Is the Collateral Order Doctrine About to Have a "Brat Summer"?

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(by **Casey Alan Coyle**)

Inspired by the Charli XCX album, the "brat summer" trend took the country by storm in the summer of 2024. From the radio to fashion to TikTok to even Vice President Harris's campaign, "brat" was everywhere. The Collins Dictionary even declared "brat" its 2024 word of the year, defining it as "characterized by a confident, independent, and hedonistic attitude." This spring, the Pennsylvania Supreme Court is poised to hear oral argument in *Chilutti v. Uber*, 58 EAP 2024. The case concerns, among other things, whether an order staying a case pending arbitration is immediately appealable as a collateral order—a question that asks the Court to not only disregard the text of the Pennsylvania Rules of Appellate Procedure but also upend four decades of contrary precedent. With the argument fast approaching, everyone is asking the same question: Is the collateral order doctrine about to have a "brat summer"?

Collateral Order Doctrine

Generally, an appellate court's jurisdiction extends only to review of final orders. Final orders are those that dispose of all claims and all parties, are explicitly defined as final orders by statute, or are certified as final orders by the trial court or other reviewing body. Pa.R.A.P. 341. There are, however, limited exceptions to the final order rule—specifically, interlocutory appeals as of right (Pa.R.A.P. 311); interlocutory appeals by permission (Pa.R.A.P. 312); and collateral orders (Pa.R.A.P. 313). The collateral order doctrine is derived from U.S. Supreme Court case law and codified in Pennsylvania Rule of Appellate Procedure 313. It is the narrowest of the three exceptions because the rules already allow a party to seek permission to appeal an interlocutory order not enumerated in Rule 311 and that discretionary process would be undermined by an overly permissive interpretation of Rule 313's limited grant of collateral appeals as of right. The classic example of a collateral order is one compelling the disclosure of putatively privileged material because, once that material is disclosed, "the bell has been rung, and cannot be unrung by a later appeal." *Commonwealth v. Harris*, 32 A.3d 243, 249 (Pa. 2011).

To qualify as a collateral order, (1) the order must be "separable from and collateral to the main cause of action," (2) the right involved must be "too important to be denied review," and (3) "the question presented [must be] such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(b). With regard to the first prong, an order is separable from the main cause of action if it is entirely distinct from the underlying issue in the case and if it can be resolved without an analysis of the merits of the underlying dispute. As for the second prong, a right is important if the interests that would go unprotected without immediate appeal are significant relative to the efficiency interests served by the final order rule. The third prong requires that the matter at issue must effectively be unreviewable on appeal from final judgment. Stated differently, the claim must be of such nature that it would be lost forever if appellate review is delayed until final judgment. Unless the order satisfies all three requirements, the appellate court lacks jurisdiction.

Chilutti

The *Chilutti* case arises out of a car accident. A woman was injured while riding in an Uber; she and her husband then filed a negligence suit against the company and its subsidiaries. The defendants filed a petition to compel arbitration, arguing that the terms and conditions of Uber's app required the couple to arbitrate their claims. The trial court granted the petition and stayed the matter pending arbitration, and the couple appealed to the Superior Court.

It has long been the rule in Pennsylvania that an order compelling arbitration is not immediately appealable. Indeed, courts of this Commonwealth have reaffirmed this principle again and again over the past 40 years. Nonetheless, the Superior Court panel in *Chilutti* held that an order compelling arbitration constitutes an appealable collateral order. *Chilutti v. Uber Techs., Inc.*, No. 1023 EDA 2021, 2022 WL 6886984, at *5 (Pa. Super. Ct. Oct. 12, 2022). The Superior Court subsequently granted reargument and withdrew the panel's opinion. But instead of disavowing the panel's holding, a divided, *en banc* Superior Court effectively adopted it. *Chilutti v. Uber Techs., Inc.*, 300 A.3d 430 (Pa. Super. Ct. 2023) (*en banc*).

The majority initially—and correctly—stated that the third prong of the collateral order doctrine involves an assessment of whether the question presented is such that "if review is postponed until final judgment, the claimed right *will be* irreparably lost." *Id.* at 437 (emphasis added). But later in the opinion, the majority declared that the relevant inquiry is whether "postponing review until final judgment in the case *may* result in the irreparable loss of [the plaintiffs'] claims." *Id.* at 439 (emphasis added). Applying the latter (and more relaxed) standard, the majority hypothesized:

> [T]here are times when a party is forced out of court because the arbitration provision either failed to meet basic contract principles or violated a party's constitutional right to a jury trial—which does not qualify as a "fraud, misconduct, corruption, or other irregularity"—and where the arbitration award is deemed fair, and therefore unreviewable, even if there was no agreement to arbitrate between the parties, which would result in the irreparable loss to the party.

Id.

Based on this new formulation of the doctrine, the majority held that an order compelling arbitration is immediately appealable as a collateral order. The majority reasoned that, because "the standard of review for common law arbitration is very limited" and "there is always a possibility that a court may find a subsequent arbitration award was fair—meaning it was not unjust, inequitable, or unconscionable—even if there was no agreement to arbitrate between the parties; resultingly, the award would remain binding on the parties. In that scenario, a party would be denied their constitutional right to a jury trial." *Id.* at 438. The majority then turned to the merits of the appeal, inventing a new, stricter standard for enforcing online arbitration agreements and holding that, based on that new test, there was no valid agreement to arbitrate between the parties. *Id.* at 499–450. The majority thus held that the trial court erred in granting the defendants' petition to compel arbitration. *Id.* at 451.

The Pennsylvania Supreme Court subsequently accepted review of the case. Briefing is now complete, and it is anticipated that oral argument will take place this spring.

Impact

If affirmed, the *en banc* Superior Court's decision could have far-reaching consequences with regard to appellate jurisdiction. Courts historically have construed the collateral order doctrine narrowly to avoid undue corrosion of the final order rule and to prevent delay resulting from piecemeal review of trial court decisions. For instance, the U.S. Supreme Court has stated that: "[T]he narrow exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of [trial] court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (cleaned up). The Pennsylvania Supreme Court has similarly noted that "it is more important to prevent the chaos inherent in bifurcated, trifurcated, and multifurcated appeals than it is to correct each mistake of a trial court the moment it occurs." *Shearer v. Hafer*, 177 A.3d 850, 858 (Pa. 2018) (cleaned up).

But by lowering the threshold to qualify for the collateral order doctrine from one in which the claim must be irreparably lost if immediate review is denied to one where the claim *hypothetically* could be irreparably lost absent such review, the Superior Court majority expanded the doctrine to potentially limitless ends and allowed the once-narrow exception to swallow the general rule against the appealability of non-final orders. Indeed, it is difficult to conceive of a scenario in

which there would not be at least some theoretical possibility, however remote, that "postponing review until final judgment in the case *may* result in the irreparable loss of [the plaintiffs'] claims." *Chilutti, Inc.*, 300 A.3d at 439. As a result, virtually every interlocutory order would now qualify as a collateral order in Pennsylvania, ushering in a new, chaotic era of bifurcated, trifurcated, and even multifurcated appeals. By creating a right of appeal to an entire class of interlocutory orders that did not previously exist, the majority opened the door to hundreds, if not thousands, of additional appeals per year that invariably will overburden an already overtaxed appellate court system in Pennsylvania.

Conclusion

While traditionally limited to a narrow set of orders, *Chilutti* may extend the reach of the collateral order doctrine to unknown limits, brushing aside the text of Rule 313 itself and the 40 years of interpretive precedent standing in its way. That may leave some Pennsylvania lawyers saying, "That's so brat."

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