

## Ninth Circuit clarifies who may appeal dismissal of securities class action

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On October 11, 2023, a Ninth Circuit panel dismissed for lack of jurisdiction an appeal from the dismissal of a putative securities class action. The appellant was an investor who filed the first lawsuit after a stock drop but did not seek to be appointed lead plaintiff. After the district court dismissed the case, the court-appointed lead plaintiff did not appeal. But the original plaintiff attempted to do so. The Ninth Circuit found that the original plaintiff lacked standing.

On February 1, 2021, Mark Habelt, an investor in iRhythm Technologies, Inc., filed a putative securities class action alleging that iRhythm and one of its executives misled investors about iRhythm's business. Although Habelt filed the lawsuit, he did not make a motion for appointment as lead plaintiff under the Private Securities Litigation Reform Act.

Ultimately, the court appointed the Public Employees' Retirement System of Mississippi (PERSM) as lead plaintiff. On September 24, 2021, PERSM filed the operative amended complaint. As often happens, the complaint continued to identify the original plaintiff (Habelt) as the "Plaintiff," but otherwise made no reference to him or his individual claims.

The defendants filed a motion to dismiss. The district court dismissed the action with prejudice for failure to state a claim. PERSM did not file a notice of appeal. However, Habelt did so.

In the Ninth Circuit, Habelt argued that he was a party to the lawsuit because he filed the initial complaint and his name was in the caption of the operative complaint. Writing for a divided panel, Circuit Judge Holly A. Thomas (who was joined by Senior Circuit Judge Carlos T. Bea) [rejected that argument](#), finding that the initial complaint was extinguished by the operative amended complaint, which did not discuss Habelt or his claims, and the mere inclusion of his name in the caption was not sufficient to make him a party.

The panel further found that Habelt's status as a putative class member did not give him standing to sue where no class had been certified. The panel also did not find any extraordinary circumstances that would confer upon Habelt standing to appeal as a non-party, concluding that Habelt ceased his involvement after filing the initial complaint. The panel noted that Habelt could have filed a motion to intervene, but never did so. Accordingly, the panel dismissed the appeal for lack of standing.

Circuit Judge Mark J. Bennett wrote a lengthy dissent stating that he would allow the appeal because Habelt was a party who filed the lawsuit and remained in the caption, the operative amended complaint covered his initial claims, and there was no indication at any point in the proceeding that he wanted to be removed from the case. Judge Bennett further wrote that even if Habelt had been a non-party, exceptional circumstances would exist that should allow him to appeal. Judge Bennett noted that not only did Habelt initiate the lawsuit but that if he could not appeal, the applicable statutes of limitation might bar him from commencing a new action. He thus found that a balancing of the equities counseled in favor of allowing the appeal. Judge Bennett also indicated that he would have reversed the district court's dismissal decision on the merits.

The majority's decision is a reminder of how the PSLRA lead plaintiff appointment process serves an important and beneficial role for defendants in streamlining litigation. After a stock drop, it remains commonplace for multiple investors to file copycat lawsuits. A contrary decision by the Ninth Circuit could have encouraged still more filings, with each investor seeking to hold a free option to pursue appellate relief if it proved to be dissatisfied with the progress of the

litigation. The Ninth Circuit's decision should foreclose such mischief.

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