# Pennsylvania's Appellate Courts Strike Out On Their Own Collateral Order Path—Part One

By BRUCE P. MERENSTEIN,[1] Philadelphia County
Member of the Pennsylvania Bar

## TABLE OF CONTENTS



## ABSTRACT

*The collateral order doctrine originated as a creature of federal appellate law that provided a means of securing appellate review even though an order did not formally end a case.*[2] *Slowly, the Pennsylvania courts adopted the doctrine as part of Pennsylvania case law,*[3] *and in 1992, the doctrine was codified in Rule 313 of the Pennsylvania Rules of Appellate Procedure.*[4] *As codified, the doctrine permits appellate review of an order that does not formally end a case if three requirements are satisfied—*

> [The] order [is] [1] separable from and collateral to the main cause of action where [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 claim will be irreparably lost.[5]

*Although the collateral order doctrine has been recognized as a valuable appellate tool, both the federal and Pennsylvania courts have emphasized that it should be used only in narrow circumstances, when all three of its requirements are met.*[6]

1. Mr. Merenstein is a partner and chairperson of the Appellate Practice Group at Schnader Harrison Segal & Lewis LLP, based in its Philadelphia office. His Schnader colleague and former chair of Schnader's Appellate Practice Group, Carl A. Solano, made major contributions to this article before he became a judge on the Superior Court of Pennsylvania in July 2016.
2. *See Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).
3. *See Bell* v. *Beneficial Consumer Discount Company*, 465 Pa. 225, 226, 348 A.2d 734, 734 (1975); *Commonwealth* v. *Bolden*, 472 Pa. 602, 609, 373 A.2d 90, 93 (1977); *Pugar* v. *Greco*, 483 Pa. 68, 70, 394 A.2d 542, 543 (1978).
4. *See* 22 Pa. B. 1354, 1355-56 (March 17, 1992).
5. Pa.R.App.P. 313(b) (numbering added).
6. *See, e.g., Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 431 (1985); *Rae* v. *Pennsylvania Funeral Dirs. Ass'n*, 977 A.2d 1121, 1129-30 (Pa. 2009).

*In the first years after adoption of Rule 313, the Supreme Court of Pennsylvania often cited the rule's federal origins and followed federal collateral order decisions when applying it.*[7] *But the past decade has seen a significant change from this practice. As a result of two groundbreaking decisions by the Pennsylvania Supreme Court—*Pridgen *v.* Parker Hannifin Corporation *in 2006,*[8] *and* Commonwealth *v.* Harris *in 2011*[9]*—Pennsylvania courts now engage in a more flexible application of the rule than that of their federal counterparts. This change has coincided with decisions signaling a more rigid application of the collateral order doctrine in the federal courts. The more flexible attitude reflected in the Pennsylvania decisions offers a vehicle for practitioners to obtain early appellate resolution of key issues and thereby to bring a quicker end to what otherwise would be protracted and expensive litigation in the Pennsylvania state courts.*

**Pennsylvania's appellate courts now engage in a more flexible application of the collateral order rule than their federal counterparts.**

*This two-part article looks closely at this recent divergence in collateral order jurisprudence by the federal and Pennsylvania state appellate courts. This first part focuses on the Pennsylvania Supreme Court's seminal decisions in* Pridgen *and* Harris*, and the numerous collateral order decisions of the Pennsylvania state courts involving claims of privilege or confidentiality; assertions of immunity defenses and other protections from suit; and issues of representation by counsel. The second part, to be published in the next issue of the* Quarterly*, discusses additional collateral order cases in such areas as the identity of parties and intervention, and then highlights some of the areas of concern and confusion regarding application of the collateral order doctrine in Pennsylvania, as well as some signs of resistance to the Supreme Court's efforts to liberalize the doctrine in an effort to ensure that appellate jurisdiction in Pennsylvania reflects the need for practicality, efficiency, and fairness.*

## THE *PRIDGEN* AND *HARRIS* DECISIONS

The first of the Pennsylvania Supreme Court's groundbreaking decisions was *Pridgen*. In defending against damages claims following a fatal air accident, the defendants argued that they were entitled to summary judgment because the claims were barred by a statute of repose in the General Aviation Revitalization Act of 1994 ("GARA"),[10] a federal statute designed to bolster the American aviation industry by cutting off liability and associated costs when an accident was caused by equipment installed at least 18 years earlier.[11] The defendants contended that GARA "conferred on them an essential immunity from suit, thus relieving them from the substantial

7. *See, e.g., Commonwealth* v. *Johnson*, 705 A.2d 830, 833-34 (Pa. 1998); *Geniviva* v. *Frisk*, 725 A.2d 1209, 1211 n.2, 1213-14 (Pa. 1999); *Ben* v. *Schwartz*, 729 A.2d 547, 550-52 (Pa. 1999); *In re Barnes Foundation*, 871 A.2d 792, 794-95 (Pa. 2005); *Vaccone* v. *Syken*, 899 A.2d 1103, 1107 (Pa. 2006). *See generally* Carl A. Solano & Bruce P. Merenstein, *Interim Issues Requiring Appellate Review—Pennsylvania's Collateral Order Doctrine: Lessons From The* Barnes Foundation *Case And The 30 Years Of Jurisprudence Preceding It*, 77 Pa.B.A.Q. 145, 152-54 (2006) (discussing use of federal precedents as guidelines for Pennsylvania collateral order jurisprudence).

8. *Pridgen* v. *Harker Hannifin Corporation*, 905 A.2d 422 (Pa. 2006).

9. *Commonwealth* v. *Harris*, 32 A.3d 243 (Pa. 2011).

10. Pub. L. No. 103-298, 108 Stat. 1552 (Aug. 17, 1994), *as amended*, 49 U.S.C. §40101 Note.

11. *Pridgen*, 905 A.2d at 424-25, 429-30, 433.

burden of maintaining a defense through trial of the underlying cases,"[12] and that they therefore should be entitled to appeal under the collateral order doctrine when their summary judgment motions were denied. In a decision that surprised many observers, the Supreme Court agreed.

Focusing on the three elements of the collateral order rule, the Court first held that the GARA issue was sufficiently separate from the merits of the case to permit an immediate appeal. The Court observed that the defendants had framed their appeal to present only a legal issue regarding what claims were barred by GARA, and that resolution of the defendants' summary judgment motion therefore did not turn on factual disputes—a consideration that had been used by the federal courts when assessing whether immunity orders qualify as collateral orders.[13] The Court said that it would assess the separability question using a "practical analysis" that "recognize[ed] that some potential inter-relationship between merits issues and the question sought to be raised in the interlocutory appeal is tolerable."[14] Ultimately, the Court concluded that GARA's statute of repose presented an issue that was "both conceptually and factually distinct from the merits" of the plaintiffs' claims, so that the first prong of the collateral order analysis was satisfied.[15]

On the second prong of the analysis—whether "the right involved is too important to be denied review"—the Court agreed that "GARA's claims relief approach may not be fully on par with immunities and constitutional entitlements" that had given rise to collateral order recognition in earlier cases, but it concluded that the federal policy of "cost control" that motivated GARA's enactment was "sufficiently important" to permit collateral order review.[16] The Court's analysis of the third prong, irreparable loss, was similar: "we conclude that the substantial cost that [the defendants] will incur in defending this complex litigation at a trial on the merits comprises a sufficient loss to support allowing interlocutory appellate review as of right, in light of the clear federal policy to contain such costs in the public interest."[17] In the Court's view, "the potential vindication of the interest in freedom from tort claims created by Congress through GARA" outweighed the Commonwealth's interest in curtailing piecemeal appeals.[18]

Closing its jurisdictional discussion, the Court expressed "a respectful disagreement" with a Third Circuit decision that had reached the opposite result.[19] Although it noted that the Third Circuit's analysis turned in part on factual disputes, the Court acknowledged that it had decided to give more weight than did the Third Circuit to Congress's intent to use GARA's statute of repose to reduce litigation costs, rather than merely to create a defense to liability.[20] The *Pridgen* decision thus marked a rare but important break with federal collateral order precedents.

While *Pridgen* signaled a willingness by Pennsylvania's Supreme Court to take a more pragmatic approach to its collateral order jurisprudence, the U.S. Supreme Court went in the opposite direction. In 2009, in *Mohawk Industries, Inc.* v. *Carpenter*,[21] the U.S. Supreme Court rejected the views of several federal courts of appeals that

12. *Id*. at 429.
13. *Id*. at 432 (*citing Johnson* v. *Jones*, 515 U.S. 304, 313-20 (1995)).
14. *Id*. at 433.
15. *Id*. at 433.
16. *Id*.
17. *Id*.
18. *Id*. at 433.
19. *Id*. at 434 n.14 (discussing *Robinson* v. *Hartzell Propeller, Inc*., 454 F.3d 163 (3d Cir. 2006)).
20. *Id*.
21. *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009).

the collateral order doctrine should permit appellate review of orders compelling parties to disclose confidential information allegedly protected by the attorney–client privilege. The Third Circuit had been one of the courts that had permitted collateral order review in privilege cases,[22] and the Pennsylvania Supreme Court had relied on the Third Circuit's decision on that issue when it reached a similar result in a state privilege case in 1999.[23] But in *Mohawk*, the U.S. Supreme Court disapproved of such decisions.

Focusing only on the third prong of the collateral order analysis, the Court in *Mohawk* held that the harm done by an order erroneously requiring disclosure of privileged information is not so irreparable as to justify collateral order review. Harm from erroneous use of the information during the judicial proceeding can be remedied at the end of the case by remanding for a new trial at which the privileged material must be excluded.[24] The Court recognized that this remedy would not rectify the loss of confidentiality resulting from a disclosure order, but it proposed other means short of interlocutory review to protect that confidentiality—particularly (and, in the context of a course of action suggested by the Supreme Court of the United States, quite remarkably), outright defiance of the disclosure order.[25] The Court also noted that in some cases the party claiming privilege might be able to have an appeal certified under the federal Interlocutory Appeals Act[26] or, in a more extreme case, obtain a writ of mandamus.[27] Because these mechanisms "provide assurances to clients and counsel about the security of their confidential communications," the Court held that including privilege orders within the collateral order doctrine was unjustified.[28]

Recognizing that the *Mohawk* decision was directly at odds with its own jurisprudence regarding application of the collateral order rule to privilege cases, the Pennsylvania Supreme Court decided to take another look at that question in *Commonwealth* v. *Harris*. Upon doing so, the Court declined to follow *Mohawk* and decided instead to adhere to its view that the collateral order rule applies.[29]

The Court said it "respectfully disagree[d]" with the U.S. Supreme Court's decision in *Mohawk* and was "particularly unconvinced" by *Mohawk's* conclusion that an appeal after judgment is an adequate means of vindicating a privilege claim.[30] Once disclosed, privileged material can be repeated to others and all confidentiality therefore will be lost; in the Court's words: "the bell has been rung, and cannot be unrung by a later appeal."[31] The procedural alternatives identified by the U.S. Supreme Court are inadequate, the Pennsylvania Court explained, because discretionary appeals under Pennsylvania's laws concerning interlocutory appeals[32] would not protect confidential communications in all cases[33] and the availability of man-

22. *See In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997).
23. *See Ben* v. *Schwartz*, 729 A.2d 547, 550-52 (1999).
24. *Mohawk*, 588 U.S. at 109.
25. *Id*. at 111-12.
26. 28 U.S.C. §1292(b).
27. *Mohawk*, 558 U.S. at 110-11.
28. *Id*. at 112-13.
29. *Harris*, 32 A.3d at 248-51.
30. *Id*. at 249.
31. *Id*. at 249.
32. 42 Pa.C.S. §702(b) (2004 ed.).
33. The Court explained that review under that Act requires that there be a controlling question of law and that resolution of that controlling question be likely to lead to termination of the case. These requirements may not be met in many discovery disputes, but the disputes nevertheless may raise confidentiality issues that are important to the parties and call for immediate review. *Harris*, 32 A.3d at 250.

damus in Pennsylvania is severely circumscribed.[34] The Court characterized the option of disobeying the disclosure order, which would subject the recalcitrant party to contempt or other sanctions (possibly including imprisonment) to coerce abandonment of the party's privilege claim, as "so extreme as to be no option at all."[35]

Together, the decisions in *Pridgen* and *Harris* mark a break by Pennsylvania from its prior course of following federal collateral order decisions. As a result, the Pennsylvania courts have struck out on their own to recognize the utility and propriety of allowing immediate review of a variety of orders that may not have qualified for such review under the Pennsylvania courts' earlier case law. The remainder of this article reviews some of this new Pennsylvania collateral order jurisprudence.

## PENNSYLVANIA COLLATERAL ORDER JURISPRUDENCE IN LIGHT OF *PRIDGEN* AND *HARRIS*

*Pridgen* and *Harris* have signaled a break with the new-found rigidity of federal collateral order jurisprudence and a willingness of the Pennsylvania courts to take a practical approach to appellate review that will enable parties aggrieved by critical adverse rulings to obtain appellate relief in a wider range of cases. Although the boundaries of this new attitude are still being tested, recent decisions in several classes of cases make clear that the change is significant.

### Cases Involving Protection of Privileges and Confidentiality

*Commonwealth* v. *Harris* made clear that the wide body of law that had developed in Pennsylvania prior to the *Mohawk* decision remains viable and continues to permit immediate appeals from orders compelling production of materials protected by privileges and similar doctrines. Thus, both before and after *Harris*, Pennsylvania courts have permitted interlocutory appellate review of claims under the attorney–client privilege,[36] the work product doctrine,[37] executive and governmental privileges,[38] the statutory privilege under the Peer Review Protection Act,[39] and journalists' statutory Shield Law privilege.[40] In *Harris*, a threat to the confidentiality of a psychotherapist's records was held subject to collateral order review.[41] Other decisions have applied the doctrine to other types of medical records,[42] including

34. The Superior and Commonwealth Courts have no general power to issue writs of mandamus or prohibition except in matters ancillary to appeals already before them; and while the Supreme Court may assume plenary jurisdiction to issue a writ of mandamus, it may do so only if the case involves an issue of immediate public importance. *Id*. at 250-51 and n.6 (*citing* 42 Pa.C.S. §§726, 741, 761(c)).

35. *Id*. at 251.

36. *See, e.g., Commonwealth* v. *Flor*, 136 A.3d 150, 154-55 (Pa. 2016); *Commonwealth* v. *Kennedy*, 876 A.2d 939, 942-44 (Pa. 2005); *Commonwealth* v. *Schultz*, 133 A.3d 294, 308-09 (Pa. Super. 2016); *T.M.* v. *Elwyn, Inc*., 950 A.2d 1050, 1056-58 (Pa. Super. 2008); *Gocial* v. *Independence Blue Cross*, 827 A.2d 1216, 1220 (Pa. Super. 2003) (*citing* additional cases). *See also Dougherty* v. *Philadelphia Newspapers, LLC*, 85 A.3d 1082, 1084-86 (Pa. Super. 2014) (permitting appeal of order denying request to disqualify opposing counsel because the opposing counsel might possess privileged information about the movant).

37. *See, e.g., Commonwealth* v. *Williams*, 86 A.3d 771, 780-84 (Pa. 2014); *Commonwealth* v. *Kennedy*, 876 A.2d 939, 942-44 (Pa. 2005); *Commonwealth* v. *Dennis*, 859 A.2d 1270, 1277-78 (Pa. 2004).

38. *Ben* v. *Schwartz*, 729 A.2d 547, 551-52 (Pa. 1999). Although the Court held that the collateral order doctrine applied to the claim of privilege, it declined to recognize the existence of an executive or governmental privilege on the facts presented. *See id*. at 553.

39. *Yocabet* v. *UPMC Presbyterian*, 119 A.3d 1012, 1016 n.1 (Pa. Super. 2015) (addressing privilege claim under Section 4 of the Act, 63 P.S. §425.4 (2010)); *Dodson* v. *Deleo*, 872 A.2d 1237, 1240-41 (Pa. Super. 2005).

40. *Castellani* v. *Scranton Times, L.P*., 916 A.2d 648, 652-53 (Pa. Super. 2007) (addressing privilege claim under 42 Pa.C.S. §5942(a) (2004)), *aff'd*, 956 A.2d 937, 942 n.5 (2008).

41. *Harris*, 32 A.3d at 251.

42. *E.g., Jones* v. *Faust*, 852 A.2d 1201, 1202-03 (Pa. Super. 2004).

mental health records under the Mental Health Procedures Act.[43] The doctrine also applies to the privilege applicable to spousal communications under Section 5923 of the Judicial Code, though not necessarily to the related bar against spousal testimony under Section 5924.[44]

The Pennsylvania decisions in this area have not been limited to privilege cases, but also have permitted collateral order review when other rules of law have been alleged to bar discovery of information. In one case, for example, the doctrine was held to permit review of a claim that an out-of-state corporation is not subject to a Pennsylvania deposition subpoena.[45]

Although adhering to a broad view of the appealability of privilege rulings, the Supreme Court has rejected the view that "the mere assertion of a privacy interest related to discovery should be found to implicate as-of-right interlocutory appellate review,"[46] explaining that not all protections in the discovery rules against "unreasonable annoyance and embarrassment" qualify for collateral order treatment.[47] Instead, in assessing whether a claimed privacy interest is important enough to merit immediate review, the Court says it will recognize "different orders of privacy interests"[48] and be more willing to permit review if the interest is grounded in constitutional[49] or statutory authorities.[50] For example, the Court has permitted collateral order review of orders that would compel identification of individuals who claim a First Amendment right to remain anonymous.[51] Even if a confidentiality interest lacks a constitutional or statutory basis, it still may qualify for immediate review if it is deeply rooted in public policy, such as an interest in protecting trade secrets and other business information.[52] But privacy interests that are less well-recognized require more fact-based assessments of their importance and are less likely to qualify for an immediate appeal.[53]

With a limited exception for grand jury matters, in which the Supreme Court has expressed some reluctance to recognize a broad right of interlocutory review,[54] the Pennsylvania courts have applied the collateral order doctrine to assertions of privileges and similar disclosure bars in all types of cases, including appeals from administrative orders.[55] And they have held that the doctrine applies regardless of the underlying privilege claim's lack of merit.[56]

---

43. *See T.M.* v. *Elwyn, Inc.*, 950 A.2d 1050, 1056-58, 1061-62 (Pa. Super. 2008) (addressing privilege under Section 111(a) of the Act, 50 P.S. §7111(a)).

44. *See CAP Glass, Inc.* v. *Coffman*, 130 A.3d 783, 787-90 (Pa. Super. 2016) (discussing 42 Pa.C.S. §§5923 and 5924 (2004)).

45. *Branham* v. *Rohm & Haas Co.*, 19 A.3d 1094, 1100-01 (Pa. Super. 2011).

46. *Dougherty* v. *Heller*, 138 A.3d 611, 628 (Pa. 2016).

47. *Id.* at 628 (*citing* Pa.R.C.P. 4011(b) and 4012(a)).

48. *Id.* at 628.

49. *E.g., Commonwealth* v. *Alston*, 864 A.2d 539, 546 (Pa. Super. 2004) (allowing appeal relating to constitutional privacy right regarding psychiatric examination of child victim of sexual abuse); *see Dougherty*, 138 A.3d at 629 n.10.

50. *E.g., Cooper* v. *Schoffstall*, 905 A.2d 482, 485 n.3 (Pa. 2006) (allowing appeal relating to statutory protection against disclosure of tax information); *J.S.* v. *Whetzel*, 860 A.2d 1112, 1116-17 (Pa. Super. 2004) (same); *see Dougherty*, 138 A.3d at 629 n.10.

51. *See Melvin* v. *Doe*, 836 A.2d 42 (Pa. 2003); *Kuwait & Gulf Link Transport Company* v. *Doe*, 92 A.3d 41, 45 (Pa. Super. 2014); *Pilchesky* v. *Gatelli*, 12 A.3d 430, 435-37 (Pa. Super. 2011).

52. *MarkWest Liberty Midstream & Resources, LLC* v. *Clean Air Council*, 71 A.3d 337, 341-42 (Pa. Cmwlth. 2013).

53. *Dougherty*, 138 A.3d at 631 (rejecting claim that fear of public disclosure of potentially embarrassing videotaped deposition testimony was sufficient for collateral order review of denial of protective order).

54. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 208-10 (Pa. 2014).

55. *See, e.g., Township of Worcester* v. *Office of Open Records*, 129 A.3d 44, 51-56 (Pa. Cmwlth. 2016) (privilege and work product challenges in Open Records Act proceeding).

56. *See, e.g., Ben* v. *Schwartz*, 729 A.2d 547, 551-54 (Pa. 1999) (upholding jurisdiction to decide government's claim that statutory privileges under the Right-To-Know Law barred requests for discovery of

## Cases Involving Immunities and Other Substantive Defenses and Protections from Suit

While *Harris* reiterated the Pennsylvania courts' adherence to their prior law on collateral order review of claims regarding privileges and similar doctrines, the Supreme Court's decision in *Pridgen* brought a new category of cases within the collateral order rule's purview. Federal decisions had previously recognized that some immunities from suit qualified for collateral order status because the immunities were intended to spare defendants not just from ultimate liability, but also from the burden and expense of litigating about liability.[57] With the exception of cases raising a double jeopardy defense,[58] the Pennsylvania courts had not had frequent occasion to apply this body of law in their reported decisions under Appellate Rule 313 until *Pridgen* opened that door.[59]

The Court in *Pridgen* acknowledged that the GARA statute of repose at issue in that case "may not be fully on par with immunities and constitutional entitlements" recognized in the federal collateral order cases, but it held that the statute nevertheless embodied a federal policy to shield aircraft manufacturers from the expenses of litigation that was sufficient to permit collateral order review of orders rejecting that defense.[60] The Court thus held that orders failing to dismiss a case on the basis of a defense designed to protect against the burdens of litigation (as opposed to one intended merely to protect against an adverse judgment in that litigation) could merit immediate collateral order review. Inevitably, the Court's decision ushered in a quest to identify what other defenses should be entitled to similar appellate treatment, and the courts soon found a number of them.

Not surprisingly, one of the first to be recognized was another statute of repose—the provision barring medical malpractice actions under the Medical Care Availability and Reduction of Error ("MCARE") Act.[61] The Superior Court held that because the MCARE repose statute was "intended to impose immunity from suit, not just immunity from liability," and because it did so to "ensur[e] that medical care is available in the Commonwealth through a comprehensive and high-quality health care system," collateral order review was appropriate.[62]

---

government files for use in civil litigation, even though claim was meritless); *Price* v. *Simakas Co.*, 133 A.3d 751, 754-59 (Pa. Super. 2016) (upholding jurisdiction to hear claim of privilege under federal health regulations, even though court ultimately held that the regulations provided no privileges against discovery).

57. *See, e.g., Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-47 (1993) (Eleventh Amendment immunity); *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-27 (1985) (qualified immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-43 (1982) (absolute immunity); *Helstoski* v. *Meanor*, 442 U.S. 500, 506-08 (1979) (Speech or Debate Clause immunity); *Abney* v. *United States*, 431 U.S. 651, 660-62 (1977) (double jeopardy).

58. *See Commonwealth* v. *Haefner*, 373 A.2d 1094, 1095 (Pa. 1977) (per curiam); *Commonwealth* v. *Bolden*, 373 A.2d 90, 94-105 (Pa. 1977) (plurality opinion). The risk that a right to immediately appeal an order denying a double jeopardy defense may encourage the filing of dilatory motions by some defendants has caused the Supreme Court of Pennsylvania to limit application of the collateral order rule in cases where the trial court finds that the double jeopardy claim is frivolous. *See Commonwealth* v. *Brady*, 508 A.2d 286, 290-91 (Pa. 1986). If the trial court finds that the claim is frivolous, the defendant may appeal only if he or she first succeeds in overturning the determination of frivolousness by filing a petition for review of that determination. *See Commonwealth* v. *Orie*, 22 A.3d 1021, 1024-28 (Pa. 2011); Pa.R.A.P. 1573.

59. Indeed, prior to adoption of Rule 313 in 1992, the Commonwealth Court adhered to the view that orders refusing to recognize governmental immunities were not collateral orders. *See* Solano & Merenstein, *supra* note 7, at 153 & n.91 (*citing* cases). As will be discussed in the second part of this article in the next issue of the *Quarterly*, some Commonwealth Court cases continue to favor that approach.

60. *Pridgen*, 905 A.2d at 433.

61. *Bulebosh* v. *Flannery*, 91 A.3d 1241, 1242 & n.1 (Pa. Super. 2014) (discussing Section 513 of the Act, 40 P.S. §1303.513); *Osborne* v. *Lewis*, 59 A.3d 1109, 1111 & n.3 (Pa. Super. 2012).

62. *Osborne*, 59 A.3d at 1111 and n.3.

In *Richner* v. *McCance*,[63] the Superior Court extended the collateral order doctrine to orders denying motions to dismiss on the basis of a *lis pendens* defense. The court explained that a trial court's order permitting a second action to proceed while an earlier action asserting the same claims was pending raised important public policy concerns because it "sanctions the continuation of substantially identical lawsuits, in separate forums, involving the same two parties, and deciding the same legal issue," and thereby "presents the potential for multiple appeals and inconsistent or contradictory results, and guarantees the waste of judicial resources."[64]

In *Yorty* v. *PJM Interconnection, L.L.C.*,[65] the Superior Court applied the collateral order rule to a federal immunity defense. PJM, a "regional transmission organization" that coordinated the flow of electricity on the interstate electrical grid, operated pursuant to a federal tariff that said it could not be held liable in tort unless it engaged in gross negligence or intentional misconduct.[66] In a negligence action by an electrical worker who was injured while repairing a high-voltage line, the trial court declined to enter summary judgment for PJM on the basis of this tariff provision.[67] Characterizing the relevant tariff clause as an immunity provision, the Superior Court held that the trial court's summary judgment order was an appealable collateral order because the immunity "functions as an absolute defense to this cause of action" that was created to reduce the cost of electricity to consumers by "limiting exposure to costly lawsuits."[68] The court rejected an argument that it lacked jurisdiction because the tariff's exception for grossly negligent conduct created a factual issue, holding that the plaintiff's claims failed to satisfy a gross negligence standard as a matter of law.[69]

The Superior Court also has held that the collateral order doctrine applies to orders declining to dismiss claims that are alleged to be preempted by federal law. In appeals relating to thousands of cases in which the plaintiffs claimed they suffered personal injuries that were caused by the generic drug metoclopramide,[70] the court held that it could review orders overruling preliminary objections that contended the claims were preempted by amendments to the Federal Food, Drug, and Cosmetic Act.[71] Because the relevant federal statutes were "designed to promote access to low-cost alternatives to name-brand drugs" and the cost of "defending more than two thousand lawsuits" could be significant, the court held that collateral order review was appropriate.[72] However, the court held that jurisdiction was lacking in one of the appeals because the preemption issue in that appeal required resolution of unresolved factual disputes.[73]

---

63. *Richner* v. *McCance*, 13 A.3d 950 (Pa. Super. 2011).
64. *Id*. at 956-57.
65. *Yorty* v. *PJM Interconnection, L.L.C.*, 79 A.3d 655 (Pa. Super. 2013).
66. *Id*. at 657.
67. *Id*. at 658-59.
68. *Id*. at 662.
69. *Id*. at 668.
70. *See Hassett* v. *Dafoe*, 74 A.3d 202, 208-09 (Pa. Super. 2013) (*appeal denied*, 99 A.3d 926 (Pa. 2014), *cert. denied*, 135 S. Ct. 2310 (2015); *In re Reglan/Metoclopramide Litigation*, 81 A.3d 80, 86-88 (Pa. Super. 2013), *appeal denied*, 99 A.3d 926 (Pa. 2014), *cert. denied*, 135 S. Ct. 1892 (2015).
71. 21 U.S.C. §301 *et seq*.
72. *See Hassett*, 74 A.3d at 209.
73. *See In re Reglan Litig*., 72 A.3d 696, 699-702 (Pa. Super. 2013) (factual issues regarding drug manufacturer's continuing responsibility for drug labeling precluded immediate resolution of preemption issue), *appeal denied*, 99 A.3d 926 (Pa. 2014); *accord Collier* v. *National Penn Bank*, 128 A.3d 307, 312-14 (Pa. Super. 2015) (claim of preemption by federal banking laws and regulations turned on unresolved contract issues and appeared not to implicate sufficiently important public policy concerns to justify collateral order treatment).

As these decisions demonstrate, *Pridgen* has ushered in a vibrant body of jurisprudence demonstrating a welcome appellate willingness to examine controlling questions of law early in those cases where public policy disfavors prolonged and expensive litigation and the question presented can end the case at an early stage. These are precisely the types of cases in which interlocutory review is most valuable. As litigation costs continue to rise, the courts' willingness to consider case-dispositive substantive issues under the collateral order rule therefore should be applauded.

## Orders Regarding Counsel

Recent decisions by the Pennsylvania appellate courts also have considered a wide variety of counsel-related issues under the collateral order rule. Although these decisions do not appear to be directly influenced by the decisions in *Pridgen* and *Harris*, the apparent growth in the number of these cases suggests an increased willingness to permit collateral order review in this area.

First, and perhaps most fundamentally, the Commonwealth Court has held that an order precluding an unrepresented entity from proceeding with a case is reviewable as a collateral order.[74] Such orders are common where a non-attorney principal in a corporation or other artificial entity tries to sue in the name of the entity, in violation of rules (based on prohibitions against unauthorized practice of law) that require the entity to be represented by counsel.[75] Although such orders usually are entered without prejudice to the right to proceed if counsel is retained, they presage dismissal of the action if the plaintiff insists on a right not to be represented by counsel, and they therefore may be reviewed immediately.[76]

On the related question whether an *individual* (as opposed to an artificial entity) may proceed without counsel, the Supreme Court has held that an order determining that a criminal defendant in a capital case may not waive his right to counsel because he is incompetent to do so is reviewable as a collateral order.[77] The Court observed that the defendant had a constitutional right to self-representation and to make his own decisions about whether to pursue further legal proceedings, and that this right would be impaired if immediate review was not permitted.[78] In addition, society has an interest in the finality of capital proceedings that favors permitting an immediate appeal.[79]

Just as the foregoing cases permitted collateral order review of decisions implicating a right *not* to be represented by legal counsel, other decisions permit such review when an order interferes with a party's desire to have counseled representa-

74. *See, e.g., In re Petition of the Tax Claim Bureau*, 84 A.3d 337 (Pa. Cmwlth. 2013).

75. In *Petition of the Tax Claim Bureau*, 84 A.3d at 339, the administrator of an estate sought to represent the estate in a tax sale proceeding. In memorandum opinions, the Commonwealth Court has held that similar collateral order treatment applies to orders precluding a trustee from representing a trust, *Straban Township* v. *Hanoverian Trust*, 2015 Pa. Cmwlth. Unpub. Lexis 294, at *9-*10 (April 22, 2015), and a pastor and board president from representing a church organized as a non-profit corporation, *Concilio DeIglesias Ministetio Marantha Pentecostal Inc.* v. *Zoning Hearing Board of the City of Scranton*, 2012 Pa. Cmwlth. Unpub. Lexis 182, at *4-*5 (Mar. 14, 2012). Under the Commonwealth Court's internal operating procedures, a memorandum opinion is not precedential. 210 Pa. Code §69.414(a).

76. *See Petition of the Tax Claim Bureau*, 84 A.3d at 340-41 (noting that prohibition against practice of law must be applied on case-by-case basis and that non-attorneys have a right to represent others in limited cases).

77. *Commonwealth* v. *Wright*, 78 A.3d 1070 (Pa. 2013).

78. *Id*. at 1077-78.

79. *Id*.

tion. In *Gerold* v. *Vehling*,[80] the appellant appealed an order that allowed her counsel to withdraw from representing her. The Commonwealth Court held that the order was appealable because the appellant's right to counsel of her choice "would clearly be lost if she is forced to wait until a final judgment is entered in her case."[81]

In *Commonwealth* v. *Schultz*,[82] the defendant, a former Penn State University employee, agreed to be represented by the university's general counsel when he testified before a grand jury investigating allegations of sexual assault at the university. Following his testimony, however, the general counsel contended that she had represented the defendant only insofar as he had been an agent of Penn State, and not in an individual capacity.[83] The defendant moved to dismiss charges stemming from his grand jury testimony because, among other things, the lawyer's purported failure to represent him in his individual capacity meant that he had been deprived of his statutory right to the presence and "assistance" of counsel under the Investigating Grand Jury Act,[84] and, once that motion was denied, he appealed to the Superior Court.[85] In an extensive opinion, the court held that it had collateral order jurisdiction. The right to counsel under the Grand Jury Act was of "vital importance" in itself and because it was created by the Legislature to protect the constitutional right against self-incrimination.[86] And in the absence of an immediate appeal, the right would be irreparably lost because "there is no effective mechanism for attacking the constructive denial of counsel at a grand jury proceeding on direct appeal" or, probably, on post-conviction collateral review.[87]

The Superior Court has permitted collateral order appeals from decisions alleged to significantly interfere with the right to counsel in civil cases as well. In *Shearer* v. *Hafer*,[88] a personal injury action, the plaintiff appealed from a protective order prohibiting her counsel from being present while she was being given an independent neuropsychological evaluation by the defendant's expert, who insisted that the presence of any observer would violate testing procedures and possibly taint the results.[89] In holding that the protective order was a collateral order, the court stated

---

80. *Gerold* v. *Vehling*, 89 A.3d 767 (Pa. Cmwlth. 2014).

81. *Id*. at 770-71. In a curious twist on *Gerold*, the Commonwealth Court also has permitted a collateral order appeal by attorneys from an order refusing to permit them to withdraw from a case after their client stopped paying them. *Commonwealth* v. *Reading Group Two Properties, Inc*., 922 A.2d 1029 (Pa. Cmwlth. 2007). The court held that continued unpaid representation would deprive the lawyers not only of fees, but also of alternative professional opportunities, injuries that could not be remedied by an appeal at the end of the case. 922 A.2d at 1033. The court distinguished the Supreme Court's holding in *Commonwealth* v. *Wells*, 719 A.2d 729 (Pa. 1998), that a criminal defendant could not use the collateral order doctrine to appeal an order refusing to permit his attorney to withdraw after discovering a conflict of interest, explaining that there is a difference between such an appeal by *the client*, who could obtain reversal and a new trial with new counsel at the end of the case, and the rights of *the attorneys*, who could not receive similar redress. *Reading Group Two Properties, Inc*., 922 A.2d at 1033.

82. *Commonwealth* v. *Schultz*, 133 A.3d 294 (Pa. Super. 2016).

83. *Id*. at 301-05. The lawyer did not explain to the defendant the purported limitations on her representation of him, and the grand jury judge did not seek to clarify the nature of her representation. *Id*. at 301-02, 324 n.26. The lawyer later gave her own incriminating testimony about the defendant to the grand jury, *see id*. at 305-07, which gave rise to separate collateral order issues relating to violation of the defendant's attorney-client privilege. *See id*. at 308-09 (holding that the privilege issues justified collateral order review); *see also supra* note 36. Although the court held that there were separate grounds for hearing the privilege and denial of counsel issues under the collateral order rule, it also held that the issues were "inextricably intertwined." *Schultz*, 133 A.3d at 309.

84. 42 Pa.C.S.A. §4549(c) (2004).

85. *Schultz*, 133 A.3d at 307-08.

86. *Id*. at 309-10.

87. *Id*. at 310-12.

88. *Shearer* v. *Hafer*, 135 A.3d 637 (Pa. Super. 2016), *appeal granted*, No. 248 MAL 2016 (Pa. Sept. 13, 2016).

89. *Id*. at 639-41.

that "any matter implicating and potentially infringing upon a litigant's right to counsel is undeniably too important to be denied review" and that immediate review was required to prevent the right from being "irreparably lost."[90] On September 13, 2016, the Supreme Court of Pennsylvania granted a petition for allowance of appeal in *Shearer* to address the issues involving the protective order but also instructed the parties to brief the question "whether the Superior Court erred in holding that the appeal was properly before it under the collateral order doctrine of Pa.R.A.P. 313."[91]

90. *Id*. at 642.
91. *Shearer* v. *Hafer*, No. 248 MAL 2016 (Pa. Sept. 13, 2016).