bankr. D. Vt. Apr. 23, 2018).

<sup>59</sup> *In re Gen. Motors*, 409 B.R. at 32.

<sup>60</sup> *McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.)*, 503 F.3d 167, 170 (2d Cir. 2007) (internal quotation marks omitted) (quoting *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir.2006)).

<sup>61</sup> Leonetti & Dalmanieras, *supra* note 48, at 230.

<sup>62</sup> See *In re Turner*, 207 B.R. 373, 376 (B.A.P. 2d Cir. 1997), *as amended* (Mar. 4, 1997) (“Because we have found that the Turners will not suffer irreparable harm if the sale is not stayed, the injury that Citizens will suffer is greater.”); *Green Point Bank v. Treston*, 188 B.R. 9, 12 (S.D.N.Y. 1995) (finding

Moreover, regardless of their adoption of either the minority or majority view, courts have continuously balanced certain factors against each other. For example, the third prong—probability of success on appeal—may be balanced against the amount of irreparable injury the plaintiff would suffer if the stay was denied.<sup>63</sup> Also, a showing of irreparable injury to non-moving parties and harm to the public interest are two prongs that may succeed or fail proportionally to one another because mootness is considered for both.<sup>64</sup>

Facts are also determinative of which factors carry the most weight in a court’s analysis. For example, in *General Motors*, the court primarily considered the stay’s potential detrimental effect on the public’s interest because it would cause “grievous damage to all of the communities in which GM operates.”<sup>65</sup> *Brown* provides another example, wherein the Bankruptcy Court for the Southern District of New York focused mainly on the probability of the movant’s success on appeal.<sup>66</sup> The appellant was the debtor’s ex-spouse and she attempted to claim her equitable distribution of marital assets that the debtor fraudulently concealed.<sup>67</sup> The court concluded because she already accepted the claimed assets in her divorce settlement, her success on appeal was not plausible.<sup>68</sup>

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harm to the creditor by a continued stall on the foreclosure sale outweighed the harm to the debtor who was to be foreclosed on).

<sup>63</sup> See *In re Brown*, No. 18-10617 (JLG), 2020 WL 3264057, at \*10 (Bankr. S.D.N.Y. June 10, 2020) (“The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury that the plaintiff will suffer absent the stay; in other words, ‘more of one excuses less of the other.’” (quoting *In re Sabine Oil*, 548 B.R. at 684)).

<sup>64</sup> See *id.* at \*7, \*10 (finding appellant failed to satisfy the public interest and irreparable injury factors because there was no evidence her appeal would be mooted without the stay); see also *In re Gen. Motors*, 409 B.R. at 31, 33 (noting, though other considerations ultimately outweighed these factors, public interest favors ability to appeal and the rejection of the stay would render the appeal moot, therefore causing appellant some injury).

<sup>65</sup> 409 B.R. at 33 (“While I am of course going through a balancing, I must say that [public interest] is a monumental factor.”).

<sup>66</sup> 2020 WL 3264057, at \*5–10.

<sup>67</sup> *Id.* at \*1.

<sup>68</sup> *Id.* at \*7–8.

The court may also condition the relief it grants on filing a bond.<sup>69</sup> “The reason for requiring a bond is to secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal.”<sup>70</sup> Bonds are particularly helpful in cases where the stay would cause the diminished value of property.<sup>71</sup> In *Adelphia*, the Southern District Court of New York granted the stay of an order confirming a highly litigated chapter 11 plan despite the diminishing value of the estate, upon finding that the “substantial possibility of success on the merits” and the claims’ impending mootness without the stay, outweighed the “serious financial harm” other parties may face if the stay was granted.<sup>72</sup> The court was heavily influenced by the fact that any stay granted would be accompanied by a substantial bond near the full amount of potential financial harm to parties—thus ameliorating any harm caused by the stay.<sup>73</sup>

## Conclusion

As discussed herein, courts in the Second Circuit have largely adopted the preliminary injunction test rather than the judicial discretion test regardless of the nature of the stay. Although the courts are split as to how to apply the preliminary injunction test—whether *all* factors must be satisfied or not—courts of the Second Circuit adopting either approach may attribute different weight to each factor in their analysis. For example, a higher showing of success on appeal allows for a lower showing of a movant’s irreparable injury absent a stay. Moreover, the potential for mootness of an appeal absent a stay may be considered “irreparable

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<sup>69</sup> FED. R. BANKR. P. 8007(c).

<sup>70</sup> *In re Sphere Holding*, 162 B.R. 639, 644 (E.D.N.Y. 1994) (quoting 9 *COLLIER ON BANKRUPTCY*, ¶ 8005.07[2] (1993)).

<sup>71</sup> *See In re Gen. Motors Corp.*, 409 B.R. 24, 34 (Bankr. S.D.N.Y. 2009); *see also In re Sphere Holding*, 162 B.R. at 644 (granting the stay and finding the case doesn’t require a bond because no damage with result from the stay).

<sup>72</sup> *In re Adelphia Commc’ns Corp.*, 361 B.R. 337, 342, 368 (S.D.N.Y. 2007) (finding also that public interest did not weigh in favor or against the stay).

<sup>73</sup> *Id.* at 368.

harm” to the movant. Courts may also consider equitable mootness when analyzing the public interest prong, but they generally favor expedient litigation. Lastly, courts in the Second Circuit rely on the unique facts of each case to determine the weight attributed to each factor and whether each factor is satisfied.