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Party Names on the Notice of Appeal: Strict Adherence to Federal Appellate Rule 3 after Torres v. Oakland Scavenger Company

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PARTY NAMES ON THE NOTICE OF APPEAL: STRICT ADHERENCE TO FEDERAL APPELLATE RULE 3 AFTER *TORRES V. OAKLAND SCAVENGER COMPANY*

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I. INTRODUCTION

In *Torres v. Oakland Scavenger Co.*,[1] the Supreme Court held that where a notice of appeal fails to adequately describe all appealing parties, a court lacks jurisdiction over the appeal of the unnamed parties.[2] Despite *Torres*, federal circuit courts continuously receive notices of appeal that fail to specifically name the appealing parties. Recently, the Tenth Circuit in *Storage Technology Corp. v. United States District Court*[3] held that each appealing party must be specifically named in the notice of appeal or in a functionally equivalent document that is filed within the time period required for a notice of appeal.[4] The Tenth Circuit's extraordinary remedy of a writ of mandamus, which ordered the district court to dismiss approximately 68 appellants not named in the notice of appeal, underscored its strong belief that the notice of appeal must be absolutely unambiguous.[5] Despite the import of *Torres* and its progeny and the ease with which Rule 3(c) is satisfied, deficient notices of appeal are continuously filed and unnamed parties suffer the harsh consequences of dismissal for failure to comply with Rule 3(c) requirements.[6]

II. STATUTORY REQUIREMENTS UNDERLYING FEDERAL RULE OF APPELLATE PROCEDURE 3

"The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."[7] The Advisory Committee Notes to Rule 3 indicate that "[b]ecause the timely filing of a notice of appeal is 'mandatory and jurisdictional,' compliance

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1. 487 U.S. 312 (1988).
2. *Id.* at 314.
3. 934 F.2d 244 (10th Cir. 1991).
4. *Id.* at 248.
5. *Id.* at 248 (an appellate court can not be relegated to the vagaries of belatedly trying to determine who the appropriate appealing parties may be).
6. *Torres*, 487 U.S. at 318 (harshness of the result is imposed by the legislature and not by the judicial process).
7. FED. R. APP. P. 3(c) (Rule 3 and Rule 4 combined require timely filing).

with the provisions of [the] rules is of the utmost importance."[8] In the past, however, courts have dispensed with literal compliance with the rules in cases where the time of filing can not fairly be exacted.[9] Such an approach restates the provisions found in Civil Procedure Rule 5(c)[10] and Criminal Procedure Rule 37.[11] Accordingly, courts have historically placed substance over form in construing the contents of the notice of appeal.[12]

Recognizing this judicial preference, one well known authority on federal practice and procedure writes:

> Defects in the wording of the notice of appeal are generally overlooked if the true intentions of the appellant can fairly be ascertained, if the courts have not been misled, and if the other parties have suffered no prejudice. The notice is not to be parsed on a technical basis; nor is the appellant to be deprived of his right to appeal because he has misspelled a party's name or misdesignated the court to which the appeal is being taken.[13]

Courts therefore, in the interest of expediting decisions or for other good cause shown, may suspend the requirements of the appellate rules in a particular case on application of a party or on its own motion, and the court may order proceedings in accordance with its direction.[14] While the courts may exercise their power to enlarge the time prescribed by the rules to do "any act," Rule 26(b) strictly prohibits enlarging the time permitted for filing a notice of appeal.[15] Upon a showing of excusable neglect or good cause, however, Rule 4(a)(5) permits the district court to extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the time prescribed by Rule 4(a).[16] The

8. *Id.* (advisory committee note citing United States v. Robinson, 361 U.S. 220, 224 (1960)). *See also* PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 13 (1989) ("[p]rescribed times for filing a notice of appeal are jurisdictional and may not be extended by the court of appeals.").

9. *Id. See, e.g.*, Fallen v. United States, 378 U.S. 139, 144 (1964) (notice of appeal by a prisoner, in the form of a letter, delivered to prison authorities for mailing well within the time fixed for appeal, was held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); Riffle v. United States, 299 F.2d 802 (5th Cir. 1962) (letter by prisoner to judge of court of appeals held sufficient).

10. FED. R. CIV. P. 5(c).

11. FED. R. CRIM. P. 37.

12. *See, e.g.*, Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974).

13. 16 CHARLES WRIGHT, KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 3949, 355-56 (1977) [hereinafter WRIGHT] citing Hoiness v. United States, 335 U.S. 297 (1948); Foman v. Davis, 371 U.S. 178 (1962) (the Supreme Court has insisted that notices of appeal are to be construed liberally rather than hypertechnically). However, not all courts adopted a liberal construction of Rule 3(c). *See, e.g.*, Van Hoose v. Eidson, 450 F.2d 746 (6th Cir. 1971); Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365 (9th Cir. 1985).

14. FED. R. APP. P. 2.

15. FED. R. APP. P. 26(b).

16. FED. R. APP. P. 4(a)(5) (the 1991 amendment to FED. R. APP. P. 4, which added subdivision 6, permits a district court to reopen the time for appeal for a period of 14 days

Tenth Circuit has strictly construed excusable neglect and does not extend it to palpable mistakes by lawyers that are merely too busy,[17] however, the Fifth Circuit does indicate that there should be flexibility in granting extensions of time to file a notice of appeal.[18] For these reasons, if a defective notice of appeal is filed omitting the name of one or more appellants, and an appellant attempts to use the extension provided for in Rule 4(a)(5) to cure the notice of appeal, a motion for leave to amend the notice to include the unnamed parties must be filed within the time limit for filing the notice of appeal.[19] If the appellant fails to file the motion to amend within the prescribed time period, the court will not have jurisdiction over the unnamed parties.[20]

As an example, the First Circuit in *In re San Juan Dupont Plaza Hotel Fire Litigation,*[21] allowed an extension of time to file a notice of appeal under Rule 4(a)(5) because the appellant had failed to specifically name all parties.[22] The original notice of appeal designated the appellant as "Plaintiffs Steering Committee" but had failed to specifically name all 2,000 appellants. The appellants sought leave in the district court pursuant to Rule 4(a)(5), to extend the original filing time so that a corrected notice of appeal specifically listing each appellant's name could be filed. In affirming the district court's grant of a time extension, the First Circuit found that the appellants' conduct may have been "excusable" in that: (1) the notice may have been adequate as filed since the Steering Committee by its very nature represented all plaintiffs; (2) the plaintiffs group was of extraordinary size; and (3) the original notice was reasonable under the circumstances.[23] Additionally, the district court had jurisdiction to consider the motion for extension of time because the defective notice of appeal did not deprive it of jurisdiction over the unnamed parties who, in effect, had not appealed.[24]

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from the date of entry of the order reopening the time for appeal if the district court finds: (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (b) that no party would be prejudiced by reopening. The motion to reopen must be filed within 180 days of the entry of judgment or within 7 days of receipt of notice from the clerk, whichever is earlier. FED. R. APP. P. 4(a)(6)).

17. Maryland Casualty Co. v. Conner, 382 F.2d 13 (10th Cir. 1967) "The Committee intended that the standard of excusable neglect remain a strict one, however. [I]t is not meant to cover the usual excuse that the lawyer is too busy . . . ." *Id.* at 16.

18. Chipser v. Kohlmeyer & Co., 600 F.2d 1061 (5th Cir. 1979). Under amended Rule 4(a), flexibility is intended in the granting of extensions but the amendment does not apply in this case. *Id.* at 1063 n.2.

19. Because of the limited circumstance set forth in FED. R. APP. P. 4(a)(6), this subdivision would not assist an appellant who failed to designate the appealing parties. *See supra* note 16.

20. Kowaleski v. Director, Office of Worker's Compensation Programs, 879 F.2d 1173, 1177 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (citing Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988)).

21. 888 F.2d 940 (1st Cir. 1989).

22. *Id.* at 942.

23. *Id. Cf.* 650 Park Ave. Corp. v. McRae, 836 F.2d 764, 767 (2d Cir. 1988) (excusable neglect must be based either on acts of someone other than appellant or his counsel or some extraordinary event).

24. *Id. See* Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990); *Torres*, 487 U.S. at 317 (courts of appeal have no jurisdiction over parties not named in an appeal).

Rule 4(a)(4) provides that if a timely post-trial motion is filed in the district court by any party under Rule 59, the time for filing an appeal runs from entry of an order granting or denying the motion.[25] A notice of appeal filed before the disposition of the motion has no effect.[26] A new notice of appeal must be filed within the prescribed time measured from the entry of the order denying the Rule 59 motion. Rule 4(a) requires that a notice of appeal be filed 30 days after a final judgment or order, except the United States or an officer or agency thereof has 60 days.[27] Unfortunately, a combination of the language from the Advisory Committee's Notes suggesting that literal compliance is not required, the Notes' reliance on opinions which liberally construe the requirements of Rule 3(c), and the language from *Wright*[28] have caused appellants to relax the vigilance required in filing a notice of appeal. Of paramount importance in the Advisory Committee's language is that the timely filing of a notice of appeal is mandatory and jurisdictional.[29] This means that a defective notice of appeal can not be cured after the time for filing because this would be the equivalent of extending the time for filing a notice of appeal.[30]

III. *TORRES V. OAKLAND SCAVENGER CO.*

Jose Torres was one of sixteen plaintiffs who intervened in an employment discrimination suit after receiving notice of the action pursuant to a settlement agreement between Oakland Scavenger and the original plaintiffs. After the district court dismissed the intervenors' complaint, Mr. Torres filed an appeal in the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the district court's dismissal and remanded the case for further proceedings.[31] The result of a clerical error by the secretary of Jose Torres's attorney, was the omission of Torres's name from both the notice of appeal and the order of the court of appeals.[32] On remand, Oakland Scavenger moved for a partial summary judgment against Mr. Torres arguing that the prior dismissal was final by virtue of Torres's failure to appeal.[33] The district court granted Oakland Scavenger's motion and the Ninth Circuit affirmed, holding that "[u]nless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him."[34] The Supreme Court granted certiorari in order to resolve the conflict among the circuits as to

25. FED. R. APP. P. 4(a)(4)(iv). *See also* FED. R. CIV. P. 59.

26. Barnett v. Petro-Tex Chemical Corp., 893 F.2d 800, 804 (5th Cir. 1990), *cert. denied*, 110 S. Ct. 3274 (1990) (pendency of motion renders notice of appeal nullity).

27. FED. R. APP. P. 4(a)(1).

28. *See supra* text accompanying note 13.

29. FED. R. APP. P. 3 (advisory committee's note).

30. *Torres*, 487 U.S. at 315 (permitting courts to exercise jurisdiction over unnamed parties after time for filing notice has passed is equivalent to permitting courts to extending time for filing notice of appeal).

31. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982).

32. *Torres*, 487 U.S. at 313.

33. *Id.*

34. *Id.* at 314 (quoting Martinez v. Oakland Scavenger Co., 807 F.2d 178 (9th Cir. 1986)).

whether a failure to file a notice of appeal in accordance with the specificity requirements of Rule 3(c), presents a jurisdictional bar to the appeal.[35]

The Supreme Court held that the specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.[36] Failure to name a party in the notice of appeal constitutes a failure of that party to timely file a notice of appeal.[37] Failure to timely file a notice of appeal deprives the court of jurisdiction.[38] Accordingly, an appeal is not perfected where a party: (1) was never named or otherwise designated on the notice of appeal; (2) did not file the functional equivalent of the notice of appeal; and (3) did not seek leave to amend the notice of appeal within the time limit prescribed by Rule 4.[39] In so holding, the Court noted that although Rule 2 gives courts the power "for good cause" to suspend the requirements of the rules, courts may not waive the jurisdictional requirements of Rules 3 and 4.[40] The Court recognized that construing Rule 3(c) as a jurisdictional prerequisite would occasionally lead to a harsh result, but held this was the only manner in which to ensure that both the opposition and the court could be certain of the identity of the appellants.[41] The last sentence to Rule 3(c) states that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal."[42] The Supreme Court explained that the Advisory Committee Note stating "the court should dispense with literal compliance in cases in which it cannot fairly be exacted" refers generally to cases later addressed by the 1979 amendment.[43] Permitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold.[44]

Strict compliance with Rule 3 is of utmost importance because jurisdictional hurdles can never be waived by a court.[45] No party need raise the jurisdiction question because it is the duty of the court to determine, sua sponte, whether it has jurisdiction over a case before it.[46] Accord-

35. *Torres*, 487 U.S. at 314 n.1 (comparing Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1368-1370 (9th Cir. 1985) (failure to specify party to appeal is jurisdictional bar); Covington v. Allsbrook, 636 F.2d 63, 64 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981); Life Time Doors, Inc. v. Walled Lake Door Co. 505 F.2d 1165, 1168 (6th Cir. 1974), with Ayres v. Sears, Roebuck & Co. 789 F.2d 1173, 1177 (5th Cir. 1986) (appeal by party not named in notice of appeal is permitted in limited instances); Harrison v. United States, 715 F.2d 1311, 1312-1313 (8th Cir. 1983); Williams v. Frey, 551 F.2d 932, 934 n.1 (3rd Cir. 1977)).

36. *Torres*, 487 U.S. at 318.

37. *Id.* at 314.

38. *Id.* at 315-17.

39. *Id.* at 314-18.

40. *Id.* at 317.

41. *Id.* at 318.

42. FED. R. APP. P. 3(c) (sentence added by the 1979 amendments).

43. *Torres*, 487 U.S. at 315.

44. *Torres*, 487 U.S. at 315-16.

45. *Id.* at 315. *See also* FED. R. APP. P. 3 (advisory committee's notes).

46. Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986); Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 664 (3d Cir. 1990); Griffith v. Johnston, 899 F.2d 1427, 1429 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991); Kowaleski v. Direc-

ingly, if a party fails to perfect an appeal as required by Rules 3 and 4, the court is powerless to invoke its equitable discretion to assist that party.[47] Rules 3 and 4 as construed in *Torres*, therefore, require the court "to insist on punctilious, literal, and exact compliance" with the requirement in Rule 3(c) that the "notice of appeal . . . shall specify the party taking the appeal."[48] *Torres* and its progeny illustrate the necessity for lawyers to be familiar with applicable legal procedural rules and to comply with them. The requirement of Rule 3(c) that the notice of appeal specify the party or parties taking the appeal serves two purposes: 1) finality, in that courts of appeals may not exercise jurisdiction over unnamed parties after the time for filing notice of appeal has passed; and 2) fairness, because the requirement provides notice to the opposition and to the court of the identity of the appellant or appellants.[49]

IV. PRE-*TORRES* CASE LAW

A. *Strict Compliance with Rule 3(c)*

Prior to *Torres*, several circuits had already interpreted Rule 3(c) to require strict compliance. In *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*,[50] the Ninth Circuit Court of Appeals found that a literal interpretation of Rule 3(c) created a bright line distinction and avoided the need to determine which parties were actually before the court long after the notice of appeal had been filed.[51] In *Farley*, only one company was named as an appellant, and a related entity was omitted by clerical error. The Ninth Circuit held that the named company was the only appellant before the court of appeals. Similarly, in *Van Hoose v. Eidson*,[52] four students were denied relief by the district court in declaring a hair code unconstitutional. The subsequent notice of appeal named "Van Hoose *et al.*" as the appellants. The Sixth Circuit dismissed all parties but Van Hoose, holding that "[t]he term *et al.* does not inform any other party or any court as to which of the plaintiffs desire to appeal in this case."[53] In a separate patent infringement case,[54] the Sixth Circuit dismissed an appeal because the notice of appeal named only the patent licensee and not the patent owner who is the only person having

tor, Office of Worker's Compensation Programs, 879 F.2d 1173, 1174 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); Spiess v. C. Itoh & Co., 725 F.2d 970, 971 (5th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984); *In re* Kutner, 656 F.2d 1107, 1110 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). *See also* Smith v. White, 857 F.2d 1042 (5th Cir. 1988) (appeal dismissed sua sponte because untimely).

47. *See e.g.*, Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 664 (3d Cir. 1990).

48. Kowaleski v. Director, Office of Worker's Compensation Programs, 879 F.2d 1173, 1176 (3d Cir. 1989) (quoting Allen Archery, Inc. v. Precision Shooting Equip. Inc., 857 F.2d 1176, 1177 (7th Cir. 1988)), *cert. denied*, 493 U.S. 1070 (1990).

49. DeLuca v. Long Island Lighting Co., 862 F.2d 427, 429 (2d Cir. 1988).

50. 778 F.2d 1365 (9th Cir. 1985).

51. *Id.* at 1369.

52. 450 F.2d 746 (6th Cir. 1971).

53. *Id.* at 747.

54. Life Time Doors, Inc. v. Walled Lake Door Co., 505 F.2d 1165 (6th Cir. 1974).

a claim for infringement.[55] Finally, in *Covington v. Allsbrook*,[56] the Fourth Circuit required actual signing by pro se parties desiring to join in the appeal noting "[t]he only means of determining which litigants are interested in pursuing an appeal is by requiring each pro se party to personally sign the notice of appeal."[57]

B. *Liberal Compliance with Rule 3(c)*

Prior to *Torres*, the Fifth, Eighth, Seventh and Third Circuits permitted appeals in limited instances by parties not named in the notice of appeal.[58] The Third Circuit allowed amendments to the notice of appeal despite its own language admonishing attorneys in multi-party cases to designate, with specificity, which parties were appealing.[59] In exercising jurisdiction over the unnamed parties, each court found there was no surprise, prejudice or detrimental reliance present.[60] Each court relied upon language such as that cited in the Advisory Committee Notes to Rule 3 and in *Wright*,[61] which suggest that courts dispense with literal compliance to the rules. Further, the courts relied upon language from the United States Supreme Court indicating that the rules are to be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits.[62] For example, in *Foman v. Davis*,[63] the district court dismissed the plaintiff's complaint on the grounds that the oral agreement on which the complaint was based was unenforceable under the statute of frauds.[64] The plaintiff filed a motion to vacate the judgment and to amend the complaint to assert a right of recovery in quantum meruit. The district court denied the motion and the plaintiff filed a notice of appeal.[65] The court of appeals dismissed the appeal from the first judgment because the first notice of appeal was premature and the second notice did not specify that the plaintiff was appealing both judgments.[66] The Supreme Court reversed, holding the

55. *Id.* at 1168.

56. 636 F.2d 63 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981).

57. *Id.* at 64. *See also,* Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1978) (per curiam) (competence of a layman representing himself is too limited to allow him to risk the rights of others by representing them in a class action in which he proceeds pro se).

58. Ayres v. Sears, Roebuck & Co., 789 F.2d 1173 (5th Cir. 1986) (notice of appeal failed to name additional party. The court permitted party to be an appellant noting lack of prejudice.); Harrison v. United States, 715 F.2d 1311 (8th Cir. 1983) (court recalled its mandate and allowed the notice of appeal to be amended to add party); Williams v. Frey, 551 F.2d 932, 934 n.1 (3d Cir. 1977) (permitting addition of two unnamed appellants); Brubaker v. Board of Education, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

59. Williams v. Frey, 551 F.2d 932 (3d Cir. 1977) (two unnamed parties added as appellants); Samuel v. University of Pittsburgh, 506 F.2d 355, 356-57 n.1 (3d Cir. 1974) (attorneys in multi-party cases must designate with specificity which parties are appealing and which are not).

60. *E.g.*, Ayers v. Sears, Roebuck & Co., 789 F.2d 1173, 1177 (5th Cir. 1986).

61. *See* WRIGHT *supra* note 13.

62. *Id.*

63. 371 U.S. 178 (1962).

64. *Id.* at 179.

65. *Id.*

66. Foman v. Davis, 292 F.2d 85, 87 (1st Cir. 1961), *rev'd*, 371 U.S. 178 (1962).

court of appeals read the second notice too narrowly.[67] The Court reasoned that the second notice "did not mislead or prejudice the respondent" and that it was "contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."[68]

In *Torres*, the Court explained that *Foman* stood for the proposition that the rules should be liberally construed to determine compliance with the rules, but failure to comply with the rules can never be harmless error because a litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court.[69] The Court explained that the mandatory nature of the time limit contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal.[70] Permitting courts to exercise jurisdiction over unnamed parties after expiration of the filing time would be the equivalent of permitting courts to extend the time for filing the notice of appeal, which is not permitted under the appellate rules.[71] For this reason, *Torres* did not establish a new rule of law, it clarified an ambiguity.[72] Only those circuits previously allowing amendments to the notice of appeal have experienced a change in the law as a result of *Torres*.[73]

V. NOTICE OF APPEAL AFTER *TORRES*

Once *Torres* confirmed that proper naming of an appellant in a notice of appeal was a jurisdictional prerequisite, courts of appeals could no longer open the door retroactively to allow an unnamed appellant to be added to the notice of appeal.[74] As a result, appellate courts have searched for ways to aid dilatory appellants who failed to specifically name all appealing parties in the notice of appeal, struggling to construe the existing notice of appeal as adequate. Analysis of the cases and parties dismissed due to inadequate party name specifications, reveals that dismissal occurs most frequently in cases where there are numerous appellants and an abbreviated form of caption is used to avoid the mundane task of naming each of hundreds of appellants.[75] The defects fall

67. *Id.* at 181.
68. *Id.*
69. *Torres*, 487 U.S. at 316-17 n.1.
70. *Id.* at 315.
71. *Id.*
72. Akins v. Board of Governors, 867 F.2d 972, 974 (7th Cir. 1988).
73. Allen Archery, Inc. v. Precision Shooting Equip. Inc., 857 F.2d 1176, 1177 (7th Cir. 1988); *See also* Akin v. Board. of Governors, 867 F.2d at 974 (Supreme Court remanded and directed court of appeals to reconsider earlier judgment that had found notice of appeal adequate).
74. *See* Santos-Martinez v. Soto-Santiago, 863 F.2d 174, 175 (1st Cir. 1988) (*Torres* made clear that the specificity as to who is appealing is a jurisdictional requirement).
75. *See, e.g.*, Storage Technology Corp. v. United States Dist. Court, 934 F.2d 244 (10th Cir. 1991) (only one of 68 appellants named); Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990) (one of 200 appellants named); *In re* San Juan Dupont Plaza Hotel Fire Litig., 888 F.2d 940 (1st Cir. 1989) (over 2,000 plaintiffs appealed but only steering committee was named); Shatah v. Shearson/American Express Inc., 873 F.2d 550 (2d Cir. 1989) (only first named plaintiff in three of 25 consolidated cases named in notice of ap-

into one of four categories: (1) failure to name the party in any fashion in either the notice of appeal or a functionally equivalent document; (2) naming the party in some representative capacity as opposed to listing the name of each individual appellant; (3) use of "et al." together with a plural designation of plaintiffs or defendants in the body of the notice; and (4) omission of a name from the notice of appeal, but the name is present in some other timely filed document which may serve as the functional equivalent of the notice of appeal.

A. *Complete Absence of Appellant's Name*

Omitting the appellant's name from the notice is common. Most courts, however, find that if the appellant's name appears somewhere in the notice of appeal body or caption, the court has jurisdiction over the appellant.[76] Appellants who are not named anywhere within the notice of appeal are considered to have failed to perfect an appeal.[77]

B. *Naming the Appellant in a Representative Capacity*

In *Brown v. Palmer*,[78] failure to designate the capacity in which the party is appealing does not render the notice of appeal ineffective.[79] In *Brown*, Peterson Air Force Base Commander James O. Palmer, and Colonel Eugene T.M. Cullinane, the Commanding Officer of the Headquarters of the Air Forces' 3rd Support Wing, were sued in their official capacities. Plaintiffs sought preliminary injunctions allowing them to attend an open house on Peterson Air Force Base and sought declaration that bar letters issued pursuant to 18 U.S.C. § 1382 violated the First Amendment. The notice of appeal read "Joan Brown et al., Plaintiff-

peal) Gonzalez-Vega v. Hernandez-Colon, 866 F.2d 519 (1st Cir. 1989) (one appellant named and the remaining 143 represented by et al.).

76. Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n, 908 F.2d 578, 580 (10th Cir. 1990) (party named in caption not required to be named in the body; caption should be looked at as part of the entire notice); Mariani-Giron v. Acevedo-Ruiz, 877 F.2d 1114, 1116 (1st Cir. 1989) (caption should be looked at as part of the entire notice). *But see* Pride v. Venango River Corp., 916 F.2d 1250 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1696 (1991) (naming a party in the caption of the notice of appeal or in collateral documents does not satisfy the specificity requirement of Rule 3(c)); Bigby v. City of Chicago, 871 F.2d 54, 57 (7th Cir. 1989) Allen Archery Inc. v. Precision Shooting Equip. Inc., 857 F.2d 1176, 1177 (7th Cir. 1988).

77. Pratt v. Petroleum Prod. Management, Inc., 920 F.2d 651, 655 (10th Cir. 1990) (only the named company properly appealed); Barnett v. Petro-Tex Chemical Corp., 893 F.2d 800, 805 (5th Cir. 1990) (body of timely filed notice of appeal named only one party; court held he was the only appellant and therefore refused to exercise jurisdiction over the appeals of 56 other parties); Marin-Piazza v. Aponte-Roque, 873 F.2d 432, 433 (1st Cir. 1989) (only the party named in the notice of appeal is properly before the court); DeLuca v. Long Island Lighting Co., 862 F.2d 427, 429 (2d Cir. 1988) (judgment imposed Rule 11 sanctions against attorney; notice of appeal was filed in the name of the client; award of sanctions runs only to the attorney as the party in interest and therefore the attorney must appeal in his or her own name); *In re* Woosley, 855 F.2d 687, 688 (10th Cir. 1988) (Torres is controlling. An unnamed appellant fails to appeal); *See also* Riggs v. Scrivner, Inc., 927 F.2d 1146 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 196 (1991) (court lacked jurisdiction over attorney against whom sanctions had been imposed since notice failed to list the name of the attorney).

78. 915 F.2d 1435 (10th Cir. 1990), *aff'd reh'g*, 944 F.2d 732 (10th Cir. 1991).

79. *Id.* at 1439-40.

Appellee v. Colonel James O. Palmer et al. Defendants-Appellant."[80] The notice of appeal did not indicate whether Colonel Palmer was filing the appeal in his official capacity or as commander of Peterson Air Force Base.[81] The Tenth Circuit held that the United States had perfected its appeal because the appellee and the court had the requisite fair notice of the specific individuals or entities seeking to appeal.[82] Further, the court held that the appellees clearly understood that an appeal by Colonel Palmer was in effect an appeal by the United States. The court reasoned that since the appellees had sued Colonel Palmer and Colonel Cullinane only in their official capacity, designation of one or the other was sufficient to perfect the appeal by the United States.[83]

In *King v. Otasco, Inc.*,[84] a father failed to specify in the notice of appeal that he brought the suit individually and on behalf of his children. The Fifth Circuit found that the children did not sue as independent parties and, therefore, the case did not concern itself with the omission of a party from the notice of appeal but rather a party's failure to designate all the capacities in which the suit was brought.[85] Because Mr. King was in fact the appellant, suing on behalf of himself and his children, the notice properly warns of a pending appeal.[86] However, the named appellant must truly be acting in a representative capacity. The designation "partnership" is insufficient to confer jurisdiction over individual partners. In *McLemore v. Landry*,[87] River Villa was a partnership composed of fifteen partners. Landry, one of River Villa's partners, acted as an agent and an attorney in fact for River Villa and all but three of the partners in certain land transactions. When the partnership defaulted on the loans securing the land transactions, the lender sued and a judgment was entered in its favor.[88] The parternership's notice of appeal read, "[C]omes River Villa, A Partnership, and the respective individual partners therein, defendants . . . and moves this Court to allow an appeal . . . ."[89] The Fifth Circuit held that the notice of appeal conferred the court's jurisdiction solely over River Villa, the partnership. The court stated:

80. Failure to name appellees is immaterial because FED. R. APP. P. 3(c) does not require specificity in naming the appellees. *See, e.g.*, International Union, United Auto., Aerospace & Agric. Implement Workers v. United Screw & Bolt Corp., 941 F.2d 466 (6th Cir. 1991); Haas v. Farmers Ins. Group, 930 F.2d 33 (10th Cir. 1991); Longmire v. Guste, 921 F.2d 620 (5th Cir. 1991); Chathas v. Smith, 884 F.2d 980, 986 n.3 (7th Cir. 1989) (Fed. R. App. P. 3(c) requires specificity of appellants and does not require appellees to be specified), *cert. denied*, 493 U.S. 1095 (1990). *But see* Kinnell v. Roberts, 931 F.2d 63 (10th Cir. 1991) (only two named appellees were parties to the appeal).

81. *Brown*, 915 F.2d at 1439.

82. *Id.*

83. *Id. See also* Battle v. Anderson, 946 F.2d 900 (10th Cir. 1991) (official capacity suits are an exception to the general rule of *Torres*); King v. Otasco, Inc., 861 F.2d 438, 443 (5th Cir. 1988) (failure to designate the capacity in which a party appeals does not render notice of appeal ineffective).

84. 861 F.2d 438 (5th Cir. 1988).

85. *Id.* at 443.

86. *Id.*

87. 898 F.2d 996 (5th Cir. 1990).

88. *Id.* at 999.

89. *Id.*

> [T]his case demonstrates the problem inherent in assuming that a generic designation, without more, automatically covers all persons ostensibly aligned on one side of litigation. River Villa is composed of 15 partners. Interplan Development, Inc., of which Landry is president, is one. As noted, it was named as a third-party defendant by River Villa. Its interests obviously are not consistent with the interests of the other partners.[90]

In *Kowaleski v. Department of Labor*,[91] Peter Kowaleski sued for black lung benefits. Although Kowaleski's wife Anna died five years prior to initiation of the suit, an Administrative Law Judge inexplicably entered the order "Anna Kowaleski, widow of Peter Kowaleski" as the claimant.[92] Upon loosing the suit, Mr. Kowaleski filed a notice of appeal in the name of "Anna Kowaleski, widow of Peter Kowaleski." While noting that Anna Kowaleski could not be Peter Kowaleski's widow because she had predeceased him, the appellate court dismissed the appeal for lack of a real party in interest since Peter Kowaleski died in the interim and the benefits could only be awarded to the claimant or a survivor of the claimant. Unfortunately, Kowaleski's attorney was not permitted to amend the notice to change the name of the appellant to Charles Kowaleski, son of Peter Kowaleski.[93]

In certified class actions, the designated representative of the class may be named in the notice of appeal.[94] In *Al-Jundi v. Estate of Rockefeller*,[95] the court upheld an appeal by the entire class, although the notice of appeal named only Al-Jundi as the appellant. The court held that the other members of the class were designated by implication since the amended complaint listed all plaintiffs as representatives of the plaintiffs' class. The Second Circuit found that both the Estate of Rockefeller and the court could "determine with certitude" that the entire class appealed the judgment.[96]

C. *Alternative Designations*

Post-*Torres* courts of appeal have dealt with innumerable designations, other than specifically naming the individual or entities, which arguably give fair notice of the specific individual or entity seeking to

90. *Id.* at 1000 n.6. *See also* Dalton Dev. Project v. Unsecured Creditors Comm., 948 F.2d 678 (10th Cir. 1991) (holding that each partnership must be specifically named in the notice of appeal); Wise v. Parkman, 932 F.2d 745 (8th Cir. 1991) (inclusion of Sheriff's name acting in official capacity was insufficient to confer jurisdiction over the county, where state law did not give the sheriff authority to appeal judgments against the county). *See also* United States v. Spurgeon, 861 F.2d 181, 183 (8th Cir. 1988) (no person asserting the interest of the trust, nor the trust were named as appellants, trust failed to appeal).

91. 879 F.2d 1173 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

92. *Id.* at 1174.

93. *Id.*

94. *See e.g.*, Al Jundi v. Estate of Rockefeller, 885 F.2d 1060, 1060 n.1 (2d Cir. 1989); Renden v. AT&T Technologies, 883 F.2d 388, 398 n.8 (5th Cir. 1989). *See also* Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158, 161 (11th Cir. 1988) (certified class had settled, only named appellants Cotton and Herod were proper appellants).

95. 885 F.2d 1060 (2d Cir. 1989).

96. *Id.* at 1061 (citing King v. Otasco Inc., 861 F.2d 438, 442-43 (5th Cir. 1988)).

appeal. The *Torres* court stated that "the specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal."[97]

In *Laidley v. McClain,*[98] only one of four plaintiffs was named in the notice of appeal followed by the "et al." designation. The Tenth Circuit dismissed the remaining unnamed plaintiffs for lack of jurisdiction.[99] Similarly, in *Pratt v. Petroleum Production Mgmt., Inc. Employee Savings Plan & Trust,*[100] the caption contained what the court referred to as "the troublesome et al. designation."[101]In *Pratt,* the caption named only "Petroleum Production Management Employees Savings Plan et al." as the appellant, and the body of the notice stated "[n]otice is hereby given that Petroleum Production Management Inc. Employee Savings Plan and Trust et al., defendants above named hereby appeal . . . ."[102] The Tenth Circuit, citing *Laidley* as its most extensive analysis of *Torres,* rejected the argument that the use of the plural "defendants" gave fair notice of the entity seeking to appeal.[103] In support of its decision, the Tenth Circuit cited the Sixth Circuit's opinion in *Minority Employees v. Tennessee Dept. of Employee Security*[104] and the First Circuit's opinion in *Rosario-Torres v. Hernandez-Colon.*[105]

In *Minority Employees,* the Sixth Circuit sitting en banc reversed its holding in *Ford v. Nicks,*[106] finding that a named corporate appellant followed by the et al. designation was inadequate identification of the parties and therefore inconsistent with *Torres.*[107] As long as the party names appeared anywhere on the face of the notice of appeal it might be sufficient although it is preferable that the name of each party appear in the body of the notice itself.[108] In *Rosario-Torres,* only one of nine appellants was named in the notice of appeal.[109] Although the body of the notice stated "[n]otice is hereby given that plaintiffs through their undersigned attorneys, appeal to the United States Court of Appeals for the First Circuit from the final judgment entered in the case of caption," the First Circuit found that only Miguel Rosario-Torres, the one appellant named in the caption, was properly before the court.[110] The First Circuit stated unequivocally that inserting the words et al. can not fulfill the mandate of Rule 3(c) and for this reason the notice is wholly inade-

97. *Torres,* 487 U.S. at 318.
98. 914 F.2d 1386 (10th Cir. 1990).
99. *Id.* at 1388.
100. 920 F.2d 651 (10th Cir. 1990).
101. *Id.* at 654.
102. *Id.*
103. *Id.* at 655.
104. 901 F.2d 1327 (6th Cir.), *cert. denied,* 111 S. Ct. 210 (1990).
105. 889 F.2d 314 (1st Cir. 1989) (en banc).
106. 866 F.2d 865 (6th Cir. 1989) (however inartful the "et al." designation may be in identifying the defendants in addition to Nicks, when read with the words "the defendants" in the body of the notice, the notice satisfactorily communicates that Nicks and the other defendants from the court below are appealing).
107. *Minority Employees,* 901 F.2d at 1332.
108. *Id.* at 1335.
109. *Rosario-Torres,* 889 F.2d at 317.
110. *Id.*

quate as to the identification of the remaining plaintiffs.[111]

When courts reject the use of the troublesome term "et al.," there is often a factual basis for their denial peculiar to the circumstances of the case. In *Torres*, the Supreme Court stated:

> The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means 'and others' utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions.[112]

This language could be construed as rejecting any use of the phrase et al., however, the plaintiffs in *Torres* purported to proceed on behalf of themselves and others similarly situated even though no class was certified. In *Torres*, the et al. could have referred to a large class of unnamed individuals or only a few. The Supreme Court did not make this distinction but the Fifth Circuit has so interpreted *Torres*.[113]

In *Storage Technology*, the caption of the notice of appeal recited the name of the appellants as "Comite Pro Rescate, et al, defendants-appellants."[114] The body of the notice of appeal stated: "Comite Pro Rescate de la Salud, et al., and all the Defendants of record herein, appeal to the District Court for the District of Colorado . . . ."[115] The district court declined to dismiss the unnamed appellants, finding there was no ambiguity in the notice of appeal. The Tenth Circuit issued a writ of mandamus to dismiss all unnamed appellants, holding that precedent dictates[116] that each appealing party must be specifically named in the notice of appeal or a functionally equivalent document properly listing the appealing parties and filed within the appeal period.[117] Here, the list of defendants in the body of the notice was not helpful because of the three complaints filed, no two listed the same defendants. "Thus, the reviewing court is left to somehow determine the identity of 'all the Defendants of record herein' absent any clear point of reference. The mischief created by this approach is exactly what *Torres* sought to eliminate by the requirement of listing the appealing parties."[118]

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111. *Id.*

112. *Torres*, 487 U.S. at 318.

113. Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127, 129 (5th Cir. 1989) (only two plaintiffs existed below, therefore, the et al. caption on the notice of appeal coupled with "plaintiffs do hearby appeal" in the body of the notice is sufficient identification of the parties).

114. *Storage Technology*, 934 F.2d at 246.

115. *Id.* at 245.

116. *See* Hubbert v. City of Moore, 923 F.2d 769, 772 (10th Cir. 1991); Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990); Pratt v. Petroleum Prod. Management Employees Sav. Plan & Trust, 920 F.2d 651, 655 (10th Cir. 1990).

117. *Storage Technology*, 934 F.2d at 248.

118. *Id.*

In *Santos-Martinez v. Soto-Santiago,*[119] the First Circuit explained that et al. was inadequate under circumstances where, although the notice was purportedly filed on behalf of all plaintiffs, two of the plaintiffs voluntarily withdrew and the claims of a third plaintiff were not mentioned anywhere in the appellants' brief.[120] Accordingly, the court held that it lacked jurisdiction over the appeals of the three remaining unnamed appellants who purportedly sought to appeal.[121] In *Gonzalez-Vega v. Hernandez-Colon,*[122] the First Circuit again rejected the use of the designation et al., but explained, "[a]s defendants point out, the showing made below in the summary judgment proceedings was weak or nonexistent as to some plaintiffs' claims making it all the more conceivable that fewer than all plaintiffs had decided to appeal."[123]

In *Griffith v. Johnston,*[124] the Fifth Circuit indicated that four exceptions exist where the use of et al. would suffice for purposes of the notice of appeal: (1) where only two parties are named in the lawsuit; (2) when the notice lists only the representative in a class action; (3) where parents sue on behalf of their children; and (4) a functional equivalent of the notice is filed in a timely manner.[125] A description of each exception follows. First, the Fifth Circuit reasoned that if only two parties are named in the lawsuit, the use of et al. would clearly refer to the unnamed party.[126] Critical to the Fifth Circuit's analysis is that there be only one appellant to which the "et al." could be referring. In *Torres* for example, all defendants were specifically named except Jose Torres. If Jose Torres was the only unnamed appellant, under the Fifth Circuit's reasoning in *Pope v. Mississippi Real Estate Comm'n,*[127] the et al. designation could only refer to Jose Torres. *Torres* is distinguished by the Fifth Circuit, however, because the plaintiffs purported to proceed on behalf of themselves and other persons similarly situated. Although the phrase et al. translates literally to "and others," the designation in *Torres* could have referred to a large class of unnamed individuals as well as, or instead of, Jose Torres.[128] The Fifth Circuit noted that in the case before it there were only two plaintiffs, James and Mary Pope, and the body of the notice of appeal used plural "plaintiffs" which could only include

119. 863 F.2d 174 (1st Cir. 1988).

120. *Id.* at 175-76.

121. *Id.* at 176.

122. 866 F.2d 519 (1st Cir. 1989).

123. *Id.* at 520.

124. 899 F.2d 1427 (5th Cir. 1990), *cert. denied,* 111 S. Ct. 712 (1991).

125. *Id.* at 1430.

126. *See, e.g.*, Chandler v. Barncastle, 919 F.2d 23, 25-26 (5th Cir. 1990) (use of et al. is sufficient in the limited context of a two-party action where one of the parties is named, since et al. can refer only to the one unnamed party); Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127, 129 (5th Cir. 1989) (where there are only two plaintiffs in the case et al. could only refer to the unnamed plaintiff). The use of the designation et ux. which means "and wife" has similarly been found to refer to an unnamed plaintiff. *See, e.g.*, Milanovich v. Costa Crociere, 938 F.2d 297, 298 (D.C. Cir. 1991); Sweger v. Texaco, Inc., 930 F.2d 35 (10th Cir. 1991).

127. 872 F.2d 127 (5th Cir. 1989).

128. *Id.* at 129.

James and Mary Pope.[129] Accordingly, in the limited context of a two party action, the Fifth Circuit distinguished *Torres* and found that the et al. designation could only refer to Mary Pope.

Second, the notice of appeal may list only the class action representative. In *Rendon v. AT&T Technologies*,[130] the notice of appeal designated "Gilbert Rendon, et al.," as the appellant.[131] AT&T argued that the phrase et al. gave no notice of the party seeking appeal. The Fifth Circuit disagreed, holding that while AT&T's argument may have merit where no class certification exists, the specificity requirements of Rule 3(c), as strictly construed in *Torres*, do not apply in actions where a class has been certified.[132] The court reasoned that since Rendon was designated the class representative below, his actions bound the entire class and, therefore, the et al. designation was sufficient to bring the certified class of plaintiffs under the court's jurisdiction.[133]

Third, parents can sue on their own behalf and on behalf of their children.[134] The Fifth Circuit reasoned that when parents sue on their own behalf and on behalf of their children, the et al. designation preserves the appeal, because the opposing party could anticipate that the parents would appeal in both their individual and their representative capacities.[135] Finally, when the notice of appeal defectively employs the et al. designation, the appellants can file a functionally equivalent document within the 30 day deadline provided by Appellate Rule 4.[136] Because there can be no ambiguity as to the identity of the appellants, the safest route is to specifically name each appellant.[137] Three circuits,

129. *Id.*
130. 883 F.2d 388 (5th Cir. 1989).
131. *Id.* at 398 n.8.
132. *Id.*
133. *Id.*
134. King v. Otasco Inc., 861 F.2d 438, 443 (5th Cir. 1988).
135. *Id.*
136. Brotherhood of Ry. Carmen v. Atkinson, T. & S.F. Ry., 894 F.2d 1463, 1465 (5th Cir.), *cert. denied*, 111 S. Ct. 131 (1990).
137. Hubbert v. City of Moore, Okla. 923 F.2d 769, 772 (10th Cir. 1991); Pratt v. Petroleum Prod. Management, Inc. Employee Savings Plan & Trust, 920 F.2d 651, 654 (10th Cir. 1990); Laidley v. McClain, 914 F.2d 1386, 1389 (10th Cir. 1990); Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n, 908 F.2d 578, 580 (10th Cir. 1990). *See, e.g.*, Walter v. Int. Ass'n of Machinists Pension Fund, 949 F.2d 310, 312-13 (10th Cir. 1991); Resolution Trust Corp. v. Sonny's Old Land Corp., 937 F.2d 128, 129 (5th Cir. 1991); Chennareddy v. Bowsher, 935 F.2d 315, 318 n.2, (D.C. Cir. 1991); Biros v. Spalding-Evenflo Co., 934 F.2d 740, 742 (6th Cir. 1991); Pontarelli v. Stone, 930 F.2d 104, 108-109 (1st Cir. 1991); Moran v. Farrier, 924 F.2d 134, 136-37 (8th Cir. 1991); Samaad v. Dallas, 922 F.2d 216, 219 (5th Cir. 1991); Rivera v. Puerto Rico Tel. Co., 921 F.2d 393, 395 (1st Cir. 1990); United States v. Tucson Mechanical Contracting, Inc., 921 F.2d 911, 913-14 (9th Cir. 1990); Delancey v. State Farm Mut. Auto. Ins. Co., 918 F.2d 491, 493 (5th Cir. 1990); Baylor v. United States Dept. of Hous. & Urban Dev., 913 F.2d 223, 224-25 (5th Cir. 1990); Barnett v. Petro-Tex Chem. Corp., 893 F.2d 800, 805 (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990); Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 317 (1st Cir. 1989) (the notice of appeal was sufficient to bring only the one named appellant before the court; remaining eight plaintiffs failed to appeal); Mariani-Giron v. Acevedo-Ruiz, 877 F.2d 1114, 1116 (1st Cir. 1989); Shatah v. Shearson/American Express, Inc., 873 F.2d 550 (2d Cir. 1989) (twenty-five cases were consolidated for pre-trial purposes, notice of appeal named only first named plaintiff in three of the actions; all unnamed appellants failed to appeal); Gonzalez-Vega v. Hernandez-Colon, 866 F.2d 519, 519-20 (1st Cir. 1989) (only one of

however, have accepted generic designations finding there was no ambiguity under the particular facts of the case.[138]

In *National Center for Immigrants' Rights, Inc. v. Immigration & Naturalization Service*,[139] the Ninth Circuit considered whether the term "defendants" fairly indicated that all and not just some of the defendants were appealing.[140] The Ninth Circuit held that *Torres* did not require that the individual names of the appealing parties be listed "in instances in which a generic term, such as plaintiffs or defendants, adequately identifies them."[141] In so holding, the Ninth Circuit relied on the Sixth Circuit's opinion in *Ford*,[142] which the Sixth Circuit had since overruled with *Minority Employees*.[143] With the decision in *Adkins v. United Mine Workers*,[144] however, the Sixth Circuit has recently clarified *Minority Employees* and accepted a generic designation of appellants.[145] In *Adkins*, the Sixth Circuit distinguished *Minority Employees* in that its notice of appeal failed to indicate more than one appellant. In *Adkins*, the notice of appeal adequately alerted defendants that "all the plaintiffs" to the action below sought to appeal.[146]

The Ninth Circuit has continued to rely on the reasoning of *Ford* and accept designations of the plural of defendant or plaintiff. In *Cammack v. Waihee*,[147] the caption read "Nell A. Cammack, et al.," and the body stated "plaintiffs above-named hereby appeal . . . ."[148] The court relying on *Ford*, found that a bare reference to the plural plaintiffs in the body of the notice, coupled with the use of et al. in the caption, clearly indicated the plaintiffs' intention was that all of the plaintiffs be included in the appeal.[149] The court found that in order for the court to have jurisdiction over the unnamed parties, the et al. designation in the caption must be coupled with the use of the plural term of plaintiffs or de-

144 plaintiffs was named in the notice of appeal, therefore the court had jurisdiction only over the appeal of the named party). *But see*, Adkins v. United Mine Workers, 941 F.2d 392 (6th Cir. 1991) (6th Cir. 1991) (court refused to dismiss appeal on jurisdictional grounds where the body of the notice made specific reference to "all of the plaintiffs" named in the complaint), *reh'g denied* (en banc), [1991 U.S. App. Lexis 26629], *petition for cert.* filed, Jan. 2, 1992; Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1323 (9th Cir. 1991).

138. Adkins v. United Mine Workers, 941 F.2d 382 (6th Cir. 1991) (all the plaintiffs to this action as set out in the complaint which has been filed herein as well as in all amendments thereto) *reh'g denied* (en banc), [1991 U.S. App. Lexis 26629], *petition for cert. filed*, Jan. 2, 1992; Baylis v. Marriott, 906 F.2d 874 (2d Cir.), *cert. denied*, 111 S. Ct. 210 (1990) (body of notice of appeal referenced "all of the plaintiffs in the action"); National Center for Immigrants' Rights, Inc. v. Immigration and Naturalization Serv., 892 F.2d 814 (9th Cir. 1989) (appellants referred to as defendants).

139. 892 F.2d 814 (9th Cir. 1989).

140. *Id.* at 815.

141. *Id.* at 816-17.

142. 866 F.2d at 865.

143. 901 F.2d at 1327.

144. 941 F.2d 392 (6th Cir.), *reh'd denied*, (en banc) [1991 U.S. App. Lexis 26629] (6th Cir. 1991), *petition for cert. filed*, Jan. 2, 1992.

145. *Id.* at 397.

146. *Id.*

147. 932 F.2d 765 (9th Cir. 1991).

148. *Id.* at 768.

149. *Id.* at 768-69. *See also* Montes v. Thornburgh, 919 F.2d 531, 534 n.3 (9th Cir. 1990).

fendants in the body of the notice.[150] One without the other will not suffice.

Use of the plurals defendants or plaintiffs, coupled with the "et al." designation in the caption will not suffice in the First, Seventh, Eighth and Tenth Circuits.[151] In *Baylis v. Marriott Corp.*,[152] the plaintiffs appealed from a final judgment dismissing their complaint against Marriott Corporation for alleged tortious inducement of breach of the plaintiffs collective bargaining agreement with their employer. The caption of the notice of appeal was styled "James Baylis, *et al.*," [sic] and stated that "James Baylis, *et al.*, [sic] all of the plaintiffs in this action, hereby appeal . . . ."[153] Marriott moved to dismiss the appeal for lack of appellate jurisdiction as to all plaintiffs other than Baylis. The Second Circuit concluded that the notice of appeal was adequate to give it jurisdiction over all of the plaintiffs. It found that "the body of the notice contained a precise indication as to which parties sought to appeal, since it stated that the appeal was being taken by 'all of the plaintiffs in this action.' Thus, the ambiguity of '*et al.*' was resolved."[154] In a confusing explanation, the court stated that "[w]e conclude that the specification that the appeal was taken by 'all of the plaintiffs in this action' was the functional equivalent of a plaintiff-by-plaintiff listing."[155]

D. *The Notice of Appeal Can Never Be the Functional Equivalent of a Notice of Appeal*

In *Torres,* the Supreme Court held that if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.[156] "The notice of appeal can never be the functional equivalent of a notice of appeal."[157] Either the notice of appeal is sufficient or not.

150. *See* United States v. Tucson Mechanical Contracting, 921 F.2d 911, 914-15 (9th Cir. 1990) (Although the caption contained the "et al." designation, the body stated that only one of the defendants appealed. The court found that the use of "et al." contradicted the use of the singular in the text of the notice and therefore it had jurisdiction only over the party specifically named in the notice.); Sauceda v. Washington Dep't of Labor & Indus., 917 F.2d 1216, 1218 (9th Cir. 1990) (Caption of appellants' notice of appeal specifically named five of the six plaintiffs and the body stated that "plaintiffs, each of them, hereby appeal." The court found that to have jurisdiction over the appeal of the omitted plaintiff, the plural designation in the body must be coupled with an "et al." designation in the caption).

151. Storage Technology Corp. v. United States Dist. Court for the Dist. of Colo; 934 F.2d 244 (10th Cir. 1991); Pratt v. Petroleum Prod. Management, Inc., Employee Sav. Plan & Trust, 920 F.2d 651, 654 (10th Cir. 1990); Laidley v. McClain, 914 F.2d 1386, 1389 (10th Cir. 1990); Madewell v. Roberts, 909 F.2d 1203,1206 (8th Cir. 1990); Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 317 (1st Cir. 1989); Akins v. Board of Governors of State Colleges and Universities, 867 F.2d 972, 973-74 (7th Cir. 1988).

152. 906 F.2d 874 (9th Cir. 1990).

153. *Id.* at 876.

154. *Id.* at 877.

155. *Id.*

156. *Torres*, 487 U.S. at 316-317, citing Houston v. Lack, 487 U.S. 266 (1988).

157. Allen Archery, Inc. v. Precision Shooting Equip., 857 F.2d 1176, 1177 (7th Cir. 1988).

If it is not, but some other document filed with the court within the 30 day time limit for filing a notice of appeal under Rule 4(a)(1) clarifies who the appellant is, that document may serve as the functional equivalent of a notice of appeal.

The United States Supreme Court recently reaffirmed in *Smith v. Barry*,[158] that some document filed with the court within the deadline for filing a notice of appeal may serve as the functional equivalent of a notice of appeal.[159] Although in *Smith* the functionally equivalent document was a brief, the circuits were split on the question of whether an appellate brief may serve as the notice of appeal required by Rule 3.[160] The Court reiterated that satisfaction that Rule 3's requirements are a jurisdictional prerequisite but that a brief could constitute the functional equivalent of a notice of appeal if the brief met all the prerequisites of Rule 3.[161] The Court remanded *Smith* for a determination of whether the brief contained all the information required by Rule 3(c). If so, it was the functional equivalent of a notice of appeal without regard to the appellant's motive.[162]

The Tenth Circuit held in *Hubbert v. City of Moore*,[163] that defects in the notice of appeal may be remedied by filing other documents supplying the omitted information.[164] The appellants in *Hubbert* filed a docketing statement specifically identifying each appellant within 30 day limit. The Tenth Circuit found that this docketing statement cured the defective notice of appeal.[165] Such a timely filing of the correction is distinguished from *Laidley v. McClain*[166] where the docketing statement was filed after the time for filing the notice of appeal had expired. In *Hubbert*, the Tenth Circuit cited with approval, *Masquerade Novelty*, *Warfield*, and *Brotherhood of Railway Carmen*.[167]

158. 112 S. Ct. 678 (1992).

159. *Id.* at 682.

160. *Id.* at 681 (citing Smith v. Galley, 919 F.2d 893, 895 (4th Cir. 1990)) (informal brief is not the functional equivalent of the notice of appeal that FED. R. APP. P. 3 requires), *rev'd sub nom.*, Smith v. Barry, 112 S. Ct. 678 (1992); Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990) (appellate brief cannot substitute for notice of appeal); United States v. Cooper, 876 F.2d 1192, 1196, (5th Cir. 1989) (appellate brief will not substitute for a notice of appeal even if it otherwise meets the requirements of FED. R. APP. P. 3 and 4); Allah v. Superior Court of State of California, 871 F.2d 887, 889-90 (9th Cir. 1989) (brief treated as notice of appeal); Finch v. City of Vernon, 845 F.2d 256, 259-60 (11th Cir. 1988) (brief treated as notice of appeal); Frace v. Russell, 341 F.2d 901, 903 (3d Cir.) (treating brief as notice of appeal), *cert. denied*, 382 U.S. 863 (1965).

161. *Smith*, 112 S. Ct. at 682.

162. *Id.*

163. 923 F.2d 769 (10th Cir. 1991).

164. *Id.* at 772.

165. *Id.* *See also* Walter v. International Ass'n of Machinists Pension Fund, 949 F.2d 310, 312-13 (10th Cir. 1991) (in conformance with *Hubbert*, a docketing statement filed outside the time for filing an appeal will not suffice). *But see* Persyn v. United States, 935 F.2d 69, 71-2 (5th Cir. 1991) (a docketing statement prepared by the clerk and not the party is not the functional equivalent of a notice of appeal because the Rule requires a party to file the document).

166. 914 F.2d 1386 (10th Cir. 1990).

167. Masquerade Novelty, Inc. v. Unique Indus., 912 F.2d 663, 664-65 (3d Cir. 1990); Warfield v. Fidelity and Deposit Co., 904 F.2d 322, 325 (5th Cir. 1990); Brotherhood of

In Masquerade Novelty,[168] the notice of appeal stated: "Walter Z. Steinman, Attorney for Plaintiff in the above captioned matter hereby appeals."[169] The Third Circuit raised jurisdiction sua sponte noting that the notice of appeal could possibly be read as indicating that the attorney, rather than his client, was appealing. Because the district court's order adversely affected only the client Masquerade Novelty, the court considered whether it, in fact, had jurisdiction over Masquerade Novelty as an unnamed appellant. The Third Circuit held that a party will be deemed to have complied with Rule 3(c) if it has, within the time period provided to file an appeal, filed documents that specify the party or parties taking the appeal.[170] At oral argument on the court's motion, which questioned whether or not the notice of appeal was sufficient, the appellants drew the court's attention to two other documents identifying the appellants, both of which had been filed within the 30 day deadline.[171] The court noted that it did not concern itself with the nature of the collateral documents so long as they were filed within the time period.[172] Previously, the Third Circuit in *Dura Systems, Inc. v. Rothbury Investments, Ltd.*[173] had confronted a situation where the notice of appeal did not name all the appellants, but a Consent Decree filed within the time period for filing a notice of appeal had identified all the appellants. The court held that the Consent Decree served as the "functional equivalent" of what the rules required. The court went on to hold that by upholding the Consent Decree as a functional equivalent it was following the United States Supreme Court's directive to construe the rules "liberally" and to avoid a construction that would allow "mere technicalities" to bar consideration of a case on the merits.[174]

In *Brotherhood of Railway Carmen*[175] the Fifth Circuit found that the notice of appeal named only one of five appealing unions. Nonetheless, within the time for filing the notice of appeal, the appellants had filed a Memorandum in Support of a Motion for Preliminary Injunction which named all six unions. This memorandum served as a functional equivalent of the notice of appeal.[176] In *Allen Archery, Inc. v. Precision Shooting Equipment*,[177] the court considering the *Torres* functional

Ry. Carmen v Atkinson, T. & S.F. Ry., 894 F.2d 1463, 1465 (5th Cir.), *cert. denied*, 111 S.Ct 131 (1990).

168. 912 F.2d 663 (3d Cir. 1990).

169. *Id.* at 664.

170. *Id.* at 665.

171. *Id.* at 664-65.

172. *Id.* at 665.

173. 886 F.2d 551 (3d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990).

174. *Id.* at 555, citing Torres, 487 U.S. 312 (1988) and Foman v. Davis, 371 U.S. 178, 181 (1962).

175. 894 F.2d 1463 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 131 (1990).

176. *See also* Board of Educ. v. United States, 920 F.2d 370 (6th Cir. 1990) (107 plaintiffs named in plaintiffs' complaint were incorporated in the notice of appeal); Warfield v. Fidelity and Deposit Co., 904 F.2d 322 (5th Cir. 1990); Page v. Delaune, 837 F.2d 233 (5th Cir. 1988). *But see* Allen Archery Inc. v. Precision Shooting Equip. Inc., 857 F.2d 1176 (7th Cir. 1988) (the appellant must be named in the notice of appeal; naming him in documents such as a supersedeas bond filed in district court will not do).

177. 857 F.2d 1176 (7th Cir. 1988).

equivalent language, stated that "[it] is designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent. It is not designed for the case where the litigant has filed a notice of appeal and failed to name the appellants."[178]

VI. APPLICATION OF *TORRES* UNDER FED. R. APP. P. 15 AND FED. R. BANK. P. 8001

A petition seeking review and enforcement of orders of administrative agencies, boards, commissions and officers must contain the same specificity as the notice of appeal.[179] The Tenth Circuit applies *Torres* in bankruptcy matters. In *Storage Technology*, the court found "[t]hat the requirements for filing a notice of appeal under Bankruptcy Rule 8001(a) are more strict than those of Fed. R. App. P. 3(c)."[180] Contrary to the Sixth Circuit's distinction in *Adkins*,[181] however, this was not the basis for the Tenth Circuit's decision. The notice of appeal was ambiguous and would not have sufficed even under Rule 3(c).[182] In *Citizens Bank & Trust Co. v. Case*,[183] however, the Fifth Circuit found that the specificity requirement set out in *Torres* is inapplicable to a notice of appeal from a bankruptcy court judgment or order.[184] The case is distinguishable because the appeal involved sanctions entered against the attorney and the party.[185] Because the party was also sanctioned and Fed. R. Bankr. P. 8001 requires that the notice of appeal contain the name of the parties to the judgment the Court held that naming the party sufficed to bring the issues before the district court.[186]

VII. CONCLUSION

No practitioner having read this article, would fail to specifically name each and every appellant, when failure to do so jeopardizes a party's appeal. There is, however, slim hope for those who are currently in the position of having filed a defective notice of appeal because, as this article demonstrates, some designations short of specifically naming

178. *Id.*

179. FED. R. APP. P. 15, Goos v. Interstate Commerce Comm'n, 911 F.2d 1283, 1288 (8th Cir. 1990); Kowaleski v. Department of Labor, 879 F.2d 1173, 1176 (3d Cir. 1989) (Rule 15(a) requires same "punctilious, literal and exact compliance" as that mandated in *Torres* for Rules 3 and 4); Arnow v. United States Nuclear Reg Comm'n, 868 F.2d 223, 225 (7th Cir. 1989).

180. *Id.* at 247. *See also* Concorde Resources, Inc. v. Woosley, 855 F.2d 687, 688 (10th Cir. 1988); Certified Class in The Chartered Securities Litigation v. The Charter Co., 92 Bankr. 510, 514 (M.D. Fla. 1988).

181. *Adkins*, 941 F.2d at 398.

182. *See Adkins*, 941 F.2d at 400 n.1 (dissenting opinion).

183. 937 F.2d 1014 (5th Cir. 1991).

184. *Id.* at 1020.

185. Ordinarily the sanctioned attorney is the real party in interest and must be named in the notice of appeal. F.T.C. v. Amy Travel Service, Inc., 894 F.2d 879, 880-81 (7th Cir. 1989) (court had no jurisdiction over sanctioned attorney not named in notice of appeal); Rogers v. Nat'l Union Fire Ins. Co., 864 F.2d 557, 560 (7th Cir. 1988) (sanctioned attorney is real party in interest and must appeal in his own name); DeLuca v. Long Island Lighting Co., 862 F.2d 427, 429 (2d Cir. 1988).

186. *Citizens Bank*, 937 F.2d at 1021.

can suffice. As *Torres* and its progeny come to the attention of more practitioners, the requirement of Rule 3(c) that the notice of appeal specify the parties appealing should cease to be an issue for the courts to address.