 Trials And Appeals In Consolidated Cases: The Landscape Post Malanchuk

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

TABLE OF CONTENTS

HOW DID WE GET HERE: THE WORLD BEFORE KINCY ......................... 49
KINCY v. PETRO, AND THE AGE OF UNCERTAINTY ..................... 51
The Kincy Decision ......................... 51

Knox v. SEPTA ......................... 51
Malanchuk in the Superior Court ........ 52
MALANCHUK v. TSIMURA: THE SUPREME COURT SPEAKS ........... 53
WHERE ARE WE NOW? ......................... 54

ABSTRACT

In 2010, the Pennsylvania Supreme Court decided Kincy v. Petro, a case about a motor vehicle accident, consolidation of two actions arising from it, and whether the pleadings therein merged. It did not draw a lot of attention at the time. However, in the years since, careful practitioners have recognized that the decision, with its pronouncement that cases ordered consolidated by the trial court do not lose their separate identities, could affect when and how to take an appeal in consolidated actions. In the following years a split in authority developed in the intermediate appellate courts as to what effect Kincy had beyond its own facts and whether the rules for appeals in consolidated cases had changed. In spring 2016, with its decision in Malanchuk v. Tsimura, the Supreme Court resolved that question, at least for now. At present, actions consolidated by the trial court under Rule 213 do not merge, and parties must be vigilant and act quickly to preserve their appellate rights. Questions as to the effect of Kincy on joinder and cross-claim practice still exist.

HOW DID WE GET HERE: THE WORLD BEFORE KINCY

As most Pennsylvania litigators know, it is not uncommon for a lawsuit to be made up of several separate actions which are at some point consolidated by the trial court for purposes of efficiency. This can happen for a number of reasons. A plaintiff might file suit against an initial group of defendants and then, through discovery, identify a new set of potential defendants to sue. Rather than move for leave to amend his complaint, the plaintiff files a separate action against the new defendants which is later consolidated with the first for purposes of discovery and trial.

1. Mr. Lehman is an attorney with the Philadelphia firm of German, Gallagher & Murtagh P.C. where he handles personal injury and commercial litigation. He previously wrote on this topic in “Trial and Appeals in Consolidated Cases: Civil Practice after Kincy v. Petro,” 86 PBA Quarterly 75 (April 2015).
Alternately, when there are multiple plaintiffs suing the same defendant or group of defendants, the court could order the actions consolidated. Parties also might attempt to consolidate a declaratory judgment action challenging coverage with an underlying tort action. It could happen for yet other reasons.

Regardless of the reason for consolidation, the guiding authority is Pennsylvania Rule of Civil Procedure 213 which states 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.

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. More often than not, the court elects to proceed pursuant to 213(a)(2) and consolidates the actions “for all purposes” or “for purposes of discovery and trial.”

In most cases, at least prior to 2010, when a court consolidated actions pursuant to Rule 213(a)(2), for “all purposes” or “for purposes of discovery and trial,” the once separate actions were treated as if they had merged into one case. This applied across the board, in cases with different plaintiffs suing different defendants and in cases where one plaintiff sued different defendants in separate actions.

Treating cases that were consolidated under rule 213(a)(2) as merged had an appellate implication. In merged cases, an order that disposed of all claims against all parties in one of the original actions and therefore would have been final under Pa.R.A.P. 341 would be treated as interlocutory in the “merged” consolidated action. While final orders can be immediately appealed and the failure to file a notice of appeal within 30 days waives appellate rights, interlocutory orders can only be immediately appealed in limited circumstances and usually parties will wait until those orders become final, at the end of the litigation, to resolve all appellate issues at once. To put this in context, under the pre-Kincy regime in a consolidated case any order that granted the summary judgment motion of all of the defendants in one, but not all, of the original suits was deemed an interlocutory order even though it would have been final and immediately appealable if the suits were separate. Unless the aggrieved party felt the order met the stringent requirements for interlocutory appeal, she would wait until the entire action had resolved and file all appeals at that point. There was no risk of waiving appellate rights.

Pre-Kincy, cases consolidated under 213(a)(2) also were deemed to be one in terms of their pleadings. In this way, post-consolidation parties to one action might assert cross-claims against parties in the other. For example, in a case where a single plaintiff has sued different groups of defendants in separate actions which are then consolidated, the defendants in action 1 might assert cross-claims against defendants in action 2.

Thus, in the pre-Kincy era, the language of the court’s consolidation order was vital. If the court ordered the cases consolidated for purposes of a joint trial and

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2. Hereafter, for ease of reference, the three options will be referred to as 213(a)(1), 213(a)(2) and 213(a)(3) although the text of the rule itself does not contain this numbering.
hearing, electing 213(a)(1), the cases were understood to remain separate. 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).3 In merged cases, orders that might be final in the separate cases were now interlocutory. Parties in different parts of the now merged action could assert claims against one another between the actions.

**KINCY v. PETRO, AND THE AGE OF UNCERTAINTY**

**The Kincy Decision**

When the Pennsylvania Supreme Court decided *Kincy v. Petro*4 in 2010, the usual and understood way of proceeding in consolidated cases was cast into doubt. In *Kincy* the Court readdressed what consolidation under Rule 213 meant and what it did not mean. Relying on *Azinger v. Pennsylvania Railroad Co.*,5 a century old decision that pre-dates the Rules of Civil Procedure, the Court held that regardless of which option under Rule 213 is elected and regardless of the language of the trial court’s consolidation order, “complete consolidation [read merger] cannot be achieved unless the actions involve the same parties, subject matter, issues and defenses.”6

Putting this into context, in a situation where one plaintiff has sued different defendants in actions that are later consolidated “for all purposes,” no merger is effected because each action has its own parties. Likewise, where multiple plaintiffs sue the same defendants and the cases are consolidated for purposes of discovery and trial, again no merger occurs. Given the mandatory joinder rules expressed in Pa.R.C.P. 1020(d) which require all causes of action against a party to be brought in one action, there is virtually no scenario where a complete merger could happen.

If *Kincy* meant cases did not merge, appellate practice was thrown into confusion. Under a broad reading of *Kincy*, any order that met the definition of a final order under Rule 341 of the Rules of Appellate Procedure needed to be appealed right away regardless of whether the remainder of the consolidated action continued on. As discussed in more depth below, pleading practice, including the assertion of cross-claims across consolidated actions was also in doubt. The obvious question was how broadly would *Kincy* be applied.

In *Kincy*, the Supreme Court for the most part, did not seem to limit itself to the facts of the case. In reasoning that consolidation under 213(a)(2) or any other sub-part of Rule 213 does not effect a merger, the Court mainly focused on *Azinger’s* definition of consolidation and on the idea that consolidation under Rule 213 exists for convenience of the parties and the court, but not to merge actions together. However, at the close of the opinion, 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.7 Since this last part of the holding related specifically to the facts of *Kincy*, it cast some doubt over how broadly the holding itself could be applied.

**Knox v. SEPTA**

The potential implications of the *Kincy* ruling on appellate practice did not take long to become a topic of litigation. In both the Commonwealth and Superior Courts,

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4. 2 A.3d 490, 494 (Pa. 2010).
5. 105 A. 87 (1918).
7. *Id.* at 495. A fuller discussion of *Kincy* appears in my prior article at 86 PBA Quarterly 78 (Spring 2015).
litigants made the argument that because consolidated cases did not merge, any order that would be a final order in any one action must be treated as such and that a failure to timely appeal such an order constituted a waiver of appellate rights.

In Knox v. SEPTA, the first post-Kince case to address the state of consolidated cases and when a party must appeal, the Commonwealth Court opted for a broad reading of Kince that would apply to all types of consolidated cases and affect what sorts of orders would be final orders that must be appealed immediately under Rules of Appellate Procedure 341 and 903.

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.

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 Commonwealth Court seeking review of, in part, the trial court’s order granting summary judgment in favor of the Plan in each action.

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, the Plan 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. Because it was 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 his or her appellate rights.

In Knox, the Commonwealth Court, relying directly on Kince, 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 involved 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.

M a l an c h u k in the Superior Court

After Knox, the Superior Court was presented with a similar case. In Malanchuk v. Sivchuk, 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

9. Id., at 1017.
10. Id., at 1018.
11. Id., at 1019.
12. Id., at 1020.
fell from scaffolding while working on a Sivchuk job at which Tsimura was also present.14

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 product liability. On Sivchuk’s motion, the court ordered the cases consolidated “for the purpose of discovery, arbitration and if [the arbitration is] appealed, trial.”15

After discovery was completed, each defendant 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.16

In December 2014 the Superior Court issued an en banc opinion in which it rejected a broad application of Kincy and held that the ruling had no effect on whether orders are final or interlocutory in a global sense.17 Judge Ford-Elliot, writing for the majority argued 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. Pertinent to the case at hand, the court opined 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 would be unreasonable to find the otherwise interlocutory order is final and appealable based solely on the manner in which the claims were originally presented.18

Malanchuk stood directly in contrast to the Commonwealth Court’s ruling in Knox. A split of authority existed, and the issue was ripe for Supreme Court review. In May of 2015, through an appeal in the Malanchuk case, the Supreme Court accepted the issue.19

**MALANCHUK v. TSIMURA: THE SUPREME COURT SPEAKS**

In May 2016, the uncertainty and split in authority over the implication of Kincy on consolidated cases and appeals practice was mostly resolved when the Supreme Court issued its ruling in Malanchuk.20 The Court reversed the Superior Court and rejected the concept that Kincy is limited to its facts. Pointing out that at the crux of Kincy was the Court’s discussion of Azinger and its pronouncement that cases may not merge unless they involve the exact same parties, subject matter, issues and defenses, the Court reasoned that because the Rules of Civil Procedure do not supplant Azinger, a consolidation under Rule 213(a)(2) does not effect a merger of the two (or more) actions regardless of the language of the trial court’s consolidation order.21 The result is that in consolidated cases, any order that would constitute a final order in that separate action (i.e. any order that disposes of all claims against all parties) is a final order which must be immediately appealed. In the case of Malanchuk, the summary judgment order to Tsimura was final as it disposed of all claims against

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15. Id., at pages 790-792.
16. Id.
18. Id. at 795.
21. Id., at 1288.
all parties in that action. Therefore, Malanchuk had properly filed an immediate appeal.

WHERE ARE WE NOW?

While the holding of Malanchuk is clear and the law is settled for the time being, the Court explicitly leaves open the possibility of some future change. In its opinion, after stating that after Kincy, Azinger remains good law and consolidation does not effect a merger, the Court adds the caveat of “unless and until such decision is overturned based upon a specific challenge containing directed and focused advocacy, or displaced upon overt rulemaking by this Court.”22 In footnotes, the Court notes that neither Kincy nor Malanchuk involved a challenge to the ongoing validity of the Azinger decision, a decision which predates the Rules of Civil Procedure. Of course, the suggestion here is that the Rules, which the Court recognized contradicted the current judicial policy of discouraging piecemeal appeals, might be changed or that a litigant could convince the Court to overturn Azinger.

Also still unaddressed by any court is whether it would 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 and Malanchuk, it is unclear whether this is even possible and, if it is, what the effect the cross-claims would have 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 another party to the action. The Explanatory Comment—2007 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? Would it matter if the cross-claims were asserted before or after the statute of limitations on plaintiff’s claims expired? This author suggests that in the wake of Malanchuk, at least until the Court decides this issue, practitioners ought to be careful of cross claims in consolidated cases. It may be advisable to seek to join as additional defendants those parties in a separate but consolidated case against whom one wishes to assert cross-claims.

At present Malanchuk is the law of the land. Practitioners must act quickly to preserve their appellate rights. Cross-claim practice across consolidated actions is questionable, and counsel should consider joinder as an alternate way of proceeding. Finally, a challenge to Malanchuk, Kincy and the Azinger case that underlies them, may be appropriate given the right case.

22. Id., at 1288.