

Always Appealing: Certification of Interlocutory Rulings for Immediate Appeal

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“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

This article discusses the two distinct but often confused avenues for seeking a trial court’s certification for immediate appellate review of a decision that is not otherwise immediately appealable as a matter of right — certification as final of a dispositive ruling that does not terminate the litigation under CR 54(b) and RAP 2.2(d), and certification that immediate appellate review of an order involving a controlling question of law will “materially advance the ultimate termination of the litigation” under RAP 2.3(b)(4).

The Washington Rules of Appellate Procedure reflect a strong bias against piecemeal appeals of interlocutory trial court rulings because they splinter appellate issues into multiple appeals rather than consolidating them in a single appeal at the conclusion of a case, upon entry of a final judgment — defined in CR 54(a)(1) as “the final determination of the rights of the parties in the action . . .” The appellate court presumes that a single appeal is better than multiple appeals even if awaiting termination of the case to review an interlocutory ruling results in multiple trials after appellate review.¹

Trial counsel frequently does not want to wait for a case to conclude before seeking appellate review of a trial court decision that does not qualify as a final judgment. The Rules of Appellate Procedure provide two distinct methods of requesting the trial court to certify for immediate appellate review a decision that is not designated in RAP 2.2(a) as immediately appealable as a matter of right. It is not uncommon for counsel to ask the trial court to certify an order under either CR 54(b) or RAP 2.3(b)(4). However, properly viewed, the two methods of certification are actually polar opposites, providing distinct means of interlocutory review for distinct types of orders.

Certification under CR 54(b).

CR 54(b) allows a trial court to certify as a final judgment an otherwise interlocutory order adjudicating a single claim in a multi-claim or multi-party case by entering findings that “there is no just reason for delay”:

CR 54(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court’s own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Certification under CR 54(b) is proper where a trial court’s order disposes of a distinct claim that is entirely severable from those remaining in the case, sufficient to justify treating an otherwise interlocutory ruling as final. Accordingly, the rule requires the trial court to make specific findings that its partial adjudication is entirely separate and distinct from the remaining claims, thereby making an otherwise interlocutory order a final judgment and allowing an immediate appeal. The party seeking certification must therefore demonstrate, and the trial court must make a finding that there is “some danger of hardship or injustice through delay which would be alleviated by immediate appeal.”²

The trial court's findings under CR 54(b) must address the practical consequences of an immediate appeal on the remainder of the case, both in the trial court and in the appellate court, sufficient to overcome the "overall policy against piecemeal appeals."³ The court's finding that there is "no just reason for delay" in entering an immediately appealable judgment must address the following factors based on the specific facts of the particular case, the nature of the claim or claims adjudicated, and the claims that remain pending:

(1) [T]he relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion 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.⁴

Although several cases recite that the appellate court reviews a trial court's certification under CR 54(b) for abuse of discretion,⁵ Washington appellate courts have repeatedly "made it clear that the appellate court must independently determine whether the tests for entry of final judgment under CR 54(b) have been met."⁶

The cases demonstrate that the appellate court will carefully scrutinize a trial court's findings to determine whether it has in fact applied the CR 54(b)'s standard before reviewing an otherwise interlocutory ruling on the merits.

For instance, the appellate court has rejected a CR 54(b) certification where the trial court has adjudicated a single claim but other claims remain pending against the same party.⁷

Similarly, where there remain competing counterclaims, the appellate court will generally view certification as inappropriate because the final judgment may reflect offsetting competing awards, and immediate enforcement activities will disrupt the proceedings before they are finally resolved.⁸

By contrast, the appellate courts have approved certifications in complicated cases where resolution of a distinct claim against one of several parties will have little effect on those remaining. For instance, the court authorized an interlocutory appeal of a declaratory judgment holding that one of 19 insurance companies had no duty to defend a gas station owner with respect to hazardous waste claims in one of over 200 sites because the "environmental contamination at the Sedro-Woolley site is segregable from the other issues."⁹

Under CR 54(b), a partial ruling certified as final by the trial court makes that ruling a fully enforceable and appealable judgment. It may be enforced as any final judgment and is entitled to the full faith and credit of a final judgment under rules of claim and issue preclusion.¹⁰ Moreover, the interlocutory appeal will not deprive the trial court of authority to adjudicate the remaining claims still pending.¹¹

Certification for discretionary review under RAP 2.3(b)(4).

The trial court's certification of its ruling for immediate discretionary review under RAP 2.3(b)(4) is quite a different animal. Rather than certifying that its ruling is so distinct and severable that it will have no effect on the remaining issues and parties in the case, RAP 2.3(b)(4) certification is proper where an immediate appeal is justified to resolve a dispositive legal issue to avoid lengthy and expensive litigation that may be superfluous once the appellate court resolves that controlling legal issue. Thus, while a certified CR 54(b) judgment is distinct and severable from the remaining issues, a certified order under RAP 2.3(b)(4) concerns a legal issue that is central and inextricably tied to the remaining issues in the case.

Under RAP 2.3(b)(4) "a party may seek discretionary review" of a decision that is not appealable as a matter of right where:

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.¹²

The party seeking certification under this provision must demonstrate, and the trial court must certify, each of the following factors:

First, the ruling must concern "a controlling question of law." This criterion should not be met where there are other alternative legal theories that may dispose of the case.

Second, the controlling issue of law must be novel or unresolved, such that there is "a substantial ground for a difference of opinion." Obviously, if there is controlling or highly persuasive authority, this factor will not be met.

Third, "immediate review . . . may materially advance," rather than delay, the "ultimate termination of the litigation." This final factor is of considerable consequence because appellate review will delay the resolution of the case for at least a year or more. Unlike a certification under CR 54(b), once an appellate court accepts discretionary review under RAP 2.3(b), the trial court

loses authority to proceed with the remainder of the case until the appellate court returns its mandate at the conclusion of the appeal, or separately authorizes the trial court to act.¹³ As a consequence, the benefits of judicial economy in the trial court must outweigh the costs of delay imposed by a lengthy appeal of an interlocutory order under RAP 2.3(b)(4).

The appellate court is not bound by the trial court's certification under RAP 2.3(b)(4), but makes its own independent determination of whether an issue is a "controlling question of law as to which there is substantial ground for a difference of opinion."¹⁴

The party seeking discretionary review must file a motion for discretionary review in the appellate court, and convince the appellate court commissioner that the trial court's certification meets the criteria for discretionary review.¹⁵ The Commissioner's Ruling may be challenged on a motion to modify to a motions panel of the appellate court.¹⁶ The case will proceed as an ordinary appeal, with perfection of the record, merits briefing, and consideration by a panel of judges, only after the commissioner (or an appellate court motions panel) grants review.

There is another significant practical distinction between a certification under CR 54(b) and one under RAP 2.3(b)(4): While a certified CR 54(b) judgment becomes enforceable, a trial court's certification under RAP 2.3(b)(4) is of little consequence until the appellate court accepts discretionary review. Under RAP 7.2, the trial court retains full authority to act in the case until such time as the appellate court actually accepts review. RAP 7.1.

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¹*See Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959); Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1547 (1986) ("The appellate system operates with a plain and intentional bias against interlocutory review.")*.

²*Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878, 882, 567 P.2d 230 (1977), quoting Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2nd Cir. 1968).*

³*Doerflinger, 88 Wn.2d at 882; Nelbro Packing Co. v. Baypack Fisheries, L.L.C., 101 Wn. App. 517, 525, 6 P.3d 22 (2000) (trial courts "should consider judicial administrative interests, as well as equity.")*.

⁴*Nelbro Packing, 101 Wn. App. at 525.*

5 e.g., *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 694, 82 P.3d 1199 (2004); *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Tr. v. Port of Everett*, 159 Wn. App. 389, 404, ¶ 23, 245 P.3d 779 (2011).

6 *Pepper v. King Cty.*, 61 Wn. App. 339, 351, 810 P.2d 527 (1991), citing *Doerflinger*, 88 Wn.2d at 881.

7 See, e.g., *Doerflinger*, 88 Wn.2d at 882–83 (dismissing appeal where trial court dismissed several theories of recovery but allowed appellants to proceed on the claims of breach of contract and the tort of outrage); *Nelbro Packing*, 101 Wn. App. at 525–26 (dismissing appeal even though trial court properly found claims separable because record did not support finding that there was no just reason for delay given pendency of additional claims in trial court); *Pepper*, 61 Wn. App. at 352–53 (1991) (dismissing appeal from certified judgment on inverse condemnation claim where plaintiffs' claims for trespass, negligence and nuisance still pending).

8 See *Loeffelholz*, 119 Wn. App. at 694; *Fluor Enter., Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 769, ¶ 17, 172 P.3d 368 (2007).

9 *Gull Indus., Inc. v. State Farm and Cas. Co.*, 181 Wn. App. 463, 481, ¶ 37, 326 P.3d 782 (2014).

10 Cf. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300–01, 840 P.2d 850 (1992) (partial summary judgment in favor one defendant was subject to modification at any time prior to entry of final judgment in absence of CR 54(b) findings).

11 RAP 7.2(1); see *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 784, 727 P.2d 687 (1986).

12 RAP 2.3(b)(4). The language regarding certifications and stipulations was adapted from 28 U.S.C.A. § 1292(b). See 2A Wash. Prac., Rules Practice RAP 2.3 (8th ed.).

13 RAP 7.2.

14 See 2A Wash. Prac., Rules Practice RAP 2.3, Drafter's Comment, 1998 Amendment (8th ed.) (confirming that appellate court would exercise its independent discretion to grant, or deny, review of a certified issue); Drafter's Comments, 2002 Amendment (changing the word "will" to "may" "to make clear that review under any of the enumerated grounds [of RAP 2.3(b)] is discretionary").

15 RAP 6.2.