What Is "Hypothetical Jurisdiction" Over An Appeal?

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January 7, 2011

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 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.