Something Old, Something New: The Partial Final Judgment Rule

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You have filed a personal-injury action against two defendants. The trial court dismisses one defendant, finding that it has immunity, but permits the case to proceed under a negligence theory against the other. Can you appeal the trial court's immunity ruling now, or must you wait until final judgment is entered against the remaining defendant?

The recent overhaul of Virginia's appellate rules gives trial lawyers clear guidelines to answer this question. Rule 5:8A authorizes the entry of "Partial Final Judgment" in certain multi-party civil cases. This new rule creates a procedure to immediately appeal rulings applicable to some but not all parties before the case is fully concluded. It authorizes a circuit court, in certain circumstances, to enter a final judgment of an otherwise interlocutory ruling so the judgment may be immediately appealed to the Supreme Court of Virginia.[1]

Overview of the New Rule

Not every ruling in a multi-party case that disposes of claims against fewer than all of the parties will be eligible for immediate appeal under the new rule. Rather, the Supreme Court has carefully limited application of the new rule to issues that are "separate and distinct" from those raised in the claims against the remaining parties in the trial court.[2]

For the Partial Final Judgment rule to apply, the various claims in the action must be able to proceed independently in the appellate court and in the trial court. Under the terms of the new rule, both the interests of the parties *and* the grounds on which judgment is entered must be separate and distinct from those raised by the issues in the claims of the remaining parties.[3] Entry of Partial Final Judgment is appropriate only when the outcome of the appeal of the Partial Final Judgment cannot affect the decision on the claims against the remaining parties in the trial court.[4] And if the Supreme Court reverses the Partial Final Judgment and returns the appealing parties to the trial court, decision of the claims against the remaining parties in the trial court cannot affect the disposition of the claims against the parties subject to the Partial Final Judgment.[5]

Final Judgments versus Appealable Interlocutory Orders

A review of final judgments and interlocutory orders is helpful to an understanding of the Partial Final Judgment rule.

By statute, the Supreme Court of Virginia has jurisdiction to hear appeals from "final judgments."[6] A final judgment is one that disposes of the whole subject of the case, gives all the relief contemplated, and leaves nothing to be done in the case except to ministerially carry the order into execution.[7] By comparison, an order that leaves anything substantive to be done by the trial court is interlocutory, not final.[8] The jurisdiction of the Supreme Court of Virginia to hear appeals from interlocutory orders is limited and purely statutory.[9] Thus, some interlocutory orders are appealable, but only when permitted by statute.[10]

Applying these principles, an order that disposes of claims against fewer than all of the parties is not a final judgment for purposes of appeal, unless authorized by statute.[11] Such an order does not dispose of the whole subject of the case, and leaves claims left to be resolved by the court or jury.

The Partial Final Judgment rule permits a trial court to make final, and thus appealable, a ruling that may otherwise have been an unappealable interlocutory order.

A New Rule . . . Sort of

The Partial Final Judgment rule is certainly new to the Rules of the Supreme Court of Virginia.

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But the concept underlying the rule is not completely foreign to Virginia practice. It mirrors, in some respects, Federal Rule of Civil Procedure 54(b), which governs judgments on multiple claims or involving multiple parties. But the Partial Final Judgment rule finds its origins in and codifies, in part, Virginia's longstanding common law "severable interest rule."

Under the "severable interest rule," an interlocutory order that was final as to some but not all the parties could, in some circumstances, be appealed before the case was concluded as to all the parties.[12] The rule was a judicially-created exception to the general rule that appeals may be taken only from final judgments and interlocutory rulings authorized by statute.[13]

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The severable interest rule allowed an adjudication that was final as to a collateral matter—i.e, separate and distinct from the general subject of the litigation and affecting only particular parties to the controversy—to be appealed before the determination of the case against all defendants.[14] Thus, a judgment was final and appealable when the interests of the parties before the trial court were independent and *severable*.[15] The judgment was severable when the original determination of those issues by the trial court, or any determination which could be made as a result of an appeal, could not affect the determination of the remaining issues in the suit.[16] Further, for a judgment to be appealable under the severable interest rule, the determination of the remaining issues in the trial court could not affect the issues between the parties on appeal if they were restored to the case by a reversal.[17]

If the issues presented in the case are truly separate and distinct, then the dismissal of one party is, in effect, a final judgment, and there is no good reason to wait until a final disposition of all the parties before appealing. Under the severable interest rule, though, a party could appeal such a ruling immediately *or* wait until a final judgment as to all parties before appealing.[18] By allowing litigants to elect the timing of an appeal, the relatively obscure severable interest rule avoided prejudicing the appellate rights of litigants who had never heard of it.[19]

Severable Interest Cases

Under the severable interest rule, the Supreme Court of Virginia permitted appeals of separate and distinct rulings involving fewer than all the parties before a final disposition as to all parties. Examining a few of the key cases, which defined the contours of the severable interest rule, adds context to the new Partial Final Judgment rule.

The Supreme Court first applied the severable interest rule in the 1925 case *Bowles v. Richmond*.[20] Although the Court did not identify the rule by name, it recognized it as an exception to the general rule that there is no appealable judgment until there is a disposition as to all joint tortfeasors.[21]

The plaintiff in *Bowles* sued the City of Richmond and a railroad for injuries sustained as a result of their negligent failure to properly safeguard the approach to an old bridge.[22] The City sought dismissal of the suit, alleging that the plaintiff had failed to give written notice of the accident to the City, as required by the City's Charter.[23] The circuit court agreed with the City, and dismissed it from the case.[24] The plaintiff appealed this ruling even though no action had been taken against the railroad.[25]

The Supreme Court decided that the order under consideration was appealable because "there [was] no joint interest between the defendants in the matters decided by the circuit court" and the issue did not relate to the merits of the case.[26] Thus, the Court reasoned, the judgment as to the City was final, and the appeal was proper.[27]

The same principle permitted an appeal of an otherwise interlocutory ruling in *Hinchey v. Ogden*, a personal-injury case.[28] The plaintiff in *Hinchey* was a passenger on a motorcycle that was struck when Henderson's vehicle crossed into its lane of travel.[29] The plaintiff sued Henderson and the superintendent of the expressway where the accident occurred.[30] She alleged that Henderson had negligently operated his vehicle, and that the superintendent had breached

his official duty to provide barriers and other traffic control devices sufficient to prevent vehicles from entering the wrong lane of travel.[31] The trial court dismissed the action against the superintendent on the basis of sovereign immunity.[32] The plaintiff appealed that ruling, even though her case remained active in the trial court against the driver defendant. Citing *Bowles*, the Supreme Court found that the sovereign-immunity ruling was appealable.[33] It presented a separate and distinct issue for appeal. The issue of the superintendent's liability was not related to, or dependent on, the issue of the driver's negligence.

One landmark personal-injury case—*Thompson v. Skate America, Inc.*—reached the Supreme Court before a final judgment as to all the parties via the severable interest rule. *Thompson* defined the duties of a business owner to protect its invitees against the danger of harm from the criminal acts of third parties. In *Thompson*, the plaintiff was assaulted by another patron, a minor, while visiting a skating rink.[34] The assailant was a known trouble-maker who had been previously ejected, and then banned, from the skating rink because of his history of causing fights and disturbances.[35] The skating rink, however, failed to enforce the ban on this occasion.[36]

The plaintiff sued three parties—the skating rink, the minor assailant, and the mother of his assailant—and asserted joint and several liability.[37] The suit against the minor for assault and battery alleged an intentional tort, but the claims against the skating rink and the minor's mother were premised on negligence theories.[38] The circuit court dismissed the negligence claims against the skating rink and the minor's mother on demurrer, but the claim against the minor assailant was not dismissed.[39]

Describing the judgment order from which the plaintiff appealed as "interlocutory in nature," the Supreme Court held that the ruling sustaining the demurrer was appealable.[40] Under the severable interest rule, the claims against the minor were based upon an intentional act separate and distinct from the issues presented on appeal.[41] Therefore, the order sustaining the demurrer was final as to the skating rink and the minor's mother, and severable from the interests of the assailant, the remaining defendant.[42]

How does the Partial Final Judgment rule work?

The Partial Final Judgment rule applies to civil suits involving claims against multiple parties—whether in a complaint, counterclaim, cross-claim, or third-party claim.[43] The Rule authorizes, but does not require, a trial court to enter a final judgment as to one or more but fewer than all of the parties.[44]

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The rule applies only if the trial court enters an order that is "expressly labeled" a Partial Final Judgment.[45] Further, the Partial Final Judgment order must include three explicit findings, which embody the principles of the severable interest rule: (i) the interests of the parties, and the grounds on which judgment is entered as to them, are separate and distinct from those raised by the issues in the claims against remaining parties; (ii) the results of any appeal from the partial final judgment cannot affect decision of the claims against the remaining parties; and (iii) the decision of the claims remaining in the trial court cannot affect the disposition of claims against the parties subject to the Partial Final Judgment if those parties are later restored to the case by reversal of the Partial Final Judgment on appeal.[46]

It is unlikely that circuit court judges will *sua sponte* issue Partial Final Judgments. Many Virginia circuit court judges do not issue their own orders. Further, rulings subject to treatment as Partial Final Judgments will likely appear in letter opinions or bench rulings. Therefore, after receiving a ruling that falls within the ambit of the rule, parties who wish to immediately appeal that ruling to the Supreme Court under Rule 5:8A should prepare an order that satisfies the requirements of the new rule and present it to the court for consideration and entry.

After Entry of Partial Final Judgment

The entry of Partial Final Judgment starts the clock on the thirty-day period to file a notice of

appeal and the three-month period to file a petition for appeal.[47] Thus, appeals from the entry of Partial Final Judgment generally will proceed as other appeals from final judgments and orders. No appeal, however, may be taken from the trial court's refusal to enter a Partial Final Judgment.[48]

Under the severable interest rule, a party aggrieved of a ruling on fewer than all the claims or parties could elect to appeal immediately or to appeal after there was a final judgment resolving the entire case.[49] In contrast, because a Partial Final Judgment is a final judgment, the entry of an order under Rule 5:8A begins the appeal process, and there is no option to delay the appeal until entry of a final judgment on all parties and claims. This point is critical – *a Partial Final Judgment under Rule 5:8A must be timely appealed or the right to appeal that judgment is forever lost*.

The Death Knell of the Severable Interest Rule

Any order that adjudicates fewer than all the claims but fails to comply with the requirements of the new Supreme Court rule is not a final judgment.[50] To be appealable, such orders must include the express findings and label required under Rule 5:8A(a). Any order adjudicating the rights of fewer than all the parties that does not contain these elements is not appealable.[51] Thus, the Partial Final Judgment rule supersedes the common law severable interest rule. As a practical matter, then, the severable interest rule is dead.

Practical Considerations

New rules, like other novelties, spark attention and interest. But litigators should carefully consider whether appealing a ruling that could be subject to the Partial Final Judgment Rule is advisable, or even helpful, to the case. The pros and cons of pursuing an appeal under Rule 5:8A depend on the unique circumstances of each case.

The benefits of the rule are obvious. An important ruling may be immediately appealed without waiting for resolution of the case against all the parties. Due to the uncertainties of litigation, some cases take years before a full and final judgment is rendered. An immediate appeal of a ruling that impacts fewer than all the parties may inform the overall case strategy and advance resolution of the case.

Cases where there has been a Partial Final Judgment will proceed on dual tracks – there will be both a case in the circuit court and an appeal in the Supreme Court. The new rule makes no provision for a stay of the proceedings in the trial court during the pendency of the appeal.[52] Managing two cases—involving at least one similar party—in different courts may present challenges and concerns that outweigh any benefit to be gained from pursuing an appeal before a final judgment as to all the parties.

Timing is an important factor to consider. Because civil appeals in the Supreme Court may take up to eighteen months to complete, a litigant may already have a final judgment in the trial court before receiving a decision from the Supreme Court on the Partial Final Judgment. If there is then an appeal of the remaining claim, dual-track litigation may result in prosecuting or defending two appeals in the Supreme Court at the same time. Similarly, if the appeal of the Partial Final Judgment is successful, then that case will be remanded, and there is the prospect of two separate trials.

Economic considerations may also impact the choice of when to appeal a ruling that involves fewer than all the parties in the case. It is usually, but not always, cheaper to appeal a case once, rather than twice. With the entry of Partial Final Judgment, the litigants on both sides of the "v" may face two appeals and two trials, rather than one.

Whatever the unique issues and circumstances of your case, Rule 5:8A should find its way into every litigator's tool box. ▣

1. There is no similar provision in the rules of the Court of Appeals of Virginia.
2. Rule 5:8A(a).
3. *Id.*
4. *Id.*
5. *Id.*
6. Va. Code § 8.01-670(A)(3).
7. *Comcast of Chesterfield County, Inc. v. Bd. of Supervisors*, 277 Va. 293, 301, 672 S.E.2d 870, 873 (2009); *Lewis v. Lewis*, 271 Va. 520, 528, n.3, 628 S.E.2d 314, 318, n.3 (2006); *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 327, 497 S.E.2d 740, 743 (1998); *Leggett v. Caudill*, 247 Va. 130, 133, 439 S.E.2d 350, 351 (1994); *Burns v. Equitable Assocs.*, 220 Va. 1020,

1028, 265 S.E.2d 737, 742 (1980); *Lee v. Lee*, 142 Va. 244, 250, 128 S.E. 524, 526 (1925).
8. *Comcast of Chesterfield County, Inc.*, 277 Va. at 301, 672 S.E.2d at 873.
9. *Lancaster v. Lancaster*, 86 Va. 201, 204, 9 S.E. 988, 989 (1889); *Thrasher v. Lustig*, 204 Va. 399, 401, 131 S.E.2d 286, 288 (1963). For example, in 2002, the legislature enacted a statute permitting interlocutory appeals by permission of the trial court in a pending civil action where no trial had commenced. Va. Code § 8.01-670.1.
10. *See* Va. Code § 8.01-626; Va. Code § 8.01-670(B) and (C); Va. Code § 8.01-670.1.
11. *Leggett*, 247 Va. at 133-4, 439 S.E.2d at 352; *Wells v. Whitaker*, 207 Va. 616, 628, 151 S.E.2d 422, 432 (1966).
12. *Thompson v. Skate America, Inc.*, 261 Va. 121, 127, 540 S.E.2d 123, 126 (2001); *Leggett*, 247 Va. at 133-4, 439 S.E.2d at 351-2.
13. *See*, *e.g.*, *Leggett*, 247 Va. at 133, 439 S.E.2d at 351.
14. *Thompson*, 261 Va. at 127, 540 S.E.2d at 128; *Leggett*, 247 Va. at 133-4, 439 S.E.2d at 352.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Dalloul v. Agbey*, 255 Va. 511, 515, n.*, 499 S.E.2d 279, 282, n.* (1998) (when the severable interest rule applies, "the order may be appealed either at the time of its entry or when the trial court enters a final order disposing of the remainder of the case").
19. However, misapplication of the rule may have fatal consequences for an appeal. In *Leggett*, the plaintiff sued three parties in a three-count motion for judgment. 247 Va. at 132, 439 S.E.2d at 351. She appealed the dismissal of Count I, which involved two of the three defendants, and the remaining two counts of her suit remained active in the trial court against all but one defendant. *Id.* Later, the trial court dismissed the remaining counts, and the plaintiff did not appeal that ruling. *Id.* The Supreme Court held that her appeal of Count I was premature and was not an appealable order under the severable interest rule. *Id.* at 133-5, 439 S.E.2d at 351-3. Consequently, the plaintiff lost her appeal.
20. 147 Va. 720, 129 S.E. 489 (1925), *aff'd on rehearing*, 147 Va. 729, 133 S.E. 593 (1926).
21. *Id.* at 725, 129 S.E. at 490.
22. *Id.* at 723, 129 S.E. at 489.
23. *Id.* at 723-4, 129 S.E. at 489.
24. *Id.* at 724, 129 S.E. at 489.
25. *Id.*
26. *Id.* at 725, 129 S.E. at 490.
27. *Id.*
28. *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983).
29. *Id.* at 236, 307 S.E.2d at 892.
30. *Id.*
31. *Id.* at 237, 307 S.E.2d at 892.
32. *Id.*
33. *Id.* at 237, n.1, 307 S.E.2d at 892, n.1.
34. *Thompson*, 261 Va. at 125, 540 S.E.2d at 125.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 126, 540 S.E.2d at 125.
39. *Id.* at 126-7, 540 S.E.2d at 126.
40. *Id.* at 127-8, 540 S.E.2d at 126.
41. *Id.*
42. *Id.*
43. Rule 5:8A(a).
44. *Id.*
45. *Id.*
46. *Id.*
47. Rule 5:8A(b).
48. Rule 5:8A(c).
49. *Dalloul*, 255 Va. at 515, n.*, 499 S.E.2d at 282, n.*.
50. Rule 5:8A(d).
51. *Id.*
52. However, the parties and the circuit court may agree that a stay is appropriate during the pendency of the appeal.