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WHAT IS "HYPOTHETICAL JURISDICTION" OVER AN APPEAL?

By Debra P. Fourlas

As we all know, courts do not issue advisory opinions on hypothetical questions – hence the requirement of an "actual case or controversy," even in a declaratory judgment action. In certain circumstances, though, an appellate court may exercise "hypothetical jurisdiction" in order to reach the merits in an appeal where appellate jurisdiction is uncertain. The rationale for exercising hypothetical jurisdiction is that it promotes judicial economy by allowing the court to rest its decision on the most clear-cut of the dispositive issues, and thus avoid spending extensive time researching and analyzing more complex issues, disposition of which is not essential to resolving the case.

The federal courts have long recognized their power to exercise hypothetical jurisdiction, bypassing difficult jurisdictional questions in cases where the substantive merits are more clear. The Supreme Court expressly endorsed this practice in *Norton v. Mathews*, 427 U.S. 524, 96 S. Ct. 2771 (1976). Later, in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003 (1998), the Court somewhat limited the exercise of such jurisdiction, finding it improper in the context of Article III jurisdictional questions. In cases not involving constitutional jurisdictional issues, however, some federal appellate courts have continued to exercise hypothetical jurisdiction when they have found it appropriate. The Third Circuit has done so repeatedly in the years since the Supreme Court decided *Steel Co. See, e.g., Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008); *Bello v. Gonzales*, 152 Fed. Appx. 146 (3d Cir. 2005); *Bowers v. NCAA*, 346 F.3d 402 (3d Cir. 2003).

In the state court system, the Pennsylvania Supreme Court has not directly addressed the question of hypothetical jurisdiction. In a concurring opinion, however, Justice Saylor expressed approval of the practice, noting: "In my view, this approach constitutes a reasonable means of insuring judicial economy in cases involving clearly meritless claims, and, furthermore, it comports with this Court's similar

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practice of permitting the resolution of waiver issues through reference to the merits of an underlying claim." *Commonwealth v. Hawkins*, 953 A.2d 1248, 1258 n.4 (Pa. 2008).

The Superior Court, relying on Justice Saylor's analysis, expressly acknowledged that it was exercising hypothetical jurisdiction in *Interest of R.Y. Jr.*, 957 A.2d 780 (Pa. Super. 2008). In *R.Y.*, the timeliness of the appeal was at issue but presented a difficult question because the applicable statutes and rules of court did not clearly indicate whether post-hearing motions would toll the appeal deadline in the particular kind of case at issue. Because the substantive merits of the appeal were comparatively simple to resolve, the court decided to employ hypothetical jurisdiction so that it could more easily dispose of the appeal without a lengthy consideration of the jurisdictional question.

The availability of hypothetical jurisdiction over an appeal suggests that it will be important, in handling appeals for clients, to consider any jurisdictional issues carefully and weigh their legal complexity against that of the substantive appellate issues. Whether the appellate court considers the merits of the appeal may depend on how the jurisdictional question is advocated, so an essential part of the advocacy of the appeal may be explaining to the court why it should (or should not) apply the hypothetical jurisdiction doctrine. ■

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AMENDMENTS TO THE FEDERAL APPELLATE RULES INCREASE SCRUTINY OF *AMICUS* BRIEFS *By Devin J. Chwastyk*

On December 1, 2010, amendments to Federal Rule of Appellate Procedure 29, governing the submission of *amicus curiae* briefs, went into effect. The amendments include new requirements that increase federal appellate courts' scrutiny of *amici* filers.

The amended Rule 29(c) requires that all *amicus* briefs include a certification stating whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person--other than the *amicus curiae*, its members, or its counsel--contributed money that was intended to fund preparing or submitting the brief and, if so, identifying each such person.

The newly amended Rule 29 is intended to discourage the practice of parties either drafting or paying for the creation of *amicus* briefs. Under the prior Rule, counsel for the parties could use *amicus* briefs not only to create the illusion of support for their positions by proxies, but also to circumvent the page limitations on principal briefs. ■

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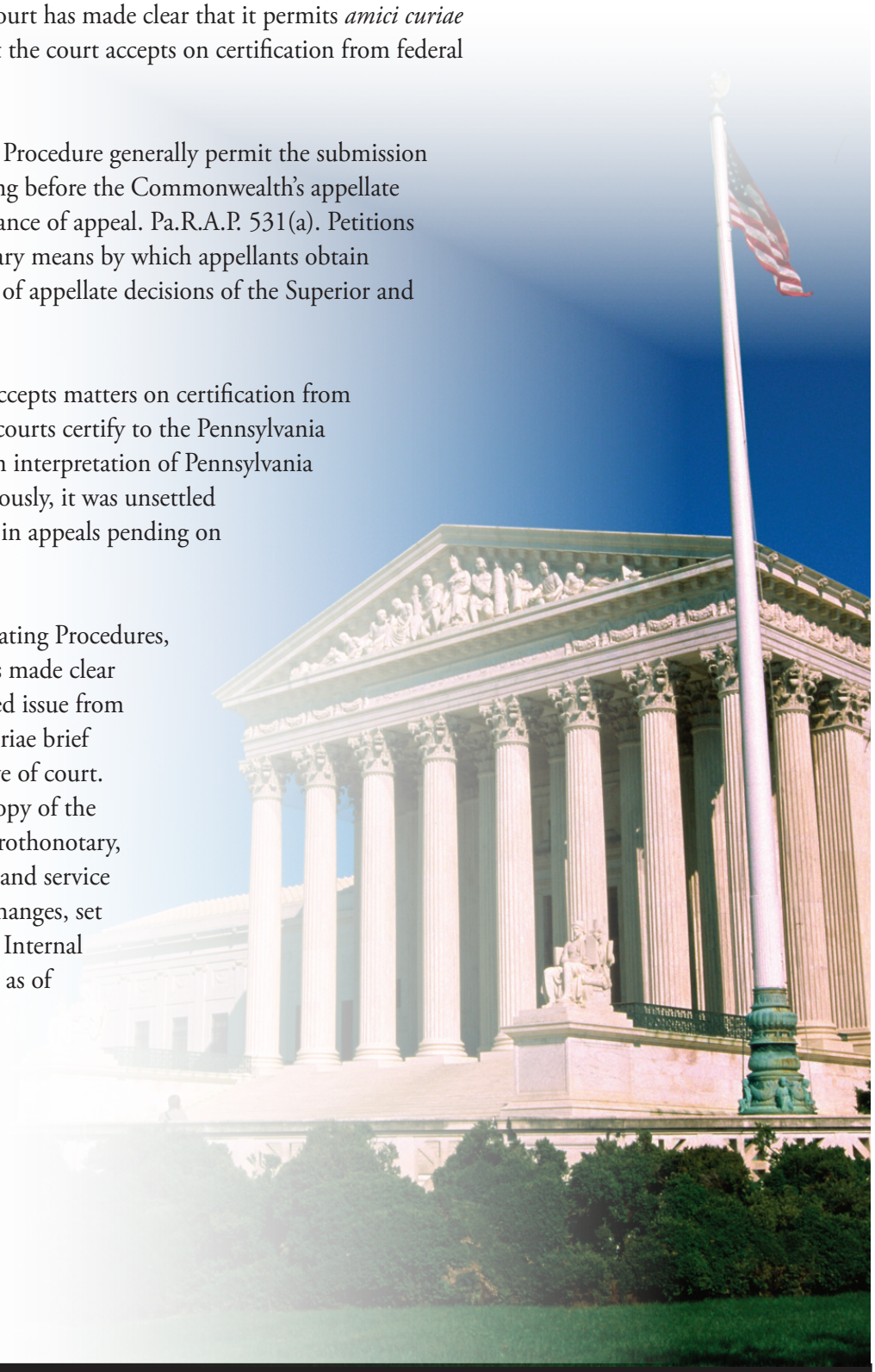
PENNSYLVANIA SUPREME COURT ALLOWS *AMICUS* BRIEFS ON CERTIFICATION QUESTIONS *By Devin J. Chwastyk*

The Pennsylvania Supreme Court has made clear that it permits *amici curiae* to submit briefs in cases that the court accepts on certification from federal appellate courts.

The Pennsylvania Rules of Appellate Procedure generally permit the submission of *amicus* briefs in any matter pending before the Commonwealth's appellate courts, except for petitions for allowance of appeal. Pa.R.A.P. 531(a). Petitions for allowance of appeal are the primary means by which appellants obtain discretionary Supreme Court review of appellate decisions of the Superior and Commonwealth courts.

The Supreme Court, however, also accepts matters on certification from the federal appellate courts. Federal courts certify to the Pennsylvania Supreme Court questions hinging on interpretation of Pennsylvania statutory or constitutional law. Previously, it was unsettled whether amicus briefs could be filed in appeals pending on certification from a federal court.

By amendments to its Internal Operating Procedures, the Pennsylvania Supreme Court has made clear that once the Court accepts a certified issue from a federal appeals court, an amicus curiae brief may be submitted without prior leave of court. Prospective amici should request a copy of the briefing schedule from the Court's Prothonotary, and abide by the deadlines for filing and service set forth therein. These procedural changes, set forth in section 63.10 of the Court's Internal Operating Procedures, were effective as of October 25, 2010. ■



PENNSYLVANIA SUPERIOR COURT FORMALIZES MEDIATION PROCEDURES

By Devin J. Chwastyk

The Pennsylvania Superior Court has been expanding its mediation program, and has now adopted internal procedures to govern that process.

The Superior Court's mediation program began in 2006 as a pilot program in the Court's Eastern District. In 2010, the Court expanded the program to the Western District, with plans to eventually make the program statewide by including the Middle District.

In September 2010, the Superior Court formalized the procedures governing that mediation program, which can be found in section 65.43 of the Court's Internal Operating Procedures.

Upon filing of an appeal to the Superior Court, appellants in the Eastern and Western Districts will receive a Mediation Statement Form from the Court's Prothonotary along with their docketing information. The appellant is required to submit in response a Mediation Statement. The Court's appointed mediator then determines whether the matter is suitable for mediation, and notifies the parties accordingly.

If the Superior Court's mediator directs a case to mediation, participation in that proceeding is mandatory. At least one confidential mediation session must be held, and the parties' attendance at that session is also mandatory.

Generally, however, the acceptance of a case into mediation will not interrupt the routine appellate process, and so parties in mediation must still be attentive to all Superior Court deadlines, including those for the ordering of transcripts, the submission of the record, and briefing schedules. ■

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