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Certifying Trial Court Decisions for Review

By Philip A. Talmadge

"A trustee shall administer the trust solely in the interests of the beneficiaries." -RCW 11.98.078(1)

You are trying a case and the court makes a ruling on discovery, the evidence or on a dispositive motion that seriously affects how the case will proceed. You think about an appeal.

In Washington, we have two types of appellate review - review as of right (RAP 2.2), and all other cases (RAP 2.3).[1] The issues subject to review as of right are listed in RAP 2.2(a). Review as of right is the easier course because you are before the appellate court essentially automatically. Discretionary review is harder. Under RAP 6.2, you have to demonstrate to the court why your case merits review. Such review is granted in 10% or fewer of the instances in which it is requested.[2]

As a public policy, Washington law generally disfavors piecemeal appeals.[3] But you can improve your chances of obtaining interlocutory review by obtaining from the trial court a certification for appeal as of right under CR 54(b)/RAP 2.2(d) or by certification under RAP 2.3(b)(4).

These mechanisms improve your chances of immediate review even though a final judgment has not been entered. This article explores how to accomplish that objective and also how to resist such interlocutory review.

CR 54(b)

In cases involving multiple claims or multiple parties, if the trial judge determines that a summary judgment order or order of dismissal under CR 12(b)(6) merits immediate review, under CR 54(b) the judge must provide in the order that there is no just reason for delay and an express direction that judgment should be entered. This is not a mechanical finding.

The court must affirmatively find that there is, in fact, some danger of hardship or injustice that will be alleviated by an immediate appeal.[4] Factors for finding such hardship or injustice were discussed by the Supreme Court in *Schiffman v. Hanson Excavating Co.*,[5] and include:

(1) the relationship between the adjudicated and the unadjudicated claims;

(2) whether questions that would be reviewed on appeal are still before the trial court for determination in the unadjudicated part of the case;

(3) whether it is likely that the need for review may be mooted by future developments in the trial court;

(4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial; and

(5) the practical effects of allowing an immediate appeal.

Not all orders qualify for a CR 54(b) finding. As the Washington Supreme Court stated in *Doerflinger v. New York Life Ins. Co.*, the case must involve multiple claims, as distinct from multiple theories of recovery.[6] This is not a crystal-clear distinction.[7]

If the trial court properly certifies the order under CR 54(b), the order is a final judgment and qualifies for review as of right under RAP 2.2(d). A party that does not appeal such an order loses the right to appeal it once the final judgment on all claims and parties is entered. If certification is improper, the appellate court may still review the matter, albeit under RAP 2.3(b).[8] The trial court's certification decision is subject to some deference by the appellate court, but it is not conclusive.[9]

A successful CR 54(b) certification does not necessarily result in a stay of further trial court proceedings.[10] In fact, an order adjudicating less than all claims remains subject to revision.[11] You should file a motion for stay in the trial court or before the appellate court under RAP 8.3 if you want to stay that portion of the case remaining after the entry of the CR 54(b)-certified order on appeal.

RAP 2.3(b)(4)

For all of those trial court decisions that do not qualify under CR 54(b), RAP 2.3(b)(4) is available.[12] The judge must find that there is substantial reason for disagreement on the legal question and immediate review will materially advance the ultimate termination of the case. With respect to the latter requirement, this does not necessarily mean that the order must terminate the case, but such an order is certainly more obvious as a reason for review.

Merely because a trial court certified an order under RAP 2.3(b)(4) does not divest an appellate court of its discretion under RAP 2.3(b) to deny review.[13] There are no data quantifying the benefit of certification on the chances of securing discretionary review, but it is the author's view that certification does help.

There is no case law expressly interpreting RAP 2.3(b)(4) nor have the courts enunciated a test for when certification is or is not appropriate. However, cases in which discretionary review has been granted after Superior Court certification are illuminating.[14] These cases have several common threads.

First, each case involved the disposition of major claims on a motion for partial summary judgment. Second, each case also involved an issue of first impression not previously addressed by Washington courts; issues of first impression are appropriate for RAP 2.3(b)(4) certification. Third, the issue or issues raised may recur in the lower courts; appellate courts have paid close attention to certified questions that are recurring in the trial courts.

RAP 2.3(b)(4) was expressly modeled by its drafters in 1998 on 28 U.S.C. 1292.[15] Federal case law under the statute, which provides that interlocutory review is aimed at institutional efficiency, is useful in interpreting RAP 2.3(b)(4).[16] The order need not be final. It does not even need to decide all of the issues pertaining to a party or even one or more claims.[17]

Like Washington law, federal law has long evidenced a policy against piecemeal appeals.[18] In light of that policy, certification under the statute usually occurs only in exceptional circumstances.[19] The statutory requirements for such review are strictly construed.[20] The statute was not designed to open the floodgates to a vast number of interlocutory appeals in ordinary cases.[21] Federal appellate courts often decline review even where a district court has certified the case.[22]

As in the case of review under CR 54(b), the granting of review does not mean the rest of the case is stayed.

In cases involving multiple claims or multiple parties, you should think about whether a trial court decision should be immediately reviewed by an appellate court. In pursuing interlocutory review of such orders, you should pay careful attention to certification under CR 54(b)/RAP 2.2(d) and RAP 2.3(b)(4) as a means of enhancing opportunities for obtaining such review.

1 *In re Grove*, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

2 *Id.* at 235–36.

3 *Minehart v. Morning Star Boys Ranch*, 156 Wn. App. 457, 462, 232 P.3d 591, *rev. denied*, 169 Wn.2d 1029 (2010) ("Piecemeal appeals of interlocutory orders may be avoided in the interests of speedy and economical disposition of judicial business.").

4 *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 504, 798 P.2d 808 (1990).

5 82 Wn.2d 681, 513 P.2d 29 (1973).

6 88 Wn.2d 878, 881–82, 576 P.2d 230 (1977).

7 The Court of Appeals in *Nelbro Packing Co. v. Baypack Fisheries, LLC*, 101 Wn. App. 517, 524, 6 P.3d 22 (2000), stated: "[W]hen the facts give rise to more than one legal right or cause of action, or there is more than one possible form of recovery and they are not mutually exclusive, the claimant has presented multiple claims for relief." But *Doerflinger* concluded that if a single claim, with multiple theories of recovery, arises from a single transaction, CR 54(b) is inapplicable. 88 Wn.2d at 881–82. *See also Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 871 P.2d 601 (1994).

8 RAP 5.1(c); *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 882-83, 652 P.2d 948 (1982) (to be eligible for CR 54(b) certification order must be final as to one claim or party).

9 *Nelbro*, 101 Wn. App. at 523.

10 *See* RAP 7.2(1). This rule speaks to CR 54(b) certifications. It is highly likely the same principle applies to interlocutory review under RAP 2.3(b).

11 *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992).

12 Review under this rule is independent of the other three prongs for discretionary review described in RAP 2.3(b).

13 Karl B. Tegland, 2A *Wash. Practice: Rules Practice* at 198. ("[C]ertification ... is not binding on the appellate court. Discretionary review remains what the name implies - discretionary.").

14 *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 500, 198 P.3d 1021 (2009) (whether an amendment of the Washington Law Against Discrimination applied retroactively to revive a claim); *Emily Lane Homeowners Ass'n v. Colonial Development, L.L.C.*, 139 Wn. App. 315, 317-18, 160 P.3d 1073 (2007), *aff'd in part, rev'd in part*, by *Chadwick Farms Owner's Ass'n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009) (review of a trial court order refusing to dismiss a claim based on retroactive amendment to the Washington Limited Liability Companies Act, where the amendment's retroactivity appeared to be a recurring issue); *Antonius v. King County*, 118 Wn. App. 1011, 2003 WL 21958392 (2003), *aff'd*, 153 Wn.2d 256, 260, 103 P.3d 729, 732 (2004) (statute of limitations issue after a grant of partial summary judgment dismissing hostile work environment claims); *In re Detention of Jones*, 149 Wn. App. 16, 23, 201 P.3d 1066 (2009) (elements necessary for a sexually violent predator to qualify for release on a less-restrictive alternate basis to detention); *Ensley v. Pitcher*, 152 Wn. App. 891, 897–98, 222 P.3d 79 (2009) (issue pertaining to res judicata and collateral estoppel that trial court deemed to be of first impression); *Cary v. Mason County*, 152 Wn. App. 959, 964, 219 P.3d 952 (2009), *rev'd*, 173 Wn.2d 697, 272 P.3d 194 (2012) (whether assessment for water resource protection was fee or a tax); *State v. McNeal*, 156 Wn. App. 340, 350–51, 231 P.3d 1266 (2010) (jury right relating to aggravating factor in criminal sentencing); *Grey v. Leach*, 158 Wn. App. 837, 843–44, 244 P.3d 970 (2010)

(issues of first impression in interpreting certain exclusion under Model Toxics Control Act); *Holden v. Farmers Ins. Co. of Wash.*, 142 Wn. App. 745, 175 P.3d 601 (2008), *rev'd*, 169 Wn.2d 750, 755, 239 P.3d 344 (2010) (interpretation of property damage under standard property loss policy).

15 Tegland, *supra* note 13, at 203.

16 *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958).

17 *Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981).

18 *Switzerland Cheese Assoc., Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24–25, 87 S. Ct. 193 (1966).

19 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454 (1978).

20 *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2nd Cir. 1990).

21 *Kraus v. Board of County Road Commissioners for County of Kent*, 364 F.2d 919, 922 (6th Cir. 1966); *Milbert*, 260 F.2d at 433.

22 *See, e.g., id.; United States v. Woodbury*, 263 F.2d 784 (9th Cir. 1959); *Antitrust Litigation* (MDL No. 296), 673 F.2d 1020 (9th Cir. 1982).

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