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High Court Answers Appeal Question For Consolidated Cases

By **Desiree Moore and Daisy Sexton** (June 18, 2018, 12:50 PM EDT)

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When a court consolidates multiple cases, do the cases merge into one? Or do they retain their individual identities? Is a final order in one case interlocutory in nature or final, so as to trigger the right to take an appeal immediately? The U.S. Supreme Court answered these questions unanimously in Hall v. Hall,[1] but it created additional questions that it may soon have to answer.

Hall, which came out of the U.S. Virgin Islands, began with a dispute between a mother and her son. Ethlyn Hall's son, Samuel Hall, served as her caretaker and legal adviser. Samuel and Ethlyn had a falling out over Samuel's handling of Ethlyn's real estate holdings. Ethlyn then established an inter vivos trust, transferred all of her property into the trust, and designated her daughter, Elsa, as her successor trustee. Ethlyn, acting in her individual capacity and as trustee of her inter vivos trust, sued Samuel and his law firm in federal district court for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment (the "trust case").

Ethlyn died after the suit was filed, and Elsa stepped in as the plaintiff in the trust case. Samuel filed counterclaims against Elsa as representative in the trust case and also filed a separate suit against her in her individual capacity, alleging intentional infliction of emotional distress, among other things (the "individual case"). On Samuel's motion, the district court consolidated the cases pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

In the individual case against Elsa, the jury returned a verdict for Samuel, awarding him $500,000 in compensatory damages and $1.5 million in punitive damages. However, the district court granted Elsa a new trial, and that case is currently pending before the district court.

In the trust case, the jury also returned a verdict for Samuel and his law firm. Elsa filed a notice of appeal, and Samuel moved to dismiss, arguing that the appeal was premature because the individual case was still pending. The U.S. Court of Appeals for the Third Circuit agreed and dismissed Elsa's appeal for lack of jurisdiction. The Supreme Court granted certiorari and reversed.

In so doing, the Supreme Court held that cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure "retain their separate identities at least to the extent that a final decision in one is

immediately appealable by the losing party." Indeed, the court noted that "[h]ad the District Court never consolidated the trust and individual cases, there would be no question that Elsa could immediately appeal from the judgment in the trust case." Here, consolidation did not result in a complete merger of the cases so as to deprive Elsa of that right.

In this vein, the court rejected Samuel's argument that Elsa's appeal was "merely interlocutory" because the individual case had not been fully resolved. Likewise, the court rejected Samuel's "plain meaning" argument, which urged the court to find that the "plain meaning of the phrase 'consolidate the actions' is ... to unite two or more actions in one whole—that is, to join them into a single case." Drawing on the legislative history, the court noted that Rule 42(a), enacted in 1938, is based on the predecessor consolidation statute of 1813. The 1813 statute authorized federal courts, when confronted with "causes of like nature, or relative to the same question," to "make such orders and rules concerning proceedings therein as may be comfortable to the principles and usages belonging to courts or avoiding unnecessary costs or delay in the administration of justice" and to "consolidate[]" the causes when it "shall appear reasonable." In essence, the purpose of the statute was judicial efficiency.

The court also surveyed seminal cases that involved questions of consolidation, including Johnson v. Manhattan Railway Co. in 1933.[2] Johnson came to the Supreme Court on appeal from the Second Circuit. In the Second Circuit opinion, Judge Learned Hand wrote that "consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before."[3] The Supreme Court affirmed, holding that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."[4]

Finally, the court rejected Samuel's argument that "consolidation" under Rule 42(a) had a different meaning than in the original consolidation statute, namely, that "consolidation" should be read so as to mean "consolidation for all purposes." The court reasoned that the interpretation of consolidation has been consistent for more than a century, and if the Federal Rules Advisory Committee intended to change the understood meaning, they would have made that intention clear.

The court did make clear that the Hall decision does not mean that district courts cannot consolidate cases "for all purposes" in appropriate circumstances. Rather, Hall supports the proposition that constituent cases "retain their separate identities, at least to the extent that a final decision in one is immediately appealable by the losing party."

The Hall decision is significant because it clarifies that parties have an immediate right of appeal following a final decision in actions consolidated under Rule 42(a). As a related consideration, in light of Hall, where a party in a consolidated action fails to take an appeal of a final decision, the time for the appeal will expire even if other constituent cases remain pending. Thus, in actions consolidated under Rule 42(a), parties must be diligent in taking timely appeals of final decisions so as not to forgo the right to an appeal. Indeed, companies that routinely face consolidation in light of hundreds of cases with similar questions of law and fact will have to be particularly diligent. For example, pharmaceutical companies that are sued for alleged damages due to the widespread use of a particular over-the-counter or routinely prescribed drug will have to take care to coordinate potentially staggered appeal deadlines in light of the sometimes thousands of lawsuits that are consolidated before one judge. Likewise, automobile manufacturers, oil and gas companies and chemical plants, and sports organizations as of late, among many others, will have to be cognizant of the potentially rolling appeals deadlines in consolidated actions against them in light of Hall.

While Hall has now clarified much of the Rule 42(a) framework, it also leaves questions unanswered. For example, what will happen in those consolidated cases where parties relied on now-overruled circuit precedent not to take immediate appeals (or in which they took immediate appeals and were denied)? It is unclear if those parties have lost their right to appeal. Similarly, if those parties have not lost their right to appeal, when does the appellate clock begin to run? There are consolidated actions pending around the country where such questions are not only relevant, but pressing. In the wake of Hall, we will likely see additional cases come before the courts that address these issues.

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[1] Hall v. Hall, 584 U.S. ___ (2018).

[2] Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933).

[3] 61 F.2d 934, 936 (2d Cir. 1932).

[4] Johnson, 496-497.