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Finality and Implied Severance, Interlocutory Orders, Final Orders

Although the court has not defined "finality", "implied severance" and "necessarily affects the final judgment", the bar must, nevertheless, sort it out at its peril.

By **Elliott Scheinberg** | February 11, 2020

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The spirit of existentialism spills into the byzantine labyrinth of "finality", "implied severance" and "necessarily affects the final judgment" in appellate procedure. In *Rivera v. Skanska USA Civ. Northeast*, 2020 NY Slip Op 00094 (1st Dept. 2020), the First Department dismissed an appeal from an order issued prior to the final judgment, on the ground of finality, where the aggrieved party, presumably unaware of the morass behind the superficially innocuous term "non-final" in CPLR 5501(a)(1), waited to appeal the order from the final judgment rather than take an immediate appeal.

These three complex principles are interwoven. Background necessary to this review derives from the 2012 Report Prepared by the Committee on Civil Practice Law and Rules, Proposed Amendment to CPLR 5501, an Affirmative Legislative Proposal of the New York State Bar Association, which tracks their statutory and decisional trajectories.

CPLR 5701(a)(1) provides:

> An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:
>
> 1. from any final or *interlocutory* judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action.

CPLR 5501(a)(1) provides:

> An appeal from a final judgment brings up for review:
>
> 1. any *non-final* judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such *non-final* judgment or order has not previously been reviewed by the court to which the appeal is taken.

Immediately noticeable is the absence of linguistic symmetry in these statutes: 5701(a)(1) uses "interlocutory" while 5501(a)(1) uses "non-final." The nuanced term, "nonfinal", has become quicksand for the unwary.

Proposed Amendment to 'Non-final' and Its Purpose

> 5501. Scope of review.
>
> (a) Generally ... An appeal from a final judgment brings up for review:
>
> 1. any [order or interlocutory] ~~non final~~ judgment ~~or order~~ which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such [order or interlocutory] ~~non final~~ judgment ~~or order~~ has not previously been reviewed by the court to which the appeal is taken.

The Report explains the amendment's purpose: to "restore the original concept of 5501(a)(l)":

> It would make it clear that an appeal from an order is optional and that if that order necessarily affects the final judgment, the order may be reviewed upon an appeal from the final judgment. It eliminates the confusion between what orders may or may not be final, and promotes the policy goal of making interim appeals optional rather than mandatory.

The Report underscores:

> Under prior practice statutes and under 5501(a)(1), an aggrieved party was not required to appeal from an order made during the course of an action or proceeding but could wait to the end of the case to see if the determination embodied in that order affected its outcome ... In drafting what became CPLR 5501(a)(l), the Advisory Committee on Practice and Procedure ... did not intend to restrict the general rule that an appeal from interim order would be optional.
>
> "CPLR 550l(a)(l) ... is designed to assure an appellant that dispositions that do not put an end to the whole case don't have to be taken up on appeal forthwith, but can be reviewed later, on appeal from the final judgment." Siegel, Practice Commentaries, C5501:3. [So read the Practice Commentary in 2012.]
>
> For this assurance to work, any order that ultimately affects the final judgment must be reviewable by an appeal from the final judgment when it is ultimately entered. However, certain cases have now held that some orders are final, and that even though an order itself can never dispose of the whole case, the failure to take an appeal from that order will preclude the appellant from raising the issue on an appeal from the final judgment.

'Burke v. Crosson'

Without reviewing its historical evolution, the Court of Appeals, in *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995), began its analysis of finality with two major declarations. First:

> Since this provision authorizes review only of prior judgments and orders that are nonfinal, the classification of a particular judgment or order as final or nonfinal is critical to the statute's proper application. We note that ... the concept of finality as used in CPLR 5501(a)(1) is identical to the concept of finality that is routinely used to analyze appealability under article VI, §3(b)(1), (2) and (6) of the State Constitution and the related statutory provisions (CPLR 5601, 5602).

The Report challenged this analogy:

> [T]he two concepts are logically distinct and serve very different roles. The Court of Appeals, as a general rule reviews decisions of the Appellate Division, which are normally reflected in an order either affirming, modifying or reversing a result at the trial court level. Because the Court of Appeals normally reviews only matters that are final, it is necessary in the context of CPLR 5601 to have a "final" order. CPLR 5601 and 5602 explicitly use the phrase "an order of the appellate division which finally determines an action."

Actions at the trial court level end not with an order but a final judgment. CPLR 5011.

Second, while the court conceded that "[t]he concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing," it offered no more than "a *fair* working definition" as the loadstar (at 15-16):

> [A] fair working definition of the concept can be stated as follows: a "final" order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters (generally, Cohen and Karger, op. cit., §§10, 11).1 Under this definition, an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant or where the court disposes of a counterclaim or affirmative defense but leaves other causes of action between the same parties for resolution in further judicial proceedings (e.g., Marna Constr. Corp. v. Town of Huntington, 31 N.Y.2d 854 ...).

The court provided exceptions to the "general principles" of the "fair working definition" (at 16):

> An exception to these general principles exists in situations where the causes of action or counterclaims that have been resolved may be deemed to be "impliedly severed" from those that have been left pending. Where implied severance is available, the order resolving a cause of action or counterclaim is treated as a final one for purposes of determining its appealability or reviewability.
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> * * *
>
> Under this approach to implied severance, an order that disposes of some but not all of the causes of action asserted in a litigation between parties may be deemed final under the doctrine of implied severance only if the causes of action it resolves do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action (Heller v. State of New York, 81 N.Y.2d 60, 62, n. 1 ... ; Lizza Indus. v. Long Is. Light. Co. ...). Thus, for example, an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where other claims or counterclaims derived from the same contract or contracts were left pending. Similarly, where a negligence cause of action has been dismissed but there remain other claims for relief based on the same transaction or transactions, the doctrine of implied severance is not available, even though the underlying legal theories may be very different.3
>
> Finally, implied severance is not applied where the court's order "decides some issues of relief but leaves

> pending between the same parties other such issues[, thereby] in effect divid[ing] a single cause of action" (Sontag v. Sontag, 66 N.Y.2d 554, 555 ...).

Notwithstanding its recognition of "the checkered history" endured by the implied severance doctrine and its "difficult[y] to reconcile its "past articulations," the court added:

> an order that disposes of some but not all of the causes of action asserted in a litigation between parties may be deemed final under the doctrine of implied severance only if the causes of action it resolves do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action.

Burke provided instances where the rule would and would not apply (at 16-17):

> Thus, for example, an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where other claims or counterclaims derived from the same contract or contracts were left pending. Similarly, where a negligence cause of action has been dismissed but there remain other claims for relief based on the same transaction or transactions, the doctrine of implied severance is not available, even though the underlying legal theories may be very different.
>
> Finally, implied severance is not applied where the court's order "decides some issues of relief but leaves pending between the same parties other such issues[, thereby] in effect divid[ing] a single cause of action" (Sontag v. Sontag, 66 N.Y.2d 554 ...).

'Necessarily Affects the Final Judgment'

Another permeating requirement in 5501(a)(1) is that the "non-final judgment or order [] necessarily affects the final judgment," which precludes review from a final judgment of orders made during the action that do not affect the final outcome. In 2013, the Court of Appeals decided *Oakes v. Patel*, 20 N.Y.3d 633 (2013), which addressed the reviewability of an order denying a motion to amend pleadings against the "necessarily affects" test. Beyond its statement that "the 'necessarily affects' rule to orders granting or denying motions to amend pleadings has been particularly vexing," the court expressly declined the opportunity to assign a "generally applicable definition" to "necessarily affects":

> Our opinions have rarely discussed the meaning of the expression "necessarily affects" in CPLR 5501(a)(1). (Matter of Aho, 39 N.Y.2d 241 ... [1976] and Siegmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3d 37 [2012] are exceptions.) We have never attempted, and we do not now attempt, a generally applicable definition. Various tests have been proposed, but how to apply them to particular cases is not self-evident, and our decisions in this area may not all be consistent. [at 644].

While finding the order denying the motion to amend reviewable, *Oakes*, nevertheless, "conclude[d] that we cannot adhere to the rule that the grant or denial of a motion to amend is always unreviewable on appeal from a final judgment." (at 644).

'Pollak v. Moore'

In *Pollak v. Moore*, 85 A.D.3d 578 (1st Dept. 2011), the plaintiff's complaint was dismissed on a motion for summary judgment. The plaintiff appealed but did not perfect. Ten months later he appealed from the judgment. The First Department, citing *Burke*, dismissed his appeal because it did not bring up for review the order, "which was marked 'final disposition' and, in fact, disposed of all of plaintiff's claims, leaving nothing further in the action that would require non-ministerial judicial action":

> "While the judgment explicitly referred to the order, and such order 'affected' the judgment, the order did not meet the further criterion that the underlying order sought to be reviewed on appeal from the judgment be 'non-final' (CPLR 5501[a][1]). Plaintiff abandoned his appeal from the order, and cannot

revive that appeal by the expedient of effecting a ministerial entry of judgment upon the final order after expiration of the time to perfect the initial appeal." [at 578].

'Rivera v. Skanska USA'

In *Rivera v. Skanska USA Civ. Northeast*, 2020 NY Slip Op 00094 (1st Dept. 2020), the First Department revisited finality. *Rivera* unfolds unassumingly enough with the plaintiff seeking to correct an "inaccurate description" in his Notice of Appeal, which mischaracterized the paper appealed as "a Decision and Order" dismissing his complaint rather than "the judgment", and a discretionary determination that the appeal be deemed timely from the judgment (CPLR 5520(c)). The plaintiff did not take an appeal at that time of the order—he never saw the oncoming "finality" freight train:

> Even if the defect were a mere "typographical error" ... we find no interest of justice basis to treat the notice as valid, where plaintiff is clearly seeking to circumvent an untimely appeal from the order (Pollak v. Moore ...).
>
> [E]ven if we were to grant plaintiff's request, the appeal from the judgment would not bring up for review the order, which was final and disposed of all of the causes of action between the parties and left nothing for further judicial action apart from the ministerial entry of the judgment (CPLR 5501[a]; Burke v. Crosson ... 315 W. 103 Enters. LLC v. Robbins, 171 A.D.3d 466, 467 ... [1st Dept. 2019]; Pollak v. Moore ...).

Conclusion

Notably, no decision has, from the perspective of statutory construction, examined the historical evolution of "non-final" or the present intent of the Advisory Committee on Practice and Procedure "to broaden the scope of review". Nor has any court commented on the use of "interlocutory" in 5701(a)(1) but not in 5501(a)(1).

The Report concludes:

> [U]ntil *Burke v. Axelrod*, [90 A.D.2d 577 [3d Dept. 1982]], and *Crystal v. Manes*, [130 A.D.2d 979 [4th Dept. 1987]], there was no concept of a final order within CPLR 5501(a)(l). Under 5501(a)(1), if an appellant appeals from a final judgment (not an order), that appeal brings up for review an earlier order so long as (1) the earlier order "necessarily affects the final judgment," and (2) the earlier order had not been "previously reviewed by the court to which the appeal is taken."
>
> *Burke v. Axelrod*, *Crystal v. Manes*, *Burke v. Crosson*, and *Pollak v. Moore*, engraft a third requirement, namely [that] that order not be "final," either in the sense of *Pollak v. Moore*, resolving all of the issues in the case and leaving nothing left but to have final judgment entered, or in the sense of *Burke v. Axelrod*, *Crystal v. Manes*, in that there is no implied severance under that doctrine as developed for Court of Appeals review.
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> This development destroys the concept envisioned in 5501(a)(l) of allowing the litigant to await the final judgment and raise all issues on an appeal from the final judgment, assuming that they "necessarily affect" the judgment. When joined with the concept of implied severance, *Pollak* makes it difficult, if not impossible, for an appellant to determine what orders are final and which are not. If an appellant guesses incorrectly and awaits the final judgment, the appellant will find his or her right to appeal lost.
>
> While the implied severance concept might make sense with respect to appeals from the appellate division to the Court of Appeals, applying it to trial court orders leads to a trap for litigants, the potential forfeiture of appellate rights, and encourages interlocutory appeals, some of which may be obviated by the final result in the action ...
>
> An order, or an interlocutory judgment is not final and, assuming that such order or interlocutory judgment "necessarily affects" the final judgment and has not been previously reviewed, then it can be brought up for review. Nothing in the amendment would prohibit a court from ordering an explicit

severance and a final judgment, but to cut off appellate rights, the paper would have to be an explicit final judgment.

Precedence

Although the court has not defined "finality", "implied severance" and "necessarily affects the final judgment", the bar must, nevertheless, sort it out at its peril. The court can resolve this issue ahead of legislative intervention. In *Park E. v. Whalen*, 38 N.Y.2d 559, 560 (1976), the court "eliminate[d] unnecessary [appellate] procedural traps for the unwary" by "interpreting" CPLR 5514(a) with broad legislative intent regarding "all other appeal time limitations" as to "harmonize" it with CPLR 5513. These three traps are no less deserving.

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