By JACOB C. LEHMAN,* Philadelphia County
Member of the Pennsylvania Bar

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ABSTRACT

With its little discussed 2010 decision, Kincy v. Petro, the Pennsylvania Supreme Court changed the law on consolidated cases and created significant new issues for practitioners to be aware of. Kincy may mean big changes for trial and appellate practice in consolidated matters and can represent a trap for the unaware. Specifically, Kincy may affect when and how to take an appeal and whether cross-claims versus joinder practice must be employed. This article explores prior practice, the Court's decision in Kincy, later intermediate appellate court opinions and the various practice questions—and pitfalls—that Pennsylvania litigators must be aware of.

INTRODUCTION

In 2010 the Pennsylvania Supreme Court decided Kincy v. Petro clarifying Rule of Civil Procedure 213 and the ways in which cases may be consolidated. Rule 213, which governs consolidation, provides that:

In actions pending in a county which involve a common question of law or fact or which arise from the same transaction or occurrence, the court on its own motion or on the motion of any party may order a joint hearing or trial of any matter in issue in the actions, may order the actions consolidated, and may make orders that avoid unnecessary cost or delay.

Thus, Rule 213(a) provides three ways in which cases might be consolidated provided they involve a common question of law or fact or arise from the same transaction. These are: (1) ordering a joint trial or hearing, (2) ordering the actions consolidated and (3) issuing other orders to avoid unnecessary cost or delay.2

Prior to Kincy, when a Court elected the second option and ordered cases “consolidated”, depending on the language of the trial court order, the cases would be treated as

* Mr. Lehman is an attorney with the Philadelphia firm of German Gallagher & Murtagh, P.C. where he handles personal injury and commercial litigation.
2. Hereafter, for ease of reference, the three options will be referred to as 213(a)(1), 213(a)(2) and 213(a)(3) recognizing that the text of the rule itself does not contain this numbering.
merged. In *Kincy*, the Court held that consolidated cases retain their separate and distinct identities under almost all circumstances. The implications of this ruling are still being worked out. Depending on how *Kincy* is interpreted it can affect trial and appeals practice for both plaintiffs and defendants. The following hypothetical illustrates the issues:

Assume you represent the plaintiff, a subcontractor employee, who was injured in a construction accident while using a drill. Initially, you sue the general contractor and the manufacturer of the drill. Through discovery you learn Plaintiff's accident was in part related to a defectively designed component part of the drill made by a different company (the “component manufacturer”). You want to assert your client’s claim against all potentially liable (and solvent) parties. In order to get the component manufacturer into the action you have two options. You might seek permission to file an amended complaint adding the component part manufacturer as a defendant. In this scenario all parties would be part of one action under one docket number. However, an equally available way to proceed (and one that avoids the time consuming process of asking permission for leave to amend which is important with an approaching statute of limitations) would be to file a separate action against the component part manufacturer and then seek to have the two actions consolidated pursuant to Pa. R.C.P. 213.

Suppose you elect the second option, file your action against the component part manufacturer and then move for consolidation. The Court grants your consolidation motion and even enters an order directing that the cases are “consolidated for all purposes including discovery and trial”. You continue through discovery. The component part manufacturer moves for summary judgment. The Court grants the summary judgment motion and the order is entered on the consolidated docket or simultaneously on both dockets. You feel that the summary judgment grant was incorrect and wish to appeal.

Pre-Kincy, the proper avenue to proceed was clear. If the Court ordered the cases “consolidated for all purposes”, electing the option described by 213(a)(2), then the cases would merge and be treated as one. An order granting summary judgment as to less than all parties in the single consolidated action would be treated as interlocutory. As an interlocutory order you did not need to appeal immediately and in practice you would be unlikely to get an immediate appeal unless you could overcome the hurdles outlined in Pa. R.A.P. 341 or Pa. R.A.P 1311.

Post-Kincy, what happens is unclear. If the cases retain their separate and distinct identities regardless of the language of the consolidation order, then does the summary judgment grant dispose of all claims against all parties in the action against the component part manufacturer? If it does, it seems the order would qualify under Rule of Appellate Procedure 341 as a final order which can and must be immediately appealed. Or, is this still an interlocutory order?

These threshold questions beg further questions. For instance, does it make a difference if parties in what were separate actions assert (or at least attempt to assert) cross-claims against one another post-consolidation? Post-Kincy it is unclear whether this is even possible and if it is, what is the effect of the cross-claims on the merger.

Cross-claims are defined by Pa. R.C.P. 1031.1. That rule provides that:

Any party may set forth in the answer or reply under the heading “Cross-claim” a cause of action against any other party to the action that the other party may be:

1. solely liable on the underlying cause of action or
2. liable to or with the cross-claimant on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action is based.

Implicit in rule 1031.1 is that cross-claims may only be asserted by a party to the action against a party to the action. The official note underscores this providing that “The term ‘underlying cause of action’ refers to the cause of action set forth in the plaintiff’s complaint or the defendant’s counterclaim. When cases are separate and distinct how can a cross-claim be filed since it would not be against another party to the action? If cross-claims are not permitted in post-Kincy consolidated cases then must each defendant move for leave to join the other defendant to its action in order to assert claims for contribution and indemnity? Again, the answer is not apparent.

On the other hand, if cross-claims are permitted between consolidated actions that retain their separate and distinct identities do the cross-claims act to merge the cases? Returning to the above hypothetical, if the component part defendant and the manufacturer defendant cross claim against one another don’t the two cases then have the same exact parties, and causes of action and therefore, under Kincy they could merge? Would it matter if the cross-claims were asserted before or after the statute of limitations on plaintiff’s claims expired?

In the years following the Kincy decision, these issues remained up in the air. Then, in December, 2014, the Superior Court, in a panel decision, Malanchuk v. Sivchuk, gave its answer. The problem is that this answer seems to conflict with the holding of the Commonwealth Court in a prior decision, Knox v. SEPTA, and with the plain language of Kincy. This article will discuss the methods of consolidation, how Kincy affected the law, the subsequent decisions, the solution arrived at by the Superior Court in Malanchuk, and the questions that remain.

**RULE 213 AND PRE-KINCY PRACTICE**

As discussed above, prior to Kincy, the appellate precedent indicated that when a trial court ordered cases “consolidated” the cases merged into a single docket. This applied in cases with different plaintiffs suing different defendants and in cases where one plaintiff sued different defendants in separate actions. Following this practice, one would determine whether the Court had ordered a joint trial and hearing 213(a)(1) or had completely consolidated the cases 213(a)(2) by looking to the language of the Court’s consolidation order. If the Court had indicated the cases were “consolidated for trial only” then option one applied. If the cases were consolidated for “purposes of discovery and trial” or simply “consolidated” then they were treated as merged under Pa.R.C.P. 231(a)(2).

Once it was determined which option under Pa.R.C.P. 213 the Court had elected, it would be relatively easy to determine whether orders entered in the action were final, or whether they were interlocutory. In a case that merged under 213(a)(1), any order that granted the summary judgment motion of some but not all defendants was not a final order (i.e., was interlocutory). Conversely, under option 1 (joint trial or hearing) summary judgment motions would be filed separately on separate dockets. An order dismissing all claims against all parties in one action was a final order. **Id.**, at 811. Further, in cases that were consolidated such that they merged, defendants in one action might file cross-claims against defendants in another.

With Kincy, it seemed that things had changed. After all, if Kincy truly applied to all consolidated cases, and stood for the proposition that consolidated cases cannot merge so long as they involve different parties and/or different theories of liability, even if a trial court treated a case as merged by, for example, consolidating the docket and accepting filings under only one docket number, wouldn’t that affect what orders were and were not final? If the cases retained their separate and distinct identities then wouldn’t any order entered have to be analyzed on a case by case basis to determine if it was a final order? Similarly, if cases were separate and distinct wouldn’t cross-claims between the actions present a problem?

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**KINCY v. PETRO**

The Facts

Kincy involved a motor vehicle accident in which a car occupied by a driver (Kincy) and a passenger (Nixon) collided with a car with only a driver (Anastasia). The car Anastasia was driving was owned by her mother (Ms. Petro). Kincy and Nixon each brought suit to recover for injuries sustained in the car accident. Kincy only sued the mother, Petro, alleging she was negligent in the operation of her car. Nixon and his wife, in a separate action, sued mother, Petro and daughter, Anastasia. They alleged negligence against the daughter and negligent entrustment against the mother.

Early on in discovery it became clear that the daughter, Anastasia, not the mother, Ms. Petro, was operating the striking vehicle. Kincy had sued the wrong person. Despite this she never sought to amend her complaint to include Anastasia as a defendant. Instead, the trial judge, on motion of Kincy, ordered the cases consolidated for “all purposes”. The consolidated cases went to arbitration where Nixon and his wife (who had sued both Anastasia and Ms. Petro) prevailed and proceeded to settle their case. Kincy’s claim then proceeded to trial, where nonsuit was entered in favor of Ms. Petro since she was not driving her car when the collision happened and the only allegations raised in Kincy’s complaint involved negligent operation of a vehicle by Ms. Petro.

Kincy appealed arguing that due to entry of the consolidation order for “all purposes” her complaint merged with that of the Nixon and his wife and that Nixon’s allegations of negligent driving against Anastasia should be considered as raised by the plaintiff (Kincy). Kincy argued that by ordering the cases consolidated for “all purposes” the Court had elected consolidation under Pa.R.C.P. 213(a)(2) and that this type of consolidation effected a merger of the two actions.

The Decision

In *Kincy v. Petro*, the Pennsylvania Supreme Court rejected Kincy’s argument that the cases had merged into a single action and therefore she did not need to amend her complaint to include a claim against Anastasia. The Court did so by way of a lengthy analysis of Rule 213 and the history of consolidation practice. Relying on a 1918 opinion, *Azinger v. Pennsylvania Railroad Co.*, in which the Court analyzed the various methods of consolidation, the *Kincy* Court held that “the second option for consolidation under Rule 213(a), relied on by Kincy, is distinct from the complete consolidation implicated in *Azinger*” and that “complete consolidation [read merger] cannot be achieved unless the actions involve the same parties, subject matter, issues and defenses”.9

In reasoning that 213(a)(2) does not refer to a merger, the Court noted that in light of the compulsory joinder rules outlined in Pa. R.C.P. 1020(d) “there are few if any circumstances, in which separate actions would involve identical parties, subject matter, issues and defenses, such that complete consolidation by a trial court would be contemplated under rule 213”.10 They recognize that while the first option expressed under 213(a) refers only to cases consolidated for joint trial or hearing, there are other reasons a court or parties might wish actions to be combined such as for purposes of discovery, to keep the cases on the same time schedule or to keep them before the same judge.11 The Court also explicitly rejected the reasoning expressed by the Superior Court in *Keefer* that the language of the trial court’s consolidation order controls whether or not cases merge. Finally the Court noted that under *Kincy’s* facts (a multi-plaintiff suit) complete consolidation is untenable as it is patently unfair to force separate plaintiffs to join forces as if they filed suit together.12

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8. 262 Pa. 242, 105 A. 87 (1918).
10. Id., at 494.
11. Id.
12. Id. at 495.
**KNOX v. SEPTA AND THE EARLY KINCY PROGENY**

What the Court in *Kincy* left unsaid is how broadly its holding should be applied. Is *Kincy* limited to suits brought by different plaintiffs against the same defendants or does it apply to the much broader category of multiple cases brought by a single plaintiff against different defendants which are then consolidated (as in the hypothetical)? The bulk of the Court’s reasoning about Rule 213 and when cases do and do not merge seems like it would apply to all consolidated cases. On the other hand, the final piece of the holding—that it is unfair to force separate plaintiffs to join forces as if they filed suit together, is limited to the multi-plaintiff case.

Following *Kincy*, a number of intermediate appellate court decisions emerged on this topic. At first, all these decisions seemed to imply that *Kincy* was to be applied broadly and that it affected what orders would be considered final versus interlocutory. Then, at the end of 2014, the Superior Court at least, reversed course in *Malanchuk v. Sivchuk*. Whether this is a final resolution of the issue is still unclear. Malanchuk seems to conflict with the Commonwealth Court’s holding in *Knox v. SEPTA*. Further, while Malanchuk says *Kincy* cannot apply beyond its facts, the language in *Kincy* does not seem to limit itself.

**Knox v. SEPTA**

The first of the post-*Kincy* decisions that address the consolidation issue is the Commonwealth Court’s decision in *Knox v. SEPTA*.13 *Knox* arose out of a collision between an uninsured driver’s car and a SEPTA bus. As a result of the accident, four passengers on the bus claimed injury. Each plaintiff filed two separate complaints (eight complaints in total)—one against the bus driver and the uninsured driver (the SEPTA action) and a separate complaint against the Pennsylvania Financial Responsibility Assigned Claims Plan (Plan action).

The trial court consolidated all eight actions pursuant to Pa.R.C.P. 213 for purposes of discovery and trial. Later, the Plan filed summary judgment motions in the four actions asserted against it. The trial court granted summary judgment to the plan in all four actions. No appeals were filed from those orders.14

The four SEPTA actions proceeded to a non-jury trial. Following post-trial motions, the Court entered a directed verdict in favor of SEPTA and the uninsured driver. The four separate passengers filed a single notice of appeal in the Superior Court seeking review of, in part, the trial court’s order granting summary judgment in favor of the Plan in each action.15

The Plan filed a motion to quash the passenger plaintiffs’ combined notice of appeal as it related to the summary judgment grant. The Plan argued that the trial court’s order that the cases be consolidated for discovery and trial did not merge the cases. Since the cases were still separate and distinct they claimed that the order, which granted summary judgment to the Plan in each of the four actions against it, was a final order for purposes of each of those actions. They claimed that as a final order under Pa.R.A.P. 341 each passenger plaintiff, by failing to take a direct appeal within 30 days of the entry of the order pursuant to Pa.R.A.P. 903, waived their appellate rights.16

In *Knox*, the Commonwealth Court relying directly on *Kincy*, granted the Plan’s motion to quash. Notably, the *Knox* Court held that complete consolidation of the Plan actions with the SEPTA actions could not be achieved because they involve different parties, issues and defenses. The Court held that the consolidation order was only for purposes of discovery and trial. The passengers should have filed appeals from the summary judgment grant within 30 days pursuant to Pa.R.A.P. 903(a) and having failed to do so, they waived their appellate rights. *Id.*, at 1020.

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14. *Id.*, at 1017.
15. *Id.*, at 1018.
16. *Id.*, at 1019.
Knox is interesting because while it does involve multiple plaintiffs it also involves a situation where each plaintiff has filed two suits against different defendants (SEPTA and the Plan). In Knox, when the court says the cases involve different, parties, issues and defenses they might, in part, be relying on the fact that there are multiple plaintiffs. On the other hand, even as to each individual plaintiffs two separate actions there are different parties; SEPTA and the uninsured driver in one action, the Plan in another. Arguably, implicit in Knox, is the suggestion that even for each individual passenger plaintiff, the cases could not be consolidated such that they merged. If this is true it means Kincy applies beyond its own facts to all consolidated cases.

**Malanchuk, Round 1 and the Other Panel Decisions**

While the Commonwealth Court addressed the issue in a published decision with Knox, the Superior Court’s initial treatment of the issue came in three unpublished panel decisions. The first of these was Malanchuk v. Sivichuk, a decision that Court revisited en banc in December of 2014 as noted above. After the Malanchuk panel decision, two other Superior Court panels also addressed the issue. In all three of these decisions the Superior Court seemed to take the view that Kincy, should be applied broadly.

In Malanchuk, the plaintiff, Ihor Malanchuk, was hired as an independent contractor by a company owned by Sivchuk. Sivchuk also hired Mr. Tsimura as an independent contractor to act as a supervisor and field manager on Sivchuk’s construction projects. While working on a project in 2008, Malanchuk was seriously injured when he fell from scaffolding while working on a Sivchuk job at which Tsimura was also present.

Malanchuk filed two separate lawsuits in the Philadelphia Court of Common Pleas; one against Sivchuk and one against Tsimura. In both actions Malanchuk raised allegations of negligence and products liability. On Sivcuk’s motion, the court ordered the cases consolidated “for the purpose of discovery, arbitration and if [the arbitration is] appealed, trial”.

After discovery was completed, both defendants filed a motion for summary judgment. The Court granted Tsimura’s motion in its entirety and denied Sivchuk’s motion in part. Malanchuk filed a direct appeal to the Superior Court of the order granting summary judgment to Tsimura. The trial court, in its 1925(b) opinion, suggested that Malanchuk had improperly appealed from an interlocutory order.

In analyzing whether it had jurisdiction to handle the appeal—in other words whether the appeal was properly taken from a final order—the panel, in an opinion written by Judge Bowes, held that under Kincy, “despite the consolidation order, these two actions have retained their separate identities because different defendants are named in each lawsuit”. The Court held that since the summary judgment order ended the action as to Tsimura, it was a final order for purposes of that action and therefore, was immediately appealable.

Malanchuk, also generated a dissent by Judge Ott. Judge Ott argued that Kincy is factually distinguishable, that the Malanchuk cases did not merge and that the order granting partial summary judgment was interlocutory. Judge Ott’s first argument is that in Kincy, at the time of the consolidation order, the statute of limitations had expired. Judge Ott seems to suggest that the Supreme Court could not accept that the Kincy and Nixon cases could merge into one action because it would, in effect, allow Kincy to assert a claim against Anastasia Petro which ordinarily she would be time-barred from doing. Judge Ott further suggests that Kincy deals with the merger of complaints by multiple plaintiffs not a single plaintiff with allegations against joint defendants. Finally, the dissenting opinion argues that a party should not be prejudiced by choosing to pursue one of the several available options for bringing another defendant into a lawsuit—i.e.

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18. Id., at pages 2-3.
19. Id., at page 3.
20. Id., at page 4.
21. Id. at page 8.
choosing to file separate cases and consolidate them rather than amending the complaint in one action to add defendants.

The Malanchuk panel, Judges Bowes Ott and Strassburger, implied a broad reading of *Kincy*—keeping consolidated cases separate and creating appealable orders—again in a 2013 Superior Court non-precedential opinion, in the Interest of Y.Z.I. a Minor (Appeal of A.R.S.). In Y.Z.I., in a footnote the panel recognizes that the order in question (denying appellant’s petition for adoption of her nephew) is appealable even though the order applied to two consolidated and competing adoption petitions. The Court notes that “while the trial court entered a single order as to competing adoption petitions, the two petitions retained their separate identities”. Citing *Kincy* the panel noted that “As the order serves to put Appellant out of court, it is final as it relates to her petition to adopt Y.Z.I.”.

A different Superior Court panel recognized *Kincy’s* no-merger rule in another unpublished decision, *Jackson v. Drew*.

Jackson involved a plaintiff who was injured in one automobile accident and then, while treating for injuries from the first accident, was hit again while driving. Jackson filed two suits against different defendants in the Allegheny County Court of Common Pleas. He moved to consolidate the actions arguing they involved a common question of law and fact, i.e. which injuries were sustained in which accident. The defendant in the first action, Danielle Drew, appealed the trial court’s order granting consolidation.

In a panel decision Judges Bowes, Wecht and Stabille, held that the order granting consolidation was interlocutory. In doing so they cited *Kincy* noting that: there is no reason to believe any claim or defense will be irreparably lost because of consolidation of these cases. The consolidation at issue here did “not result in merger of the pleadings, or the loss of the separate identities of the actions”.

**MALANCHUK ROUND 2**

In December of 2014, in a full court decision, the Superior Court reversed its earlier panel ruling in *Malanchuk*. In the new opinion the Court rejects a broad application of *Kincy* and holds that the ruling has no effect on whether orders are final or interlocutory.

As he had for the panel decision, on re-argument *en banc* Malanchuk, the plaintiff in the underlying case, relied on *Kincy* for the position that because the actions were consolidated under Rule 213, the claims against each defendant retained their separate identities thereby rendering summary judgment for Tsimura a final order. Malanchuck argued his direct appeal from that order was proper.

Judge Ford Elliot, writing for the Court, rejected Malanchuk’s position, noting that it expands *Kincy’s* application far beyond its holding and abrogates the definition of a final order. He writes that *Kincy* is limited to its facts, a case with multiple plaintiffs where the statute of limitations had run, and if consolidation had been permitted it would have subverted the time bar on suit. He notes that *Kincy* never addressed the issue of what sorts of orders in consolidated cases are appealable.

Echoing the dissent of Judge Ott in the panel decision, the majority opinion in *Malanchuk* states that there is no reason to treat the [summary judgment order] any differently simply because the claims against each defendant were initially filed separately and then consolidated for trial pursuant to Rule 213(a). It is unreasonable to find the otherwise interlocutory order is final and appealable based solely on the manner in which the claims were originally presented.

**WHERE ARE WE NOW?**

While the recent *Malanchuk* decision makes the hurdle for those arguing for a broad reading of *Kincy* much higher, the issue is not completely settled. For one thing, *Malanchuk* could be read to conflict with *Knox v. SEPTA*. For another, as the panel deci-
sions that precede Malanchuk make clear, there is obviously dissent, or at least confusion on this point. The Supreme Court, when it decided Kincy, could have limited Kincy to its facts but, for the most part did not do so. The pronouncement in Kincy, that cases retain their separate and distinct identities was emphatic. The Malanchuk opinion never fully addresses this pronouncement and its scope head on. Instead, Malanchuk focuses on the definition of a final order in R.A.P. 341 and more or less assumes that the order granting summary judgment to Tsimura cannot qualify because when the two actions (one against Sivchuk and one against Tsimura) were consolidated for trial, the merged Malanchuk does not address the clear statement in Kincy that the actions are separate and distinct unless they have the exact same parties, issues etc. except by saying that case is limited to its facts.

This author suggests that while, for now, Malanchuk, is controlling at least in the Superior Court, practitioners should remain aware of this issue. When two or more cases are consolidated any order entered that has the effect of ending all claims against all parties in one or more, but not all, of the consolidated actions, should be treated as final, and any party wishing to appeal should file a notice of appeal within 30 days of the order in accordance with Pa.R.A.P. 903. This is imperative, as if the order is construed as final failure to file the notice of appeal within 30 days results in a waiver. If the order merits, the practitioner might, in addition, seek an interlocutory appeal arguing that she wishes to do so “in the alternate” to the extent the trial or appellate court rules that the underlying order is not final. Practitioners also ought to be careful of cross claims in consolidated cases. It may be advisable to seek to join as an additional defendant, those parties in a separate but consolidated case, which one wishes to assert cross-claims against.