No lead plaintiff status, no standing ruling draws dissent and an appeal

By Jonathan D. Uslaner and Lauren M. Cruz

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In *Habelt v. iRhythm Technologies, Inc.*, 83 F.4th 1162 (9th Cir. 2023), a split three-judge panel from the Ninth Circuit held that an investor who was the first to file a putative securities fraud class action complaint, but who did not seek appointment as the lead plaintiff under the Private Securities Litigation Reform Act (PSLRA), lacks standing to appeal an adverse decision by the district court dismissing the action. The majority decision further reinforces why investors, if they intend on ever taking an active role in an ongoing securities class action, are best suited to seek lead plaintiff status.

Background

In early 2021, Mark Habelt filed a complaint on behalf of himself and a putative class of iRhythm Technologies, Inc.'s common stock purchasers under the Securities Exchange Act of 1934. Three other putative class members moved for appointment as lead plaintiff under the PSLRA, but Habelt did not. The district court ultimately appointed the Public Employees' Retirement System of Mississippi (PERSM) as the lead plaintiff. PERSM amended Habelt's complaint and the defendants' moved to dismiss it under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court granted the defendants' motion in early 2022. PERSM did not appeal, but Habelt did.

The split decision

The majority opinion, written by the Honorable Holly A. Thomas, dismissed Habelt's appeal "for lack of jurisdiction." *Id*. at 1164. The majority reasoned that dismissal was required because Habelt was not a "party to the action" and "no extraordinary circumstances" warranted his standing to appeal as a non-party. *Id*. at 1164-65.

As to "standing," the majority focused on the "well settled" rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id*. at 1165. Habelt argued that he was a party "because he filed the initial complaint and is listed in the caption" of the operative complaint, but the majority disagreed. *Id*. at 1166. The majority reasoned that a case caption is simply "the handle to identify" the action and "the more important indication" of party status is "the 'allegations in the body of the complaint.'" *Id*. The majority found the "operative pleadings," PERSM's second amended complaint, made no mention of Habelt or his individual claims and "makes clear that PERSM is the sole plaintiff." *Id*. Additionally, Habelt's "status as a putative class member" did not confer standing because, according to the majority, "unnamed class members" are not parties before the class is certified. *Id*.

Next, the majority analyzed whether "exceptional circumstances" existed to confer standing upon Habelt as a non-party. *Id*. at 1167. The majority cited existing Ninth Circuit authority that says "[a] non-party may have standing to appeal when she, '(1) ... though not a party, participated in the district court proceedings, and (2) the equities of the case weigh in favor of hearing the appeal.'" *Id*. Under the first prong, the majority stated that "participation" required Habelt to be "significantly involved in the district court proceedings," concluding that Habelt's participation "does not meet that high bar" because he "did not apply to be appointed lead plaintiff, challenge PERSM's motion for appointment as lead plaintiff, or otherwise participate in the suit after PERSM's appointment." *Id*. Under the second prong, the majority found that equities were not in Habelt's favor either because he was not brought into the action unwillingly, did not follow the "better practice" of filing a motion to intervene, and "is not bound by the district court's judgment" because he can file another action against iRhythm. *Id*.

In a lengthy dissent, the Honorable Mark J. Bennett wrote that he would have found that Habelt remained a party because he initiated the action, remained in the caption, had claims that were "clearly covered" by the operative complaint, and "never evinced any intent to remove himself as a party" nor "received notice of termination of his party status." *Id*. at 1168-72. Judge Bennett accused the majority of "elevat[ing] form over substance" by "create[ing] a new rule that a litigant's name must be specifically listed in the body of the operative complaint to be considered a party, regardless of the history of the litigation." *Id*. at 1169. Judge Bennett also pointed to "the lack of any notice" to Habelt that his party status had been terminated, which he found "inconsistent with due process." *Id*. at 1170-71.

Judge Bennett also would have found "exceptional circumstances" because "the dearth of caselaw" addressing the facts of the case "illustrates that Habelt's situation *is* exceptional." *Id*. at 1172. Even if "the PSLRA *is* a trap for the unwary" that "extinguishes the involvement of other named plaintiffs," penned Judge Bennett, "Habelt wasn't unwary – he wasn't a silent voice who should have assumed his silence equaled non-party status. He was the Plaintiff, who had the right to assume that a plaintiff (i.e., a party) who is never dismissed, remains a party absent something (like a statute, a court order, or a very clear binding case) telling him that some event or series of events stripped that status from him." *Id*.

What's next?

On Nov. 8, 2023, Habelt petitioned for rehearing *en banc*, mirroring Judge Bennett's dissent. If the majority's decision stands, it provides a further reason for sophisticated investors to exercise their right to apply for lead plaintiff status. Through the PSLRA, Congress encouraged sophisticated investors to seek to lead class actions. H.R. Conf. Rep. No. 104-369, at *8-9, *33-34. The majority's decision instructs that if investors fail to exercise this right under certain circumstances, they may lose their party status and right to appeal if the party who was appointed lead plaintiff chooses to stop prosecuting the action.

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A plea to implement prior recommendations to family law courts

By Mark E. Minyard

Guided by the commitment for fundamental change, the objective of the Elkins Family Law Task Force (EFLTF) was to "develop a blueprint for fundamental change in the family law system." Although the EFLTF made well over 100 recommendations, many of the most impactful recommendations have yet to be implemented. And, although they are not the reasons for the current deficiencies in the family court system, improvements are not likely to occur unless our family law judicial officers and lawyers alike make this their cause and calling and prod our political leaders into action. Perhaps, if all California family law judicial officers simultaneously requested reassignment out of family court, Gov. Gavin Newsom might realize that it is in his own best interest to acknowledge that our family courts are in crisis and take the necessary action to fill the incredibly high number of vacant judicial positions throughout the state and that, by not addressing this issue, Gov. Newsom is opening himself up to a backlash which might significantly impact his own future plans.

The following EFLTF recommendations and proposals, if implemented, would have an immediate and significant impact on access to justice and due process throughout California's family court system:

- That 19% of the judicial officers in each county be assigned to family court. For example, this would increase Orange County's sitting family court judicial officers to 27, from the current 17 and one-half judicial officers (Twenty if you count the two and one-half Department of Child Support Services judicial officers that are funded by the federal government.)
- That the Judicial Counsel "adopt a rule of court requiring that long-cause hearings and trials that cannot be completed in one day must, absent a finding of good cause, be continued to the next day routinely designated by the court for trials."
- That "Courts may want to assign civil trial judges with family law experience to hear trials, particularly those principally involving financial issues."
- That "[although] Family Law is often regarded as somehow less important than some other types of cases in the courts, judicial leadership is needed to ensure that the family courts get sufficient resources to provide California families with the time and attention they deserve to resolve their family law disputes in a timely manner."
- That "The resources provided have not been proportionate to the volume of cases and proceedings related to family law. Many suggested changes can increase efficiency in the delivery of services in family law without adding resources. However, without significant additions of judicial officers and staff resources, courts will be unable to meet the crushing workload in family courts."
- That supervising family law judges, in consultation with the presiding judges, work to ensure that the family court has adequate resources and that this be a duty of the presiding judge.
- That supervising family law judges be elevated to presiding judges in courts with more than ten family law judicial officers.
- That a rule be adopted that allows judicial officers to sanction lawyers, not just the parties, for inappropriate or delaying behavior.
- That the courts accurately assess the workload of the family courts and the reallocation of resources.
- That the judicial appointment process be changed to encourage more family law attorneys to apply.
- That, with exceptions, before being assigned to a family law assignment, a judicial officer has at least two years of judicial experience.

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Judicial workload metrics: a critical examination

In 2019, the Workload Assessment Advisory Committee (WAAC) issued its most recent report assessing the judicial needs of each county to the Judicial Council of the State of California. This report uses a set of workload standards (case weights) which are a significant part of the formula used to determine the number of needed judicial officers. As Mark Twain once said, "There are lies, damned lies, and statistics." The validity of the WAAC analysis is questionable at best. The needs assessment uses data from 2015, 2016 and 2017. Interestingly, Orange County and San Diego County were not included in the analysis and while Los Angeles County is listed as being a part of the analysis, a footnote indicates that there was only partial court participation. Is partial 1% or 99% and what departments were omitted? The report includes a detailed discussion of complex civil cases but does not give the same analysis to family law matters, which is complex by any definition and more nuanced and unique than complex civil.

The report acknowledges some of its limitations by noting the significant differences between the size of courts, the need to perform additional analysis, the need for more data, and the fact that the analysis will evolve over time, etc. The report does not take into consideration the workload of new or expanded legislatively required findings required by Family Code Sections: 4320, 2030, 2033, 6320, and 3030 or the new CARE Court. The report also added the following caveats: the report was based on "self-reported" data, the analysis may not reflect a "typical workload," and that the data was collected at one point in time (a four-week period) and gathering data throughout the year would provide a better representation of the average workload.

The report included qualitative feedback that impacted judicial workloads but noted that, unlike in prior reports, it did not adjust case weights based on that feedback. The feedback related to unfunded legislative mandates, rehabilitation and diversion related workloads, new and amended laws related to criminal justice reform, increased filing in civil cases, and increased filings in mental health cases.

Most Interestingly, the report listed the average number of minutes per filing needed by a judicial officer to resolve family law matters as follows: Dissolution 85, Parentage 127, Child Support 43, Domestic Violence 56, and Other Petitions 133. The minutes listed seem to bear no resemblance to actual practice. It is not clear whether the times listed are attributable only to pre-judgment litigation or also to post-judgment litigation. It is not clear what actions are included in "Other Petitions." Does that category include discovery motions, spousal support, post-judgment modifications, enforcement matters and attorney fee hearings? The 133 minutes attributed to "Other Petitions" is 30% of the total minutes referenced. If "Other Petitions" means post-judgment filings, the analysis is further flawed by the fact that post-judgment matters comprise 60% to 70% of a judicial officer's total workload.

When a judgment is entered in a civil case, unless there is an appeal or enforcement action, the matter is closed. However, a family law matter may be open for decades. The case will remain open until the youngest child attains the age of 18 and graduates from high school and until one spouse dies if spousal support is being paid – 2,000 filings from 2023 remain open in 2024, 2025, etc. They are part of the bucket that continues to fill each year as more cases are filed. It is not clear how or whether the analysis addresses this dynamic.

It is unclear how or whether individual courts use this analysis to allocate judicial officers between departments but its value relative to determining the number of judicial officers needed in family law departments is de minimis.

This article is part two of a four-part series about recommendations for change to family law courts.

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