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Second Circuit Holds Named Plaintiffs in Class Action Must be Named in Every Notice to Court or Risk Losing Right to Appeal

Rule 3 of the Federal Rules of Appellate Procedure ("FRAP") sets forth the requirements for filing an appeal in federal court. Recently, the U.S. Court of Appeals for the Second Circuit clarified that FRAP Rule 3(c)(1)(A) requires individual *named* plaintiffs to indicate their intent to appeal, even if members of a putative class, and "not merely rely on a notice of appeal filed by the lead plaintiffs or other persons qualified to represent the class." *Cho v. BlackBerry Ltd.*, 991 F.3d 155, 159 (2d. Cir. 2021).[1]

I. Background and Procedural History

In 2013, Blackberry released the Z10, a smartphone that became a commercial failure. Later that year, several individuals filed separate putative securities class actions, alleging material misrepresentations and omissions relating to the release of the Z10.

In October 2013 the actions were consolidated in the U.S. District Court for the Southern District of New York, and the court appointed lead plaintiffs and counsel. A consolidated amended complaint was signed by the law firm Kahn Swick & Foti as "Lead Counsel for Lead Plaintiffs and the Class," and by the firm Brower Piven as "Counsel for Additional Plaintiffs Yong M. Cho and Batuhan Ulug and the Class."

After the district court granted a motion to dismiss the complaint, the plaintiffs moved for reconsideration and for leave to amend the complaint, with identical language in the signature blocks. The district court denied the motion.

The lead plaintiffs then appealed on behalf of the class to the Second Circuit. The notice of appeal stated "Lead Plaintiffs Todd Cox and Mary Dinzik hereby give notice, on behalf of themselves and all others similarly situated…" and was signed by Kahn Swick & Foti as "Lead Counsel for Lead Plaintiffs and the Class" and Brower Piven as "Additional Counsel for Lead Plaintiffs and the Class." Cho and Ulug were not mentioned in the caption, the signature block, nor anywhere in the notice of appeal. On August 24, 2016, the Second Circuit affirmed the district court's dismissal, but remanded because the district court "erred in denying leave to amend without explanation."[2]

Following the remand, the plaintiffs filed a second amended complaint that again identified Cho and Ulug as plaintiffs. The defendants moved for judgment on the pleadings, asserting that the claims of Cho and Ulug should be dismissed, *inter alia*, because they failed to appeal the district court's dismissal of the first amended complaint without

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1 Unless otherwise noted, all quoted statements in this memorandum are taken from this decision.

2 *Cox* v. *Blackberry Ltd.*, 660 F. App'x 23 (2d Cir. 2016).

leave to amend and were bound by the ruling. The district court granted the motion for judgment on the pleadings, concluding that FRAP Rule 3 required Cho and Ulug to indicate their individual intent to appeal. The court rejected Cho's and Ulug's argument that FRAP Rule 3(c)(3) (which states"[i]n a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class") applied, as Cho and Ulug "cease[d] to be represented by the Lead Plaintiffs" when they joined the complaint as individual plaintiffs.[3] Cho and Ulug appealed to the Second Circuit.

II. The Second Circuit Decision

The Second Circuit affirmed the district court's dismissal of Cho's and Ulug's claims, holding that they had not joined the prior appeal, and the district court's original dismissal of their claims was therefore final as to them. Specifically, the court determined that Cho's and Ulug's "status as individual named plaintiffs precluded them from being represented on appeal by the lead plaintiffs; consequently, they were required either to clearly indicate their intent to join the lead plaintiffs' notice in their individual capacity or to file their own notice." The Court also rejected Cho's and Ulug's arguments that they could remedy the deficiency by bringing claims against a new defendant in the second amended complaint and that the district court had abused its discretion.

The Second Circuit first looked at FRAP Rule 3(c)(1)(A) and concluded that, based on the plain text of the rule, Cho and Ulug had not satisfied the requirement that the notice of appeal specify them as parties taking the appeal, as they had not been identified in the caption or notice.

The Court then determined that FRAP Rule 3(c)(3) did not apply to Cho and Ulug because "the provision covers *unnamed* class members," and not named plaintiffs who have appeared individually in the district court. The court explained that the purpose of Rule 3(c)(3) was not to displace 3(c)(1)(A)'s generally applicable requirement, but to alleviate the burden in class actions of naming each individual putative class member. The court also observed that, as individual named plaintiffs, Cho and Ulug have rights not available to unnamed class members, such as the rights to file an individual appeal and assert different arguments. Thus, while the lead plaintiffs are "'qualified to bring the appeal as representative[s] of the class' under Rule 3(c)(3), they are not qualified to appeal Cho's and Ulug's individual claims, even if those claims are, at this stage, the same claims as those being pursued by the class." To find otherwise would distort the purpose of the notice requirement, as it would not be clear whether Cho and Ulug would be bound by decision in the appeal.

The Court rejected the argument that Cho's and Ulug's intent to appeal was "clear from the notice" within the meaning of FRAP Rule 3(c)(4)[4] because their attorneys had signed the notice. Indeed, the Court found the fact that their attorneys had previously signed filings on behalf of "Additional Plaintiffs Yong M. Cho and Batuhan Ulug and the Class," but signed the notice of appeal on behalf of "Lead Plaintiffs and the Class" suggested the opposite—that Cho and Ulug did not intend to appeal.

In its analysis, the court relied in part on *Cohen v. UBS Financial Services Inc.*, 799 F.3d 174 (2d Cir. 2015), in which the Court concluded that the plaintiff's notice, "on behalf of himself and all others similarly situated" did not "'clearly express any other named plaintiff's intent to join the appeal.'" Specifically, in *Cohen*, the court rejected Cohen's argument that other named plaintiffs had joined the appeal.

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[3] *Pearlstein* v. *Blackberry*, 93 F. Supp.3d 233 (S.D.N.Y. 2015).

[4] Rule 3(c)(4) provides that "an appeal may not be dismissed ... for failure to name a party whose intent to appeal is otherwise clear from the notice."

The Court also distinguished a U.S. Court of Appeals for the Third Circuit decision holding that an appeal captioned "Jean Massie, *et al*." sufficiently gave notice that the other named plaintiffs were parties to the appeal. *Massie v. U.S. Dep't of Housing & Urban Development*, 620 F.3d 340 (3d Cir. 2010). The appeal of the dismissal of the claims against Blackberry, in contrast, did not contain the phrase "*et al*." but added only "all others similarly situated," which is commonly used to refer to only unnamed parties, not named parties.

Finally, the court rejected Cho's and Ulug's argument that FRAP Rule 3(c)(1)(A) imposes too great a burden on individual plaintiffs in putative class actions, relying on *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2054 (2017). The Court found that the burden on Cho and Ulug, who already had counsel, was "negligible," as their counsel already previously stated that they signed certain pleadings on behalf of their individual clients.

III. Implications

As the Court observed, the notice requirements of FRAP Rule 3 serve an indispensable purpose of notifying the court and parties of which parties are bound by the court's judgment and which parties may be liable for costs of sanctions on the appeal. Because Cho and Ulug did not comply with the technical requirements of the Rule, they were precluded from taking advantage of the favorable decision on appeal, a result that the Second Circuit acknowledged was "harsh." Attorneys for all parties should check carefully to ensure that their parties are sufficiently identified in appeals in which they wish to participate, while attorneys for the defense should pay particular attention to any insufficient appeals. The insufficient naming of parties can be grounds for dismissing an appeal.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Lauren Perlgut (counsel) at 212.701.3558 or lperlgut@cahill.com; Jake Overlander (associate) at 212.701.3653 or joverlander@cahill.com; or email publications@cahill.com.