Interim Issues Requiring Appellate Review—Pennsylvania's Collateral Order Doctrine: Lessons From The *Barnes Foundation* Case And The 30 Years Of Jurisprudence Preceding It

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OVERVIEW

As the Pennsylvania Supreme Court's decision last year in the *Barnes Foundation* case made clear, counsel must be well-versed in the rules governing appeals from collateral orders—or risk waiving the right to take such appeals. In 1992, the Pennsylvania Supreme Court added Rule 313 to the Pennsylvania Rules of Appellate Procedure. Rule 313, "a codification of existing case law with respect to collateral orders,"[1] provides for an immediate appeal as of right from a collateral order.[2] A collateral order is one that is "separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost."[3] The rule is derived from federal case law, and promulgation of Rule 313 was intended to bring greater certainty to an area of Pennsylvania appellate practice that courts and practitioners had found confusing. Nevertheless, because the Pennsylvania Supreme Court has decided few collateral order cases, application of the collateral order rule to a specific case still is not always clear or obvious.

The resulting uncertainty is a matter of grave concern. As the Pennsylvania Supreme Court recently made clear, failing to take an immediate appeal from a collateral order can waive the right to take *any* appeal from the collateral ruling later in the case. Given this fatal effect on the right of appeal, further clarification of

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[1] Pa. R. App. P. 313, note (1992).
[2] Pa. R. App. P. 313(a).
[3] Pa. R. App. P. 313(b).

the situations to which the rule applies is needed. Fortunately, there is a readily available source of such clarification: the federal case law from which the rule was derived in the first place. As the Pennsylvania Supreme Court itself has advised, courts and litigants should look to the federal jurisprudence for guidance on collateral order issues. Although Pennsylvania's intermediate appellate courts have occasionally been reluctant to do so, the Supreme Court consistently has used federal case law as a guide for the past three decades.

THE DANGER OF GETTING IT WRONG:THE SUPREME COURT'S DECISION IN *IN RE BARNES FOUNDATION*

In September 2002, the Barnes Foundation, a non-profit corporation operating an educational program and gallery in Lower Merion, Pennsylvania, filed a petition in the Orphans' Court of Montgomery County, seeking to amend its charter, bylaws, and indenture on the ground that deviation from the administrative terms of its governing documents was necessary for the Foundation's survival.[4] Although the Foundation sought a number of changes, the one that received the most attention was its request to relocate its gallery to a new building to be constructed in center city Philadelphia.[5] Governing public charity law automatically made the Attorney General of Pennsylvania a party to the proceeding so that he could look after the public interest in his role as *parens patriae*.[6] But others sought to intervene in the case as well, including three of the 154 students then enrolled in the Foundation's formal educational programs (including a student named Jay Raymond),[7] and Lincoln University, which had a right to nominate some of the Foundation's trustees.[8] The Court permitted Lincoln's intervention, but it denied intervention by the three students.[9] No one took an appeal within 30 days of the court's February 2003 order denying intervention.

After Lincoln University withdrew from the case in September 2003, another group of three students (which did not include Raymond) petitioned to intervene.[10] The students' petition was denied, but they were permitted to participate as *amici curiae*, and acted, in effect, as adverse parties to the Foundation in pre-trial and trial proceedings.[11] The court held two hearings on the Foundation's petition and, in December 2004, entered a final order granting the Foundation's petition in full.[12] No party to or participant in the proceedings, including the three students who participated as *amici curiae*, appealed from the court's final judgment.[13] However, Raymond, one of the three original students who unsuccessfully petitioned to intervene more than two years earlier, filed a notice of appeal to the Superior Court in January 2005, within 30 days of the Orphans' Court's final order.[14]

The Foundation moved in the Superior Court to quash Raymond's appeal as untimely, but the court declined to act on the motion at that time, deferring consideration of the motion to the merits stage of the proceedings.[15] Because the matter involved an issue of significant public importance and because delayed implementation of the relief awarded by the Orphans' Court could have threatened the Foundation's financial survival, the Foundation filed a King's Bench petition in the Pennsylvania Supreme Court that urged the Court to take jurisdiction of Raymond's appeal on an emergency basis.[16] The Attorney General filed

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[4] *In re Barnes Found.*, 582 Pa. 370, 372, 871 A.2d 792, 793 (2005), *dismissing appeal from* 69 Pa.D.& C. 4th 129, 172-74 (O.C. Montg. 2004).

[5] *Barnes Found.*, 582 Pa. at 372, 871 A.2d at 793; *In re Barnes Found. (No. 12)*, 24 Fid. Rep. 2d 94, 95 (O.C. Montg. 2004).

[6] *See In re Barnes Found.*, 453 Pa. Super. 243, 253, 683 A.2d 894, 899 (1996) ("the law requires the participation of the Attorney General's Office in any proceeding to modify the terms of a charitable trust").

[7] *In re Barnes Found. (No. 11)*, 23 Fid. Rep. 2d 127, 129 (O.C. Montg. 2003).

[8] *Id.* at 132.

[9] *Id.* at 129, 131-33.

[10] *In re Barnes Found. (No. 12)*, 24 Fid. Rep. 2d 94, 94-95 (O.C. Montg. 2004).

[11] *Id.* at 95.

[12] *In re Barnes Found.*, 69 Pa.D.&C. 4th 129, 131-32, 172-74 (O.C. Montg. 2004).

[13] *In re Barnes Found.*, 582 Pa. 370, 373, 871 A.2d 792, 793 (2005).

[14] *Id.* at 372-73, 871 A.2d at 793.

[15] *Id.* at 373, 871 A.2d at 793-94.

[16] *Id.* at 373, 871 A.2d at 794. The King's Bench power was conferred on the Pennsylvania Supreme Court at the time of its creation in 1722. *See Commonwealth* v. *Onda*, 376 Pa. 405, 408, 103 A.2d 90, 91 (1954) (*citing* Act of May 22, 1722, Sec. XIII, 1 Sm. L. 131). The power has always included, among other things, the authority to remove proceedings from lower tribunals for their determination by the Supreme Court. This aspect of the King's Bench power is now codified in Section 726 of the Pennsylvania Judiciary Code, which authorizes the Supreme Court to assume plenary jurisdiction over any matter of "immediate public importance" pending in a lower court and "enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. §726. *See*, e.g., *In re Assignment of Avellino*,

a separate petition seeking the same relief, and, after initially objecting, Raymond joined in the request that the Supreme Court assume jurisdiction.[17]

In its King's Bench petition, the Foundation asked the Supreme Court to summarily dismiss or quash Raymond's appeal or to affirm the Orphans' Court's decrees. The Foundation's primary argument was that Raymond's only appellate standing was as a person denied intervention by the Orphans' Court in February 2003, and that Raymond was required to appeal from that denial of intervention within 30 days of the February 2003 order—not two years later. Agreeing with that argument, the Supreme Court took jurisdiction over Raymond's appeal and then issued a unanimous opinion and judgment quashing it as untimely.[18]

The Court first agreed that, because his intervention petition had been unsuccessful and he was thus a non-party, Raymond had no standing to appeal from the Orphans' Court's December 2004 final decree.[19] On the other hand, the Court noted, Raymond could have appealed from the trial's court order denying him intervention because that denial qualified as a collateral order under Rule 313.[20] Raymond's appeal from the intervention order was untimely, however. Under Appellate Rule 903, appeals must be filed within 30 days, and, the Court held, "a common pleas court's order denying intervention is one type of order which must be appealed within thirty days of its entry under Rule of Appellate Procedure 903, or not at all, precisely because the failure to attain intervenor status forecloses a later appeal."[21] The Court observed that this holding was consistent with the rule in federal court, citing a number of federal circuit court decisions and quoting at length from the *Wright & Miller* federal practice treatise.[22]

The *Barnes Foundation* decision makes clear that the collateral order doctrine is not some obscure appellate jurisdictional rule to be studied in law school and then quickly forgotten. Rather, it is a potentially useful tool for obtaining an early resolution of an important issue in a case, as well as a potential trap for the unwary if an order is not recognized as falling within the doctrine and if an appeal is not taken within the appropriate time after a collateral issue is resolved.

This article focuses primarily on the first of these issues, determining whether an order is collateral, but the second issue—the timeliness of an appeal from a collateral order—deserves some preliminary discussion. In *Barnes*, the order at issue, a denial of intervention, put the putative intervenor out of court and terminated any ability to participate further in the case. Those factors, which gave rise to treatment of the order as a collateral order, also favored application of a rule that failure to appeal from the order within 30 days terminated all appellate rights. But there are other collateral orders in which the appeal deadline is less clear-cut.

For example, in *In re Estate of Petro*, the court dealt with a series of orders relating to an estate administrator's petition to recover assets taken from the decedent's estate.[23] The court held that the asset recovery was a matter collateral to the rest of the action,[24] but the court was divided on when the matter became appealable. Over a strong dissent that argued that each collateral order in the series had to be appealed within 30 days, the majority held that the appellant could defer his appeal until 30 days after the last of the series of orders that determined the collateral matter.[25] While more forgiving of late appellants, this holding of *Petro* risks eliminating collateral order appeal deadlines altogether if the "collateral" matter

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547 Pa. 385, 389-91, 690 A.2d 1138, 1140-41 (1997). *See generally* Bernard F. Scherer, *The Supreme Court of Pennsylvania and the Origins of King's Bench Power*, 32 Duq. L. Rev. 525 (1994).

[17] *Barnes Found.*, 582 Pa. at 373, 871 A.2d at 794.

[18] *Id.* at 375, 871 A.2d at 795.

[19] *Id.* at 373-74, 871 A.2d at 794.

[20] *Id.* at 374, 871 A.2d at 794.

[21] *Id.*

[22] *Id.* at 374-75, 871 A.2d at 794-95 (*citing Credit Francais Int'l, S.A.* v. *Bio-Vita, Ltd.*, 78 F.3d 698, 703 (1st Cir. 1996); *B.H.* v. *Murphy*, 984 F.2d 196, 199 (7th Cir. 1993)); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 15A FEDERAL PRACTICE AND PROCEDURE §3902.1 (2005). In the federal courts, "the denial of a motion to intervene as of right is a final, appealable order." *Development Fin. Corp.* v. *Alpha Hous. & Health Care*, 54 F.3d 156, 158 (3d Cir. 1995); *see also Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (same). Therefore, an unsuccessful applicant for federal intervention "cannot appeal from any subsequent order or judgment in the proceeding." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947); *Polak* v. *Lebron*, 61 Fed. Appx. 807, 811 (3d Cir. 2003) (non-precedential decision) ("[A] putative intervenor must normally file an appeal of such denial within thirty days of the order and may not await final judgment in the underlying action" (internal quotation omitted)).

[23] 694 A.2d 627, 629-30 (Pa. Super. 1997).

[24] *Id.* at 630.

[25] *Compare id.* at 630-32, *with id.* at 635-38 (Ford Elliott, J., dissenting).

lingers throughout the remainder of the case. On this risk, *Jones* v. *Faust*, where the collateral matter was compelled discovery of privileged documents, is instructive.[26] The Superior Court held in *Jones* that each time the trial court entered a new order imposing sanctions for failure to produce the documents, the collateral matter continued and the appeal time ran anew.[27] In contrast, the federal courts hold that an appeal must be brought within 30 days of each collateral order, but that if the collateral matter is not moot at the time that another appealable order (usually the final order on the merits) is entered, those remaining elements of the collateral matter can be appealed at that time.[28]

While the timing issue is difficult, it necessarily does not arise unless the order at issue qualifies as collateral, and the remainder of this article addresses that issue. Unfortunately, the recent collateral order jurisprudence in Pennsylvania, particularly in the intermediate appellate courts, has been less than a model of clarity and consistency, making determination of collateral order status problematic. While the Pennsylvania Supreme Court has repeatedly emphasized that both the development and the application of Pennsylvania's collateral order doctrine should follow the federal experience under the doctrine, the intermediate appellate courts have been less faithful to this principle. As a result, litigants and their counsel are left to wonder whether an issue is ripe for interlocutory review under the collateral order doctrine and, even more significantly, whether they risk waiving the right to raise the issue at a later time by not taking an immediate appeal.

THE FEDERAL GENESIS OF THE COLLATERAL ORDER DOCTRINE

The collateral order doctrine has its origins in the United States Supreme Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*[29] *Cohen* was a shareholder derivative action brought in federal court on the basis of diversity jurisdiction. The substantive issue in the appeal was the applicability in a federal suit of a state statute requiring a plaintiff in derivative actions to give security for the reasonable expenses that the corporation might incur in the suit.[30] The district court denied the corporation's motion to require such security and the corporation took an immediate appeal to the Third Circuit.[31] Although a final order had not yet been entered in the case, the Third Circuit held that it had jurisdiction under "a liberal and reasonable construction" of the final order requirement of the appellate jurisdiction statute, 28 U.S.C. §1291.[32] After the court reversed the district court's order and held that the state statute was applicable,[33] the Supreme Court granted *certiorari*.

Before addressing the substantive issue, the Court questioned the court of appeals' jurisdiction to review the district court's interlocutory order.[34] The Court observed that the primary purpose of the requirement that there be a "final order" was to "disallow appeal from any decision which is tentative, informal or incomplete."[35] Although the district court's decision in *Cohen* was "final in that sense," the Court pointed out that Section 1291 also prohibited appeals, "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge."[36] The order in question, however, did not constitute "any step toward final disposition of the merits of the case and will not be merged in final judgment."[37]

The Court concluded, in language frequently repeated in the ensuing decades, that the district court's order "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[38] Because the Court had long given Section 1291 "this practical rather than a technical construction," it held that the district court's order was appealable as "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[39]

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[26] 852 A.2d 1201 (Pa. Super. 2004).

[27] *Id.* at 1203.

[28] *See*, e.g., *Behrens* v. *Pelletier*, 516 U.S. 299, 307-11 (1996); *In re Montgomery County*, 215 F.3d 367, 372-73 (3d Cir. 2000); *Weir* v. *Propst*, 915 F.2d 283, 286 (7th Cir. 1990).

[29] 337 U.S. 541 (1949).

[30] *Id.* at 543.

[31] *Beneficial Indus. Loan Corp.* v. *Smith*, 170 F.2d 44, 48 (3d Cir. 1948).

[32] *Id.* at 49.

[33] *Id.* at 51.

[34] *Cohen*, 337 U.S. at 545.

[35] *Id.* at 546.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 546-47. Thirty years after *Cohen*, the Court slightly revised (and simplified) the collateral order doctrine, creating the current federal formulation, under which an interlocutory order is immediately

ADOPTION OF THE COLLATERAL ORDER DOCTRINE IN PENNSYLVANIA

In the slightly more than half century since *Cohen* was decided, it has been invoked thousands of times by federal courts of appeals in accepting (or dismissing) appeals from interlocutory orders of district courts. The doctrine codified in *Cohen* also has been adopted by the courts of many states, and that is what the Supreme Court of Pennsylvania did in *Bell* v. *Beneficial Consumer Discount Co.*[40] In that 1975 opinion by Justice Samuel J. Roberts, the Court unanimously held that "a pretrial order dismissing the class aspects of a suit, but allowing the case to proceed as an individual action, is an appealable final order."[41]

In reaching its decision in *Bell*, the Court had to deal with the Appellate Court Jurisdiction Act of 1970, which, subject to certain narrow statutory exceptions, conferred jurisdiction on Pennsylvania's appellate courts to hear appeals only from "final orders."[42] The Court noted that it was difficult to ascertain whether a lower court order was final and appealable under the statute, and, citing *Cohen*, expressly chose to "follow the reasoning of the United States Supreme Court that a finding of finality must be the result of a practical rather than a technical construction."[43] The Court held that the class dismissal order before it was immediately appealable.[44]

In *Commonwealth* v. *Bolden*, another opinion authored by Justice Roberts, the Court held that a defendant in a criminal case could take an immediate appeal from the denial of his application to dismiss an indictment on double jeopardy grounds following the declaration of a mistrial.[45] In analyzing the appellate jurisdiction issue, the Court noted that both the final order rule and the various exceptions to that rule were similar under federal and Pennsylvania law.[46] After quoting *Cohen's* description of the collateral order doctrine and discussing various federal court cases applying the doctrine to double jeopardy cases, the Court pointed out that "the policies underlying the final judgment rule are the same in the federal and state systems," and thus, the analyses in the federal cases were "helpful in construing" the state statute.[47]

The year after *Bolden*, the Court addressed the collateral order issue again in *Pugar* v. *Greco*, and for the first time articulated the three-part federal collateral order formulation in stating Pennsylvania law.[48] The Court stated the collateral order requirements as follows: "an order is considered final and appealable if (1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost."[49] In *Pugar*, the Superior Court had dismissed an interlocutory appeal from a trial court's denial of a motion for permission to appeal an arbitra-

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appealable if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

[40] 465 Pa. 225, 226, 348 A.2d 734, 734 (1975). A review of the various state court decisions citing *Cohen* reveals far more Pennsylvania citations than those of any other state's courts. As of the end of 2005, almost 150 Pennsylvania state court decisions reported on Lexis cited to *Cohen*; no other state's courts cited the decision more than 50 times.

[41] Justice Roberts had dissented from the Court's dismissal of a criminal appeal about eight months earlier, arguing at that time for adoption of the *Cohen* collateral order rule. *See Commonwealth* v. *Barber*, 461 Pa. 738, 741-42, 337 A.2d 855, 856-57 (1975) (Roberts, J., dissenting).

[42] *Bell*, 465 Pa. at 227-28 & n.6, 348 A.2d at 735 & n.6 (citing Act of July 31, 1970, P.L. 673, art. II, §204, 17 P.S. §211.204 (Supp. 1975)).

[43] *Id.* at 228, 348 A.2d at 735 (*citing Cohen*, 337 U.S. at 546). While the Court in *Bell* followed *Cohen's* "reasoning" for determining the appealability of an interlocutory order, its result was ahead of that in the federal courts. In 1978, the United States Supreme Court reached a different conclusion on the issue presented in *Bell*, holding that an order denying class certification is not immediately appealable under the collateral order doctrine. *See Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978). That federal decision proved unsatisfactory, and twenty years later the Federal Rules of Civil Procedure were amended to provide for a discretionary appeal of a class certification decision. *See* Fed. R. Civ. P. 23(f) (effective Dec. 1, 1998). Meanwhile, Pennsylvania has adhered to the *Bell* decision. *See Alessandro* v. *State Farm Mut. Auto. Ins. Co.*, 487 Pa. 274, 280, 409 A.2d 347, 350 (1979) (reaffirming holding of *Bell* in light of *Coopers*); *DiLucido* v. *Terminix Int'l, Inc.*, 450 Pa. Super. 393, 397-98, 676 A.2d 1237, 1239 (1996) (same); *cf. Weinberg* v. *Sun Co.*, 565 Pa. 612, 614-15, 777 A.2d 442, 444 (2001) (reviewing class certification order in interlocutory appeal without addressing collateral order issue).

[44] *Bell*, 465 Pa. at 229-36, 348 A.2d at 736-39.

[45] 472 Pa. 602, 609, 373 A.2d 90, 93 (1977).

[46] *Id.* at 612-13, 373 A.2d at 94-95.

[47] *Id.* at 613 & n.8, 373 A.2d at 94-95 & n.8.

[48] 483 Pa. 68, 394 A.2d 542 (1978).

[49] *Id.* at 73, 394 A.2d at 545 (*citing Cohen*, 337 U.S. at 546).

tion award without paying the costs of the arbitration, as required by a local court rule.[50] The Supreme Court granted permission to appeal, and, after reaffirming its commitment to "follow[] the approach of" *Cohen*, upheld the Superior Court's determination that the order in question was not appealable because it did not "adversely affect a claimed right which will be irreparably lost if review is postponed."[51]

Over the next 15 years, the Pennsylvania Supreme Court reiterated many times its adherence to the collateral order doctrine set forth in *Cohen*.[52] Although the Superior Court and Commonwealth Court invoked the doctrine dozens of times as well,[53] these courts also complained that "the subject of finality and appealability has presented difficult issues for Pennsylvania appellate courts, often resulting in uncertainty for litigants deciding whether to take an appeal."[54] Both of Pennsylvania's intermediate appellate courts expressed a "need for clarification and reform in this area."[55] The Pennsylvania Supreme Court appeared to respond to this call for clarification by codifying the collateral order doctrine in the Pennsylvania Rules of Appellate Procedure with the addition of Rule 313 in 1992.[56]

THE COLLATERAL ORDER DOCTRINE UNDER RULE 313

Rule 313 reads, in full:

> (a) General rule. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
>
> (b) Definition. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

In promulgating Rule 313, the Appellate Court Procedural Rules Committee cited to both Pennsylvania and federal cases and said that the new rule "is a codification of existing case law with respect to collateral orders."[57] In the fourteen years since Rule 313 was enacted, the Pennsylvania Supreme Court has continued to look to federal decisions based on *Cohen* in interpreting and applying the new Pennsylvania procedural rule.

For example, in its first decision directly addressing Rule 313,[58] the Supreme Court adopted the reasoning of the United States Supreme Court that an order removing defense counsel in a criminal case is not immediately appealable under the collateral order doctrine, contrary to a prior holding of the Pennsylvania Superior Court.[59] The Court reiterated that it had "followed the United States Supreme Court's approach to collateral orders established in" *Cohen* and specifically relied on prior federal case law in reaching its holding.[60]

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[50] *Id.* at 71-72, 394 A.2d at 543-44.

[51] *Id.* at 73-74, 394 A.2d at 545.

[52] *See*, e.g., *Fried* v. *Fried*, 509 Pa. 89, 94, 501 A.2d 211, 214 (1985); *Pennsylvania Ass'n of Rural & Small Sch.* v. *Casey*, 531 Pa. 439, 442-43, 613 A.2d 1198, 1199 (1992).

[53] *See*, e.g., *Buchanan* v. *Century Fed. Sav. & Loan Ass'n*, 259 Pa. Super. 37, 42-44, 393 A.2d 704, 707 (1978); *Gray* v. *State Farm Ins. Co.*, 328 Pa. Super. 532, 537-39, 477 A.2d 868, 871-72 (1984); *Duttry* v. *Talkish*, 394 Pa. Super. 382, 385-91, 576 A.2d 53, 55-58 (1990); *Shoemaker, Thompson & Ness* v. *York*, 47 Pa. Cmwlth. 28, 30-31, 407 A.2d 1374, 1375-76 (1979); *Doe* v. *Dep't of Public Welfare*, 105 Pa. Cmwlth. 482, 484-87, 524 A.2d 1063, 1064-65 (1987); *Gamble* v. *Pennsylvania Turnpike Comm'n*, 135 Pa. Cmwlth. 84, 86-89, 578 A.2d 1366, 1367-68 (1990).

[54] *Bollinger* v. *Obrecht*, 122 Pa. Cmwlth. 562, 565 n.2, 552 A.2d 359, 360 n.2 (1989).

[55] *Id.* (*citing Zarnecki* v. *Shepegi*, 367 Pa. Super. 230, 244-46, 532 A.2d 873, 880-81 (1987) (*en banc*) (Del Sole, J., dissenting); *Grim* v. *Betz*, 372 Pa. Super. 614, 623-27, 539 A.2d 1365, 1369-71 (1988) (*en banc*) (Beck, J., concurring); *National Recovery Systems* v. *Perlman*, 367 Pa. Super. 546, 551, 533 A.2d 152, 154 (1987)); *see also Trackers Raceway, Inc.* v. *Comstock Agency, Inc.*, 400 Pa. Super. 432, 442-54 (1990) (Beck, J., dissenting).

[56] *See* 22 Pa. Bull. 1354, 1355-56 (Mar. 28, 1992).

[57] Pa. R. App. P. 313, note (1992) (*citing Pugar* v. *Greco*, 483 Pa. 68, 73, 394 A.2d 542, 545 (1978), and *Cohen* v. *Beneficial Indus. Corp.*, 337 U.S. 541 (1949)).

[58] In two prior decisions, the Supreme Court had mentioned Rule 313 but not applied it. *See General Accident Ins. Co. of Am.* v. *Allen*, 547 Pa. 693, 700 & n.8, 692 A.2d 1089, 1092 & n.8 (1997) (noting appellant's argument that order was appealable under Rule 313 but not reaching issue because of determination that order was final appealable order under Rule 341); *Pennsylvania Ass'n of Rural & Small Sch.* v. *Casey*, 531 Pa. 439, 443 n.2, 613 A.2d 1198, 1199 n.2 (1992) (noting that an order not appealable under the 1992 amendments to Rule 341 might be appealable under Rule 313, but that the 1992 amendments did not apply retroactively to the present case).

[59] *Commonwealth* v. *Johnson*, 550 Pa. 298, 303-06, 705 A.2d 830, 833-34 (1998) (overruling *Commonwealth* v. *Cassidy*, 390 Pa. Super. 359, 568 A.2d 693 (1989), and adopting the reasoning of *Flanagan* v. *United States*, 465 U.S. 259 (1984)).

[60] *Johnson*, 550 Pa. at 302 n.2, 705 A.2d at 832 n.2.

In a 1999 decision, *Geniviva* v. *Frisk*, the issue was whether a trial court order denying approval of a settlement under the Probate, Estates and Fiduciaries Code was appealable under Rule 313.[61] Apparently reflecting the intermediate appellate courts' pleas for assistance, the Court acknowledged that "our courts have not provided significant analysis of the elements defining a collateral order—separability, importance, and irreparable loss if review is postponed—so as to allow for predictable application to different circumstances."[62] The *Geniviva* case provided "the opportunity to examine the contours of two of the factors"—the second and third ones.[63] In undertaking an extensive analysis of these factors, the Court once again looked to federal decisions, relying on both Supreme Court and Third Circuit precedents in similar contexts.[64] The Court adopted the general reasoning of those federal courts and also followed the specific holding of the United States Supreme Court in the same context, concluding that an order denying approval of a settlement agreement is not immediately appealable under the collateral order doctrine.[65]

Just three weeks after issuing its decision in *Geniviva*, the Supreme Court decided *Ben* v. *Schwartz*.[66] In that case, the Court held that a trial court order compelling a state agency to produce its investigative file containing allegedly privileged documents regarding complaints against a dentist was an appealable collateral order, reversing a contrary decision of the Commonwealth Court that such an order "was not separable from and collateral to the main cause of action."[67] The Commonwealth Court had developed a line of cases that rejected efforts to appeal orders compelling production of privileged documents, reasoning that such orders "are to be considered collateral only when they do not relate in any way to the merits of the action."[68] But in *Ben*, the Supreme Court rejected that approach in favor of an analysis in a federal case.[69] After quoting at length from the Third Circuit's decision in *In re Ford Motor Co.*, the Court noted that it found "the *Ford Motor* concept of separability to be more practical in application than the standard articulated by the Commonwealth Court."[70] The Court also followed (as it had in *Geniviva*) the Third Circuit's analysis of the "importance" prong of the collateral order test in *Ford Motor*, and endorsed the Third Circuit's approach to the final prong, quoting its reasoning that "[t]here is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material."[71]

More recently, in *Melvin* v. *Doe*, the Supreme Court reversed a Superior Court determination that a trial court order compelling defendants—anonymous authors of statements on a web site—to reveal their identity was not an appealable collateral order under Rule 313.[72] The Superior Court, relying on state-court precedent and focusing on the substance of the information sought to be disclosed, had held that the trial court order did not fall within Rule 313.[73] The Supreme Court, once again relying on federal precedents and rejecting prior state intermediate appellate court decisions, reversed the Superior Court, holding that the issue addressed in the trial court order was "plainly separable from the [underlying] action."[74]

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[61] 555 Pa. 589, 591, 725 A.2d 1209, 1210 (1999).

[62] *Id.* at 592, 725 A.2d at 1211.

[63] *Id.* at 593, 725 A.2d at 1211.

[64] *Id.* at 594 n.2, 596-99, 725 A.2d at 1211 n.2, 1213-14 (*citing, inter alia, Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994); *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997)).

[65] *Id.* at 598-99, 725 A.2d at 1214 (following *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994)).

[66] 556 Pa. 475, 729 A.2d 547 (1999).

[67] *Id.* at 480, 729 A.2d at 550.

[68] *Id.* (*citing Doe* v. *Department of Pub. Welfare*, 105 Pa. Cmwlth. 482, 524 A.2d 1063 (1987)).

[69] *Id.* at 481-83, 729 A.2d at 550-52 (*citing In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997)).

[70] *Id.* at 483, 729 A.2d at 551-52.

[71] *Id.* at 484-85, 729 A.2d at 552 (*quoting Ford Motor*, 110 F.3d at 964). *See also Commonwealth* v. *Shearer*, 882 A.2d 462, 468-70 (Pa. 2005) (applying *Ben* and *Geniviva*, and holding that an order granting a criminal defendant's request to compel a minor complainant in a sexual assault case to submit to a psychological exam was a collateral order), *rev'g* 828 A.2d 383 (Pa. Super. 2003) (*en banc*); *Commonwealth* v. *Kennedy*, 583 Pa. 208, 215-17, 876 A.2d 939, 943-44 (2005) (applying *Ben*, and holding that an order denying a criminal defendant's motion to quash a subpoena compelling attendance of a witness at trial was a collateral order), *rev'g* 817 A.2d 1180 (Pa. Super. 2002).

[72] 575 Pa. 264, 836 A.2d 42 (2003).

[73] *Melvin* v. *Doe*, 789 A.2d 696, 698-99 (Pa. Super. 2001) (*citing Pace* v. *Thomas Jefferson Univ. Hosp.*, 717 A.2d 539 (Pa. Super. 1998); *Van Der Laan* v. *Nazareth Hosp.*, 703 A.2d 540 (Pa. Super. 1997)).

[74] 575 Pa. at 270-72, 836 A.2d at 46 (reaffirming rule from *Ben* v. *Schwartz*, and reiterating rejection of reasoning of *Doe* v. *Department of Public Welfare*, 105 Pa. Cmwlth. 482, 524 A.2d 1063 (1987)). The Court also held that the other requirements of Rule 313 were met and that the trial court order was

Last year, in the *Barnes Foundation* case discussed above, the Supreme Court relied on decisions by the First and Seventh Circuit Courts of Appeals, as well as commentary from a leading federal practice treatise, in determining that an order denying intervention is collateral and thus an appeal must be taken within 30 days of that order to prevent forfeiture of the right to appeal from it.[75] And earlier this year, in *Vaccone* v. *Syken*, the Supreme Court held that an order disqualifying counsel in a civil case is not a collateral order under Rule 313.[76] Although the Superior Court had similarly held that the order did not fall within Rule 313, the appellants in *Vaccone* argued that an earlier decision of the Superior Court supported their position.[77] The Supreme Court disagreed, declining to follow the earlier Superior Court decision and instead holding that a "more relevant approach would be that of the United States Supreme Court."[78]

A consistent theme of the Supreme Court's Rule 313 jurisprudence thus has been a determination to follow federal law regarding the collateral order doctrine. In interpreting and applying the three prongs of the doctrine, the Supreme Court repeatedly has followed federal case law and overturned lower court departures from the federal precedents. This trend has been carried over from the pre-Rule 313 days and the Court's initial adoption of the *Cohen* collateral order test as the law in Pennsylvania three decades ago.

FEDERAL JURISPRUDENCE AS A GUIDELINE FOR FUTURE DECISIONS

Despite the Supreme Court's consistent reliance on federal jurisprudence as a guide for resolving collateral order questions, uncertainty continues to pervade this area. In part, the uncertainty merely reflects the difficulty of applying a general appellate rule to an infinite variety of interlocutory orders presenting novel candidacies for collateral order review. But another contributor to the uncertainty may be a continuing reluctance of the intermediate appellate courts to embrace the Supreme Court's reliance on federal cases as guides in this area.

That reluctance reached its high water mark nearly two decades ago in the Superior Court's 1989 decision in *Commonwealth* v. *Cassidy*.[79] In *Cassidy*, the Superior Court rejected a prior holding of the United States Supreme Court (*Flanagan* v. *United States*[80]) that an order removing defense counsel in a criminal case is not immediately appealable under the collateral order doctrine, and declared: "As a state court, . . . we are not bound to follow this holding. Our supreme court was free to ignore, reject, or adopt the *Cohen* test when it was created by the United States Supreme Court; we are equally free to reject the Supreme Court's method of applying that test to a specific situation."[81] Almost 10 years later, in *Commonwealth* v. *Johnson*, the Pennsylvania Supreme Court adopted the position of the United States Supreme Court in *Flanagan* and rejected the Superior Court's approach in *Cassidy*.[82]

While *Johnson* appears to have rectified an overt reluctance of the appellate courts to follow federal collateral order decisions, areas of apparent disagreement remain. Perhaps the best example relates to trial court orders rejecting government defendants' claims of immunity from suit. The core principle behind the immunity defense is quick resolution of a claim without subjecting the government official or entity that claims the immunity to the demands of a lawsuit (including pre-trial proceedings). A failure to permit an immediate appeal from a trial court's order denying a motion to dismiss or for summary judgment based on the immunity issue risks eviscerating the protections of the immunity doctrine and depriving immune defendants of redress. Nevertheless, there is a curious split between the federal and Pennsylvania courts on allowance of collateral order appeals from immunity decisions.

In federal court, the longstanding rule has been that a party entitled to absolute immunity from suit may take an interlocutory appeal from an order denying its motion to dismiss on that ground.[83] As the United States Supreme Court noted in the seminal case of *Mitchell* v. *Forsyth*, "the denial of a substantial claim of absolute immunity is an order appealable be-

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therefore immediately appealable. *Id.* at 278, 836 A.2d at 50.

[75] *In re Barnes Found.*, 582 Pa. 370, 374-75, 871 A.2d 792, 794-95 (2005). *See generally* Part I, *supra*.

[76] *Vaccone* v. *Syken*, 899 A.2d 1103, 1107 (Pa. 2006).

[77] *Id.* at 1106-07.

[78] *Id.* at 1107.

[79] 390 Pa. Super. 359, 568 A.2d 693 (1989).

[80] 465 U.S. 259 (1984).

[81] *Cassidy*, 390 Pa. Super. at 363-64, 568 A.2d at 695.

[82] *Commonwealth* v. *Johnson*, 550 Pa. 298, 303-06, 705 A.2d 830, 833-34 (1998).

[83] *See*, e.g., *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-43 (1982).

fore final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."[84] In *Mitchell*, the Court extended this rule to claims of qualified immunity by federal government officials, holding that "qualified immunity is in fact an entitlement not to stand trial under certain circumstances."[85]

Significantly, the Court in *Mitchell* held that a denial of a motion to dismiss or for summary judgment on qualified immunity grounds was a collateral issue subject to immediate appeal under the collateral order doctrine even though such a ruling entailed "consideration of the factual allegations that make up the plaintiff's claim for relief."[86] The Court also made clear that "the fact that an issue is outcome determinative does not mean that it is not 'collateral' for purposes of the *Cohen* test."[87] In subsequent years, the Court extended the *Mitchell* rule to trial court orders denying a state agency's motion to dismiss on Eleventh Amendment immunity grounds,[88] and reaffirmed the principle from *Mitchell* on numerous occasions.[89]

In contrast with this clear line of federal jurisprudence, however, the Pennsylvania intermediate appellate courts have repeatedly refused to entertain interlocutory appeals from trial court orders denying immunity to a defendant.[90] For example, in a series of pre-Rule 313 cases, the Commonwealth Court held that trial court orders denying summary judgment or judgment on the pleadings on governmental immunity grounds were not appealable orders under the collateral order doctrine.[91] In some of these decisions, the court expressly declined to follow *Mitchell*.[92] The Superior Court, while not yet issuing any published opinions on the subject, has also declined to accept interlocutory appeals under the collateral order doctrine of trial court orders denying an immunity defense.[93]

Thus, contrary to the Pennsylvania Supreme Court's consistent, three-decades' long practice of following federal precedents in interpreting and applying Pennsylvania's collateral order doctrine, the intermediate appellate courts continue to carve out areas of the law in which they decline to follow the federal jurisprudence and instead create a Pennsylvania-specific rule. Of course, Pennsylvania is not required to adhere slavishly to federal precedents in interpreting its own rules, and there will be occasions where differences in state and federal policies or in statutory or jurisdictional mandates will call for different state and federal results. But in the absence of such reasons, the presumption should be that

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[84] 472 U.S. 511, 525 (1985).

[85] *Id.*

[86] *Id.* at 528. *See generally id.* at 525-29 (analyzing collateral order issue).

[87] *Id.* at 529 n.10.

[88] *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-47 (1993).

[89] *See*, e.g., *Behrens* v. *Pelletier*, 516 U.S. 299, 307-11 (1996) (holding that defendant could appeal twice—from denial of motion to dismiss and then again from denial of summary judgment—from adverse qualified immunity rulings under the collateral order doctrine); *Johnson* v. *Jones*, 515 U.S. 304, 318 (1995) (noting, in dicta, that the *Mitchell* rule would apply to claims of immunity by state officials).

[90] In *Johnson* v. *Fankell*, the United States Supreme Court held that a defendant's right to an interlocutory appeal of an adverse immunity decision in a *state court action* was governed by state law and not the *Mitchell rule*. 520 U.S. 911, 919-22 (1997).

[91] *See Farber* v. *Pennsbury Sch. Dist.*, 131 Pa. Cmwlth. 642, 645, 571 A.2d 546, 547 (1990) (order denying judgment on the pleadings); *Brown* v. *City of Philadelphia*, 126 Pa. Cmwlth. 549, 551, 560 A.2d 309, 310 (1989) (same); *Horowitz* v. *Cheltenham Township*, 123 Pa. Cmwlth. 586, 589-91, 554 A.2d 188, 189-90 (1989) (order denying summary judgment), *aff'd per curiam*, 524 Pa. 101, 569 A.2d 351 (1990); *Bollinger* v. *Obrecht*, 122 Pa. Cmwlth. 562, 569-70, 552 A.2d 359, 362-63 (1989) (same). Although the Supreme Court affirmed without opinion the Commonwealth Court's order quashing the appeal in *Horowitz*, its per curiam affirmance had no precedential effect with respect to the Commonwealth Court's reasoning. *See Commonwealth* v. *Tilghman*, 543 Pa. 578, 589-90, 673 A.2d 898, 904 (1996) (explaining effect of per curiam affirmance). Moreover, in subsequent decisions, the Supreme Court specifically rejected the Commonwealth Court's reasoning in *Horowitz* that an order cannot be collateral if it involves the same subject matter as the underlying suit. *See*, e.g., *Melvin* v. *Doe*, 575 Pa. 264, 270-72, 836 A.2d 42, 46 (2003); *Ben* v. *Schwartz*, 556 Pa. 475, 480-83, 729 A.2d 547, 550-52 (1999).

[92] *See*, e.g., *Bollinger*, 122 Pa. Cmwlth. at 569-70, 552 A.2d at 362-63; *Gwiszcz* v. *City of Philadelphia*, 121 Pa. Cmwlth. 376, 379, 550 A.2d 880, 881 (1988); *cf. Lancie* v. *Giles*, 132 Pa. Cmwlth. 255, 258 n.3, 572 A.2d 827, 829 n.3 (1990) (acknowledging that the issue whether a trial court order denying summary judgment on qualified immunity ground in a Section 1983 action falls under the collateral order doctrine is a "more difficult" issue in light of *Mitchell*).

[93] While the Superior Court has yet to issue a published opinion on this topic, the authors have been counsel on appeals involving trial court orders denying an immunity defense that the Superior Court has quashed.

the federal precedents provide authoritative guidelines. That is what the Supreme Court has taught in its consistent jurisprudence dating back more than 30 years, and that is what makes most sense in light of the federal derivation of the collateral order rule in *Cohen*. Unless and until the Supreme Court specifically addresses this issue by reminding the intermediate appellate courts yet again of the longstanding practice in the Commonwealth of following the federal collateral order doctrine, litigants and their counsel will be faced with the uncertainties and dangers of a muddled collateral order doctrine.

CONCLUSION

The stakes are large. Given the holding in the *Barnes Foundation* case that a collateral order must be appealed within 30 days of its resolution, uncertain litigants will be faced with the prospect of waiving an issue by not appealing it at the appropriate time under the collateral order doctrine or, conversely, wasting time and resources on a potentially premature appeal of an issue not deemed to fall under Rule 313 by the intermediate appellate courts.

The Supreme Court should reiterate, in case there is any doubt, that absent compelling reasons, the Pennsylvania appellate courts should look to the well-developed federal jurisprudence under the collateral order doctrine in interpreting and applying Rule 313. Following this longstanding rule will ensure that litigants and their counsel are not left in the dark and confronted with the prospect of either waiver or unnecessary delay when dealing with potential collateral orders.