ARE MY RIGHTS IMPORTANT ENOUGH TO VINDICATE? THE TEXAS SUPREME COURT RE-EVALUATES NON-PARTY APPELLATE STANDING IN *IN RE LUMBERMENS*

I. INTRODUCTION

The Texas Supreme Court case *In re Lumbermens Mutual Casualty Co.*, involved the successful effort of an insurer, having not participated as a named party in a suit against its insured at the trial level, to intervene in the subsequent appeal.[1] The *Lumbermens* court framed its re-examination of exceptions to the general rule that "only parties of record may appeal a trial court's judgment" around the idea that "a person or entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights."[2] This language by the *Lumbermens* court may, on its face, appear to greatly expand appellate standing to non-parties such as insurers, allowing more challenges to judgments. The *Lumbermens* court nevertheless avoided a bright line rule defining for whom the remedy is available, stating instead, "[W]hether a would-be intervenor is entitled to appeal under the virtual-representation doctrine is an equitable determination that must be decided on a case-by-case basis."[3] This Note urges the Texas Supreme Court to adopt a relatively bright line rule such as Colorado's "substantially aggrieved" standard,[4] rather than leave non-parties uncertain as to whether their interests are important enough to vindicate.[5]

Part II of this Note is a recitation of the case. The background facts and procedural posture of this case raise a plethora of questions which, while conducive to an enriched understanding of the controversy, must be separated from what the *Lumbermens* court actually decides and why. Part II attempts to frame these facts as such.

Part III of this Note analyzes the legal issues involved in the Texas Supreme Court's reasoning in *Lumbermens*. This Note focuses on Texas case law addressing non-party appellate standing, the development of the doctrine of virtual-representation as it relates thereto, and the impact of the *Lumbermens* decision on both.

Throughout Part III, this Note also observes the substantive impact that the Texas Supreme Court's shifting analysis of the doctrine of virtual representation has had on insurance jurisprudence in Texas. Of particular pragmatic significance

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1. *See In re* Lumbermens Mut. Cas. Co., 184 S.W.3d 718, 729 (Tex. 2006).

2. *Id.* at 723.

3. *Id.* at 729.

4. In AMCO Ins. Co. v. Sills, 166 P.3d 274 (Colo. Ct. App. 2007), the majority and dissent agreed on the principles of the rule but could not agree on how to apply them to the facts.

5. *See infra* Part III.C.

with respect to insurance law, *Lumbermens* seems to repudiate the view that a non-party insurer who has not participated at the trial level must drop potential policy defenses as a prerequisite to attaining party status.[6] Part III concludes with a proposal to replace the virtual representation doctrine with a bright line rule, such as Colorado's "substantially aggrieved" standard, as a test for non-party standing to appeal that is more effective in achieving the court's objectives.[7]

This Note concludes in Part IV, conceding the wisdom behind a case-by-case approach in general, but nevertheless urging the formulation of a bright line rule. Would-be appellants should know whether they may invoke their rights, and the present state of the law fails to inform them.

II. RECITATION OF THE CASE

A. *Factual Background*

Opposing briefs in *Lumbermens* were submitted by Lumbermens Mutual Casualty Company ("Lumbermens"), as Petitioner, and Sonat Exploration Company ("Sonat"), as Respondent.[8] To understand who these two entities are, why they came before the court, and what was at stake for all involved, requires some explanation of the factual background.

Lumbermens provided excess-liability insurance for Cudd Pressure Control, Inc. ("Cudd").[9] Cudd had a Master Service Agreement ("MSA") to perform gas-well services related to hydrocarbon production for Sonat's gas-well operations in Bryceland, Lousiana.[10] The MSA between Cudd and Sonat

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6. *Compare infra* Part III.B.2, *with infra* notes 99-105 and accompanying text.

7. *Infra* Part III.C.

8. Petitioner's Brief on the Merits, *In re Lumbermens*, 184 S.W.3d 718 (Tex. 2006) (No 04-0245), 2004 WL 1810950; Sonat Exploration Co.'s Brief on the Merits in Opposition to Lumbermens' Petition for Writ of Mandamus, *In re Lumbermens*, 184 S.W.3d 718 (No 04-0245), 2004 WL 1810951; *see In re Lumbermens*, 184 S.W.3d at 720 n.1, (noting that "Sonat's successor-in-interest is El Paso Production Company").

9. *In re Lumbermens*, 184 S.W.3d at 721. Note that Lumbermens Mutual Casualty Company is a subsidiary of the financially distressed Kemper Insurance Company. Sonat's Response Brief, *supra* note 8, at 29 & n.43; *see also* Charles E. Boyle, *Disquieting Developments at Kemper/Lumbermens Mutual,* INS. J., Jan. 27, 2003, *available at* http://www.insurancejournal.com/magazines/west/2003/01/27/features/25724.htm (describing the company's financial woes and citing fellow pundits' description of the situation as a "death spiral").

10. *Accord* Brooks Well Servicing, Inc. v. Cudd Pressure Control, Inc., 36-796, p. 1 (La. App. 2 Cir. 8/22/01); 796 So. 2d 66, 68 ("Sonat owned and operated the Otto Cummings Alt. Well No. 2, a high pressure gas well in Bryceland, Louisiana."); Sec'y of Labor v. Brooks Well Servicing, Inc., No. 99-0849, 20 O.S.H. Cas. (BNA) 1286, 2003 WL

included provisions for reciprocal indemnification, backed by insurance, against claims brought by their respective employees.[11]

On October 24, 1998, Sonat's gas well caught fire and exploded while workers were attempting a "snubbing" operation – "attempting to push a 23 foot long pipe into a pressurized gas well."[12] Occupational Saftey and Health Administration ("OSHA") investigators determined that the pipe buckled and was ejected from the well as a result of miscalculations by Cudd.[13] The well ignited and burned for two days.[14] Five people were unable to escape from the snubbing unit basket suspended above the well.[15] In total, seven people were killed and three others were severely burned.[16]

22020493, at *1 (O.S.H.R.C. Aug. 26, 2003) (describing the operation as "specialized"); *see* Cudd Pressure Control, Inc's Conditional Petition for Review at 1, Cudd Pressure Control, Inc. v. Sonat Exploration Co., 202 S.W.3d 901 (Tex. App.—Texarkana 2006, pet. denied) (No 06-0979), 2007 WL 810124 (describing how Sonat has settled more of the associated tort claims than at stake in *Lumbermens*). Note that Cudd Pressure Control, Inc. and Brooks Well Control, Inc. had separate but similar Master Service Agreements with Sonat for both companies to perform well operations to assist Sonat in hydrocarbon production. Lumbermens' Brief, *supra* note 8, at 5-6; *see also In re Lumbermens*, 184 S.W.3d at 721 n.2 (noting the existence of separate litigation dealing with *Brooks* that is referenced, but not substantively analyzed by the court).

11. *In re Lumbermens*, 184 S.W.3d at 721; *see infra* note 35 (discussing "Oilfield Indemnification" statutes in Texas and Louisiana).

12. Press Release, OSHA Reg'l News Release, *OSHA Proposes $207,750 Penalty Against Three Oil and Gas Companies Servicing a Well Near Bryceland, La.* (Apr. 23, 1999), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=905; *see Sec'y of Labor*, 2003 WL 22020493, at *1 (providing detailed technical description of the site preparation for snubbing); *see also* OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, OIL AND GAS WELL DRILLING AND SERVICING ETOOL: SPECIAL SERVICES, fig.19 and accompanying text ("Snubbing rig"), http://www.osha.gov/SLTC/etools/oilandgas/servicing/special_services.html#Snubbing (last visited Nov. 17, 2007).

13. *See* OSHA Press Release, *supra* note 12.

14. *Sec'y of Labor*, 2003 WL 22020493, at *2-3.

15. *Id.* at *1. However, OSHRC vacated the Administrative Law Judge's finding that the set-up of the snubbing rig's work basket violated 29 C.F.R. § 1910.36(b)(1) (regulating emergency escapes from workplace structures intended for human occupancy). *See id.* at *1 n.2, 5-6.

16. *See In re Lumbermens*, 184 S.W.3d at 721; Brooks Well Servicing, Inc. v. Cudd Pressure Control, Inc., 36-723, p. 2 (La. App. 2 Cir. 6/27/03); 850 So. 2d 1027, 1029 (*modifying* 36-796 (La. App. 2 Cir. 8/22/01); 796 So. 2d 66) (describing injuries as burns); *see also* Press Release, OSHA Reg'l News Release, *OSHA Proposes $207,750 Penalty Against Three Oil and Gas Companies Servicing a Well Near Bryceland, La.* (Apr. 23, 1999) (describing four fatalities as Cudd employees).

B. *Prior History*

The victims' surviving families filed claims in Texas against Sonat.[17] After "Cudd refused to indemnify Sonat . . . Sonat filed a cross-claim against Cudd."[18] "Sonat eventually settled the personal-injury suits, and the underlying indemnity action proceeded."[19]

Cudd argued, *inter alia*, that because Louisiana law rather than Texas law applied to the MSA, the insurance and indemnity obligations of the agreement were unenforceable.[20] On a motion for partial summary judgment, the trial court found that Texas law applied to the MSA and that Sonat was entitled to indemnification from Cudd.[21] A jury trial was then held to determine whether Sonat had settled with the victims' surviving families for a reasonable amount.[22] On October 22, 2001, the district court rendered judgment based on a jury verdict of $20.7 million in damages.[23]

Cudd filed a notice of appeal with the Court of Appeals for the Sixth Judicial District of Texas (Texarkana) on June 6, 2003.[24] Lumbermens posted a bond for $29 million to secure the judgment against its insured, Cudd.[25]

Prior to Cudd filing its appellate brief, Cudd and Sonat agreed that, pursuant to TEX. R. CIV. P. 11, Cudd would not pursue the choice-of-law issue in its appeal of the indemnity suit.[26] In return, Sonat agreed to dismiss Cudd from a

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17. *In re Lumbermens*, 184 S.W.3d at 721; Sonat's Response Brief, *supra* note 8, at 4 & n.5 (listing three wrongful death suits brought against Sonat by the families of Cudd employees).

18. *In re Lumbermens*, 184 S.W.3d at 721.

19. *Id.*

20. *See* Lumbermens' Brief, *supra* note 8, at 6-7 (explaining that this affirmative defense was successful in similar suits filed in Louisiana against the other contractor, Brooks); *see also Brooks Well Servicing*, p. 1-4; 850 So. 2d at 1029-31 (stating Louisiana judiciary's view of the procedural posture of the controversy); *infra* note 34 (arguing the choice of law to be applied).

21. *In re Lumbermens*, 184 S.W.3d at 721; *see also* Lumbermens' Brief, *supra* note 8, at 7 (explaining that the Harrison County District Court partial summary judgment ruling in favor of Sonat was decided without comment).

22. *See In re Lumbermens*, 184 S.W.3d at 721; *see also* Cudd Pressure Control, Inc. v. Sonat Exploration Co., 202 S.W.3d 901, 903 (Tex. App.—Texarkana 2006, pet. denied) (explaining that the jury found the settlement amount was reasonable).

23. Sonat's Response Brief, *supra* note 8, at 5; *see Cudd Pressure Control*, 202 S.W.3d at 903 (stating that the actual amount was $20,719,166.74).

24. Docket at 6, *Cudd Pressure Control*, 202 S.W.3d 901 (No. 06-03-00077-CV).

25. *See In re Lumbermens*, 184 S.W.3d at 720, 721 (using the term "bond" to indicate "appellate security").

26. Sonat's Response Brief, *supra* note 8, at 5-6; *see In re Lumbermens*, 184 S.W.3d at 721-722; *see also* TEX. R. CIV. P. 11.

separately pending action for breach of contract.[27] Cudd fulfilled its part of the Rule 11 agreement by omitting the choice-of-law issue in the brief on the merits filed with the Court of Appeals on October 8, 2003.[28] Sonat fulfilled its part of the Rule 11 agreement by filing a motion to dismiss the separately pending action for breach of contract.[29]

On December 22, 2003, Lumbermens filed a motion with the Court of Appeals in order to intervene and argue the choice-of-law issue Cudd had "abandoned."[30] Although Lumbermens posted supersedeas bond, it had never been a named party.[31] On January 27, 2004, the Court of Appeals denied Lumbermens' motion.[32] Lumbermens then petitioned the Texas Supreme Court for a writ of mandamus requesting the Court of Appeals to grant its motion.[33]

C. *Summary of the Court's Decision*

1. Anti-Indemnity Law

As a preliminary matter, both Sonat and Lumbermens presented vigorous arguments as to the choice-of-law issue.[34] Although the Texas Supreme Court observed that the choice-of-law question may be dispositive, the only determination made was whether Lumbermens could raise this dispositive issue.[35]

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27. *In re Lumbermens*, 184 S.W.3d at 721-22 (explaining that the agreement called for Sonat to nonsuit Cudd).

28. *Id.* at 722; *see* Cudd Docket, *supra* note 24, at 5.

29. *See In re Lumbermens*, 184 S.W.3d at 722.

30. *Id.*; *see* Sonat's Response Brief, *supra* note 8, at 6 n.10; *see also* Lumbermens' Brief, *supra* note 8, at 22-23 (characterizes Cudd's decision not to appeal as "abandoned").

31. *See In re Lumbermens*, 184 S.W.3d at 720 (acknowledging that posting of bond is a fact critical to the question before the court); Lumbermens' Brief, *supra* note 8, at 10-25 (contending that the central question is how it should make itself known to the court of appeals); *see also* TEX. R. APP. P. 24.1(b) ("Suspension of Enforcement of Judgment Pending Appeal in Civil Cases").

32. Lumbermens' Brief, *supra* note 8, at 8-9. Furthermore, the court denied a "Motion for Rehearing" on this same issue on February 18, 2004. *Id.*

33. *See In re Lumbermens*, 184 S.W.3d at 720.

34. *See* Lumbermens' Brief, *supra* note 8, at 26-50; Sonat's Response Brief, *supra* note 8, at 23-28.

35. *See In re Lumbermens*, 184 S.W.3d at 727. To understand why the choice-of-law issue is dispositive requires a brief explanation of the respective "Oilfield Indemnity" statutes of Texas and Louisiana. The Texas Oilfiled Anti-Indemnity Act states anti-indemnity restrictions do not apply

> to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor. . . . With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage . . . [that] . . . each party as indemnitor has agreed to obtain for the benefit of the other. . . .

2. Decision

The court considered whether an insurer who had posted bond, but did not participate as a named party at the trial court level, could participate in the appeal as an intervenor.[36] Justice O'Neill, writing for the court,[37] framed the issue in terms of whether Lumbermens is a party by right under the doctrine of virtual representation, and whether Lumbermens had equitably invoked its right under that doctrine.[38]

Because there is no Texas Rule of Appellate Procedure allowing intervention *per se*, the court considered the standard by which to review the decision to deny Lumbermens' motion to intervene as a matter of first impression.[39] The court chose to adopt the same standard of review as used for trial level "intervenor's pleadings."[40] The court further explained that abuse of discretion is generally the correct standard "when a party seeks mandamus relief from a court of appeals' order limiting appellate rights."[41] The Texas Supreme Court held the

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TEX. CIV. PRAC & REM. CODE ANN. § 127.005(a)-(b) (Vernon 2007). In contrast, the Louisiana Oilfield Anti-Indemnity Act ("LOIA") reflects a statutory scheme tending to limit contractual agreements that require contractors to indemnify against the operator's negligence. *See* LA. REV. STAT. ANN. § 9:2780 (2007). The U.S. Court of Appeals for the Fifth Circuit observed, "The LOIA was enacted generally to protect Louisiana oilfield contractors from over reaching principals who force the contractors through indemnity agreements to bear the risk of the principal's negligence. . . . The LOIA is broadly written and has been broadly interpreted by the Louisiana courts and this Court." Roberts v. Energy Dev. Corp., 104 F.3d 782, 784 (5th Cir. 1997). *See generally* Allen Holt Gwyn & Paul E. Davis, *Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law*, 23-SUM CONSTR. LAW. 26 (2003) (including a summary table of all fifty states).

36. *In re Lumbermens*, 184 S.W.3d at 720.

37. *Id.*

38. *See id.* at 722, 723-25 ("IV. Virtual Representation Requirements"), 725-29 ("V. Timing Considerations").

39. *See id.* at 722-23 ("II. Standard of Review"); *see generally* TEX. R. APP. P. 10 ("Motions in the Appellate Courts").

40. *In re Lumbermens*, 184 S.W.3d at 722-23 ("When reviewing a trial court's decision to strike a party's intervention . . . we apply an abuse-of-discretion standard . . . although Rule 60 does not speak to a party's effort to intervene on appeal . . . we review the court of appeals' decision for abuse of discretion."); TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken . . . for sufficient cause . . . .").

41. *In re Lumbermens*, 184 S.W.3d at 722-23 (citing Nat'l Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 59 (Tex. 1993) (explaining that the court of appeals commits an abuse of discretion when it misapplies legal principles)); *see also* TEX. R. APP. P. 18; *In re* White, 227 S.W.3d 234, 236 (Tex. App.—San Antonio 2007, pet. denied) (suggesting that *Lumbermens* now defines the breadth of exceptions to the general rule that "only parties of record may appeal a judgment" and holding, "[b]ecause [petitioner] is not a party to the underlying cause, she has no right to appeal the final judgment and a petition for a writ of mandamus is an appropriate means to challenge the trial court's order."); Lewelling v. Bosworth, 840 S.W.2d 640, 642 (Tex. App.—Dallas 1992, no writ) ("A mandate is the official notice of the action of the appellate court, directed to

court of appeals to have indeed abused its discretion and that Lumbermens must be "entitled to invoke the virtual representation doctrine."[42]

D. *Subsequent History*

On August 24, 2006, the court of appeals heard Lumbermens' choice-of-law argument in the contractual indemnity suit between Sonat and Cudd.[43] The Court of Appeals decided that Louisiana law applied to the MSA and the decision could "inure to [Cudd's] benefit," notwithstanding the Rule 11 agreement that Cudd would not raise the choice-of-law issue because "[the] issue was raised solely by Lumbermens."[44] Cudd, Sonat, and Lumbermens filed further appellate briefs on the choice of law issue before the Texas Supreme Court.[45]

III. ANALYSIS

In a different opinion from the same year that *Lumbermens* was decided, the Texas Supreme Court stated:

> [O]ur oft-repeated position [is] that a party should not lose the right to appeal because of an "overly technical" application of the law. . . . [W]e have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.[46]

In this same spirit, *Lumbermens* seems to have vastly broadened appellate standing. The court stated, "Generally, only parties of record may appeal a trial court's judgment. . . . On a few occasions, though, we have determined that a person or

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the court below, advising it of the action of the appellate court and directing it to have its judgment duly recognized, obeyed, and executed.").

42. *See In re Lumbermens*, 184 S.W.3d at 720, 729 (ordering, albeit "conditionally," that a writ of mandamus be issued).

43. Cudd Pressure Control, Inc. v. Sonat Exploration Co., 202 S.W.3d 901, 904 (Tex. App.—Texarkana 2006, pet. denied) (relying on Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50 (Tex. 1991) as controlling law).

44. *Id.* at 911 (on appeal for indemnity action, court decided that Louisiana rather than Texas law applied).

45. *See* Texas Supreme Court's Case Information, http://www.supreme.courts.state.tx.us/opinions/printcase.asp?FilingID=27774 (last visited Nov. 17, 2007).

46. Guest v. Dixon, 195 S.W.3d 687, 688 n.7 (Tex. 2006) (quoting Briscoe v. Goodmark Corp., 102 S.W.3d 714, 717 (Tex. 2003) and Verburgt v. Dorner, 959 S.W.2d 615, 616-17 (Tex. 1997)).

entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights."[47] This does not necessarily throw open the (appellate) courthouse doors to all comers. Non-parties considering whether to challenge judgments and settlements that are in derogation of their interest must surely be wondering, "Are my rights important enough to vindicate?"

The *Lumbermens* court relied heavily on its own relatively recent holdings in *Motor Vehicle Board of Texas v. El Paso Independent Automobile Dealers Association*,[48] *City of San Benito v. Rio Grande Valley Gas Co.*,[49] and (to a lesser extent) *Continental Casualty Co. v. Huizar*[50] to supply both the authority and rationale for why "virtually represented" parties have the right to bring their own appeal.[51] Relying heavily on these recent cases without referencing the historical context lacks the explanatory power of the broader perspective to be gleaned from examining preceding cases.

Thus, this part of the Note reviews the line of Texas cases which precede *Lumbermens* and the evolution of Texas jurisprudence with respect to the right of non-parties to appeal. Then, this part of the Note examines the *Lumbermens* court's tests for applying the virtual representation doctrine to appellate standing, and asserts that the *Lumbermens* court's tests reflect a shift from a primary concern over protecting judgments against interested but unauthorized non-parties to a greater concern over protecting non-party rights. Rather than challenging the validity of this priority, this Note merely contends that a bright line rule would be better than the virtual representation doctrine for determining whose rights are worth vindicating.

A. *Prior Texas Cases*

Each of the cases in this sub-part are discussed as follows: First, the significance of the case as it relates to the development of Texas jurisprudence regarding the right to appeal and the virtual representation doctrine, is stated generally. Next, the case is put into context both in terms of the facts and the outcome of the case. Finally, this Note's theory on each case is presented. This theory focuses on how a main authority within

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47. *In re Lumbermens*, 184 S.W.3d at 723 (citations omitted).
48. 1 S.W.3d 108 (Tex. 1999).
49. 109 S.W.3d 750 (Tex. 2003).
50. Continental Cas. Co. v. Huizar, 740 S.W.2d 429 (Tex. 1987).
51. *In re Lumbermens*, 184 S.W.3d at 722, 725, 726-28 (Tex. 2006).

the case is used and how use of that authority informs the case as a whole.

1. *Smith v. Gerlach*

In *Smith v. Gerlach*, The Texas Supreme Court established as a general principal of law that to bring a writ of error to reverse a judgment, one must be "a party to the suit, or one whose privity of estate, title or interest appears from the record of the cause in the court below, or . . . the legal representative of such party."[52] This rule has been subsequently characterized by the Texas Supreme Court as an elementary principal of law.[53] From the concerns articulated by the *Smith* court, a conception of "identity of interest" may be inferred and analyzed.

The outcome of *Smith* was that the payee-assignor of a promissory note was not allowed to appeal the judgment of a suit brought by the indorsees against the payor.[54] The *Smith* court observed that payee-assignor was not a party to the suit.[55] Although the payor had actually brought an appeal, the payee-assignor wished to pursue different grounds.[56] In ruling against the payee-assignor, Justice Wheeler, writing for the *Smith* court, explained the right to appeal in terms of the "authority from either party to disturb the judgment."[57]

In reading *Smith*, the court was aware that others had an interest in the judgment. But far from wondering if such non-parties had important rights to vindicate, the court was concerned with protecting the judgment from unauthorized appeals. The *Smith* court cited *Dale v. Roosevelt* as authority for the proposition that only parties, privies of interest from the record and legal representatives have authority to appeal.[58] The *Smith* court's reasoning echoed the underlying concern, expressed in *Dale*, about strictly limiting who may derive advantage from reversal of judgment.

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52. Smith v. Gerlach, 2 Tex. 424, 427 (1838).

53. *See* Gunn v. Cavanaugh, 391 S.W.2d 723, 725 (Tex. 1965) ("The rule thus announced is, indeed, an elementary principle which has come down to us from the earliest days of the common law." (quoting Wood v. Yarbrough, 41 Tex. 540 (1874))).

54. *See Smith*, 2 Tex. at 427.

55. *See id.* at 426.

56. *Id.* ("[T]he defendants appealed, but neither party took any further steps to bring up the cause for revision. Subsequently Floyd, the payee and assignor of the plaintiffs, prosecuted in his own name this writ of error, and now asks a reversal of the judgment.").

57. *Id.* at 427.

58. *Id.* (quoting Dale v. Roosevelt, 8 Cow. 333, 1826 N.Y. LEXIS 133 (N.Y. Sup. Ct. 1826)).

The holding of *Dale* was "an administrator *de bonis non* may maintain a writ of error, on a judgment against the previous executor or administrator."[59] The *Dale* court, in answering "Why does an administrator *de bonis non* form an exception?" did not merely cite the relevant statute and treat the matter as fully disposed.[60] Instead, the *Dale* court explained the reasoning behind why the exception created by the law was a prudent one, notwithstanding the implied (but grave) concerns that one "who is not a party or privy . . . will derive an advantage from . . . reversal [of the judgment]."[61]

That these concerns are also present in *Smith* is evident in several ways. First, the *Smith* court cited several examples of cases where parties (including both named parties and non-parties) whose relationships to an alleged error in the adjudication were deemed insufficient to allow that party to bring a writ of error.[62] Next, the *Smith* court focused on why "interest in the cause" must be a matter of record by explaining:

> His petition for the writ of error does indeed allege that he is interested in the judgment, and exhibits what purports to be an agreement signed by the plaintiffs, stipulating that in case the debt could be collected in "good money," . . . and pay over to [payee-assignor] the residue; and that every reasonable exertion should be made to collect good money. But this is a mere *ex parte* representation, made to the judge on the application for the writ of error. Neither party to the record was afforded an opportunity in the court below to controvert the allegations . . . .

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59. *Dale*, 8 Cow. 333, 1826 N.Y. LEXIS 133 at *1; *see also* BLACK'S LAW DICTIONARY 431 (8th ed. 2004), *de bonis non administrates* ("[Law Latin] *Hist.* Of the goods not administered. When the first administrator of an intestate estate dies or is removed, the second administrator is called an administrator *bonis non*, who administers the goods not administered by the previous executor.").

60. *Dale*, *8* Cow. at 337-38, 1826 N.Y. LEXIS 133 at *8-9.

61. *Id.*

62. *See Smith*, 2 Tex. at 427 (citing, *inter alia*, Campbell's Devisees v. Smith, 9 Ky. (2 A.K. Marsh.) 118 (Ky. Ct. App. 1819) (holding that a non-party lacks authority to appeal ejectment despite being tenant in possession); Inhabitants of Shirley v. Inhabitants of Lunenburgh, 11 Mass. 379, 381-83 (1814) (holding, in a dispute between two towns to remove a pauper from one town to the other, that while the non-party pauper may himself have the authority to bring a writ of error based on the prejudice to his own interest caused by an insufficient summons, the named parties had no authority to advantage themselves by insisting on this writ of error the pauper's behalf)); *cf.* Robert G. Bone, *Rethinking the "Day In Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 210-11 (1992) (describing nineteenth century "no participation" theory of preclusion as being a status-based inquiry).

> The consequence of maintaining this proceeding would be that any person may bring a writ of error to reverse any judgment. . . . It will be only necessary that in his petition for the writ he aver an interest.[63]

The importance of vindicating a non-party's interests did not seem to factor into the *Smith* court's analysis at all—the contention that the plaintiff owed the non-party payee-assignor a duty was reduced to a mere "*ex parte* representation."[64]

It should not, however, be concluded that because the *Smith* court flatly refused to consider the interest of the payee-assignor, the Texas Supreme Court did not place great value on the substantive right to appeal. In a different case, Justice Wheeler explained:

> The [Texas] Constitution guaranties the right of appeal. The laws regulating the exercise of the right are intended to afford the party every possible facility in its furtherance consistent with a due regard to the rights of the opposite party; and they should be so construed as most certainly and effectually to attain this object.[65]

From the perspective of the *Smith* court, the narrowly-drawn exceptions to the issue of appellate standing were necessary to preserve, not limit, the substantive right of those with standing to appeal. The exceptions were so narrowly drawn that the *Smith* court did not actually address or explain how close a "privity" relationship must be, or what qualifies as a "legal representative" for purposes of the right to appeal. Implicitly, the payor-assignee did not qualify for this exception, and explicitly, such an explanation was unnecessary for the *Smith* court to decide the case.[66]

A further implication of this omission may be that the *Smith* court had confidence in the explanatory power of legally defined status as an explanation of standing.[67] To the extent that such a

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63. *Smith*, 2 Tex. at 427.

64. *Id.*

65. Shelton v. Wade, 4 Tex. 148, 1849 WL 3984 at *2 (Tex. 1849) (dismissing the writ of error brought by appellee against procedural defects by the appellant in perfecting appeal).

66. *See Smith*, 2 Tex. at 427 (If the payor-assignee had met whatever the *Smith* court meant by "legal representative" then the outcome of the case would have been in favor of the payor-assignee.).

67. *See* parenthetical discussion on cases *supra* note 62; Bone, *supra* note 62, at 212 (discussing how status-based explanation has "lost its power").

conclusion might be true, it nevertheless imperils useful inquiry. Specifically, the focus of the analysis risks being shifted to an aesthetic evaluation of how satisfactory one finds a status-based explanation to be and away from an empiric inquiry into what useful purpose is served by the *Smith* court excepting "privity" or "legal representative" status, whatever their ultimate parameters may have been.[68] At a minimum, it can be said that naming parties serves the useful purpose of identifying who is to be "subjected to the jurisdiction of the court."[69] A traditional view, discussed by Oliver Wendell Holmes, Jr., is "[a] proper name, when used in business or in pleading, means one individual thing, and no other as every one knows, and therefore one to whom such a name is used must find out at his peril what the object designated is."[70] The terms "privity" or "legal representative," in keeping with the *Smith* court's focus on the named parties, cannot be inferred to have meant anyone with any important interest. Rather, these terms must have been functionally referring to some person or entity with a relationship to the named party that, for purposes of the case, has an interest identical to that of a named party. To the extent that "privity of estate, title or interest" with the named party may have been a question of fact, requiring that the interest "appears from the record" allowed the named parties "an opportunity in the court below to controvert."[71] And where the circumstances were such that "legal representative" was not a controvertible fact, it would, nevertheless, be a matter of record.[72]

2. *Continental Casualty Company v. Huizar*

In *Continental Casualty Co. v. Huizar*, Justice Kilgarlin, in his concurring opinion, revisited the exceptions in *Smith* to the named party rule and concluded that the "legal representative"

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68. *Cf.* Bone, *supra* note 62, at 212 (suggesting "The pragmatic view, still with us today, [which] evaluates procedure according to its real world impact on individuals, the judicial system, and society at large, rather than its impact on formal legal rights . . . ." is a mode of evaluation unused prior to the twentieth century).

69. Devlin v. Scardelletti, 536 U.S. 1, 15 (2002) (Scalia, J. dissenting) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 34(1) (1980)).

70. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 309 (Dover Books 1991) (1881) (citations omitted) (expressing skepticism towards the explanatory power of the "meeting of the minds" justification for voiding a contract).

71. Smith v. Gerlach, 2 Tex. 424, 427 (1838).

72. *See, e.g.*, Hubbard v. Lagow, 567 S.W.2d 489, 492 (Tex. 1978) (holding "that a [court-appointed] receiver in bankruptcy is the legal representative of the bankrupt. As the legal representative, the receiver has standing to pursue a writ of error appeal to the court of civil appeals . . . .").

exception can be satisfied, "wherein parties come under the doctrine of virtual representation."[73] Justice Kilgarlin, drawing upon history and logic, formulated the following test for whether a non-party has the right to appeal under the doctrine of virtual-representation:

> An affirmative answer to three questions is required for [a non-party] to have the right to pursue the appeal.
>
> First, is [the non-party] bound by the judgment against [the named party]? . . .
>
> Second, does [the non-party's] privity of estate, title or interest appear from the record of the cause in the trial court? . . .
>
> Third, is there an identity of interest between [the non-party] and [the named party] . . . ?[74]

Despite at least one commentator's skeptical predictions, subsequent Texas courts have required all three tests.[75] An examination of *Huizar* would seem incomplete without some analysis of how Justice Kilgarlin's formulation of a rule for standing under the virtual-representation doctrine impacts insurance jurisprudence.

Huizar is an insurance case, arising from a wrongful death action against an architectural firm.[76] The outcome of *Huizar* was that an insurer, who did not intervene at trial, was not allowed to intervene at the appellate level in order to prevent a

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73. Continental Cas. Co. v. Huizar, 740 S.W.2d 429, 430-32 (Tex. 1987) (Kilgarlin, J., concurring).

74. *Huizar*, 740 S.W.2d at 431-32.

75. *See* Pamella A. Hopper, Comment, *Will The Real Party In Interest Please Stand?: Direct Action Statutes v. The Doctrine of Virtual Representation*, 36 S. TEX. L. REV. 557, 573 & n.93 (1995) ("Even though all three of Justice Kilgarlin's requirements may not be necessary, all were established in Huizar." (relying upon Am. Physicians Ins. Exch. v. Cardenas, 717 S.W.2d 707 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.) to support the hypothesis, and arguing that the "from the record" test was unfair, as matter of policy, because of jury basis against insurers)); *see also, e.g.*, Preston v. Am. Eagle Ins. Co., 948 S.W.2d 18, 20 (Tex. App.—Dallas 1997, no writ) (ignoring *Huizar*'s analysis of the *Smith* exceptions and applying a different set of legal standards to determine if "an intervenor is a party for purposes of appeal"). *But see, e.g.*, Motor Vehicle Bd. of Tex. v. El Paso Indep. Auto. Dealers Ass'n, 1 S.W.3d 108, 110 (Tex. 1999) (citing and requiring all three *Huizar* elements); New Boston Gen. Hosp., Inc. v. Texas Workforce Comm'n, 47 S.W.3d 34, 40 (Tex. App.—Texarkana 2001, no pet.) (using *Huizar* tests and declaring, "Our review of the record indicates that New Boston met each of these prongs."); McIntosh v. City of El Paso, No. 08-99-00157-CV, 2000 WL 1643510, at *1 (Tex. App.—El Paso Nov. 2, 2000, no pet.) (not designated for publication) (citing *Huizar*'s synthesis of earlier case law).

76. *See Huizar*, 740 S.W.2d at 429-30 (majority opinion).

post-judgment settlement between the plaintiff and its insured.[77] The majority in *Huizar* declined to decide whether the insurer had the right to appeal under the doctrine of virtual representation, and instead found any ostensible rights to appeal to have been waived when the insurer voluntarily paid the judgment.[78] Justice Gonzalez, in his dissenting opinion, argued that the "opportunity to obtain review" should have been derived, under the doctrine of virtual representation, from the insurer's control of the defense of the insured.[79] Kilgarlin, in arguing why "actual control" is the wrong test for the virtual representation doctrine offered by the dissent, analyzed *Smith* through a discussion of the Texas Supreme Court's previous analysis of *Smith* in *Gunn v. Cavaughn*.[80]

Gunn held that, under Texas law, a biological parent who was not made a party to the adoption proceedings of his children but was nevertheless found to have deserted them was "entitled thereafter to a plenary hearing to determine whether or not such parental rights have in fact been lost through neglect, mistreatment, abandonment or other antisocial conduct[,]" but was not entitled to appeal the adoption proceeding itself.[81] The *Gunn* court enumerated certain narrow exceptions to the named party rule including: legislated aspects of probate, and the doctrine of virtual-representation applied to class actions.[82] The *Gunn* majority specifically stated, "While [the father] may have been interested in the outcome of the case, he was neither a named party, a party by virtual-representation, nor a party by

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77. *See id.* at 430.

78. *See id.* (holding that insurers payment of judgment "under protest" was nevertheless sufficient to waive any rights to appeal, citing Highland Church of Christ v. Powell, 640 S.W.2d 235 (Tex. 1982)).

79. *Id.* at 433-34 (Gonzalez, J., dissenting) (quoting RESTATEMENT (SECOND) OF JUDGMENTS, § 39 (1982)).

80. *See id.* at 430-32 (discussing Gunn v. Cavaughn, 391 S.W.2d 723, 724-27 (Tex. 1965) (analyzing Smith v. Gerlach, 2 Tex. 424 (1838))).

81. *See also In re* McAda, 780 S.W.2d 307, 313 (Tex. App.—Amarillo 1989, writ denied) (citing *Huizar* for a holding closer to the facts of *Gunn*); *cf.* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751-52 (Tex. 2003) (explaining when a bill of review is proper and what elements must be proven). *Compare Gunn*, 391 S.W.2d at 724, *with* discussion *supra* note 62 of Inhabitants of Shirley v. Inhabitants of Lunenburgh, 11 Mass. 379, 381-83 (1814).

82. *See Gunn*, 391 S.W.2d at 725 ("Probate appeals are distinguishable from the usual species of civil cases . . . ." (citing Specia v. Specia, 292 S.W.2d 818 (Tex. Civ. App.—San Antontio 1956, writ. ref'd n.r.e.))). In *Specia*, the court determined a main beneficiary could be a party to a contest suit within Rule 359 even though he was not named as a party. 292 S.W.2d at 819; *see also* TEX. R. CIV. P. 359 (repealed 1983) (relating to petition for writ of error).

other device or theory known to the law. He was simply omitted as a party thereto . . . ."[83] The inference which may be drawn is that the *Gunn* majority sought an identical interest between the named party and the non-party seeking to appeal. At the very least, the important interest of the father, to the extent that it implies a due process concern, did not seem to imply that a liberal recognition of the right to appeal should follow.[84] Justice Steakly, writing for the dissent in *Gunn*, decried that "the parental rights in three children of a non-consenting, non-notified, and non-participating natural father have been taken away" and that "the majority is complicating what is actually a simple situation."[85] Importantly, Justice Steakly proposed a different reading of *Smith*, stating:

> I would not restrict the concept of privity to matters of property rights and would recognize the controlling fact that the interest of the natural father appeared on the face of the record from the beginning. Heretofore this Court has been liberal in recognizing the right of appeal.[86]

Justice Kilgarin's concurring opinion in *Huizar* strove to move beyond the mere cataloging of historically observed exceptions (as done in *Gunn*) and to establish some theory by which to measure factual situations against some set criteria in order to determine whether a non-party should be allowed to participate in an appeal.[87] Justice Kilgarlin's opinion began moving in this direction with a discussion *Grohn v. Marquardt*, a probate case.[88] In *Grohn*, because a Texas statute had specifically abrogated a common-law rule regarding the preclusive effect on remaindermen of a judgment against an executor, that court was required to refer to

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83. *See Gunn*, 391 S.W.2d at 725 (emphasis omitted).

84. *See id.* at 724 (expressing the view that due process was not implicated because "there is no great constitutional consideration which requires that the parent, who acts within the six-month's [sic] period [to bring a writ of error], should have two remedies, while the parent who, for some reason, does not act within such period, is restricted to one remedy only").

85. *Id.* at 727 (Steakley, J., dissenting).

86. *Id.* at 727-28.

87. *See* Continental Cas. Co. v. Huizar, 740 S.W.2d 429, 431 (Tex. 1987) (Kilgarlin, J., concurring) ("[I]f [named party] 'represented' [non-party], as the dissent contends, it must be under some theory other than class action or a statutorily imposed status such as a trust beneficiary or devisee of a decedent's estate.").

88. *See id.* (analyzing Grohn v. Marquardt, 487 S.W.2d 214, 215-18 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.)).

abstract principals of law via Restatement (First) of Property § 180.[89] Commentators have observed that the virtual representation doctrine developed in probate matters as a doctrine of preclusion, specifically to make judgments against a present holder of a remainder interest binding against future holders of that remainder interest.[90]

Kilgarlin echoed *Gunn*'s qualification that the Texas "legislature has adopted different policy in regards to probate appeals from those in ordinary civil cases."[91] Kilgarlin then adopted the class-action term "doctrine of virtual representation" to describe the idea that a named party may be representing an interest identical to that of a non-party.[92] Although the

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> The living holder of a future interest is bound by the outcome of judicial proceedings only if the proceeding is of the type which is binding on the thing itself, or if the proceeding is one which, because of statutory provisions, binds the holder of such future interest without either joinder or "representation" of such holder, or if the holder of the future interest is "duly represented" in such proceedings.

Grohn, 487 S.W.2d at 218 (citing RESTATEMENT (FIRST) OF PROPERTY § 180 (1936)).

90. *Compare* Bone, *supra* note 62, at 209, stating:

> [V]irtual representation during this early period was based on a no-participation theory of nonparty preclusion. . . . It had to do . . . with the tenant in tail representing the remainder estate as a legal entity . . . by bringing that estate before the court so that the chancellor's decree might bind it and, indirectly, all the remaindermen who owned an interest in it.

With Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of A Nonparty's Claim*, 68 TUL. L. REV. 1303, 1310-11 (1994) (footnotes omitted), stating:

> Virtual representation was a rule of equity used to "bind persons unknown, unascertained, or not yet born." Courts applied the doctrine to allow the "present settlement of estates" tied up with the future interests of the "unascertainable." The doctrine of virtual representation, in short, allowed unborn remaindermen to be represented by an "existing class of remaindermen." In these instances, to deny virtual representation was to risk protracting suits into perpetuity; these circumstances made it necessary "that a decree be had effectively binding the interests of all persons concerned."

See also Amy C. Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1036 n.102 (observing that the Bone and Johnson articles advocate opposing positions). *But see* McArthur v. Scott, 113 U.S. 340, 392-94 (1885) (refusing to apply the Ohio version of virtual representation doctrine to bind minor living and unborn grandchildren "entitled under the will to share with [testator's] other grandchildren" in a will contest because "[t]he only parties to that proceeding, who were of age and capable of representing themselves, were the heirs at law, interested to set aside the will, and one of whom, afterwards father of the present plaintiffs, filed the bill for that purpose").

91. *Compare Huizar*, 740 S.W.2d at 431 (Kilgarlin, J., concurring) (interpreting the right to appeal under virtual representation from case law, not statute), *with Gunn*, 391 S.W.2d at 725 (distinguishing "[p]robate appeals . . . from the usual species of civil cases").

92. *See Huizar*, 740 S.W.2d at 431 (Kilgarlin, J., concurring) (quoting "doctrine of representation" definition from *Grohn*); *id.* (Kilgarlin, J., concurring) ("In its original sense, 'representation,' or as it is sometimes called, 'virtual representation,' was limited to situations involving class actions . . . ."); *see also* TEX. R. CIV. P. 42(a) ("One or more

commentators, who trace the origins of the virtual-representation doctrine to probate do not deny the historical link between class action and the virtual-representation statute, they view the two as quite different.[93] Despite adopting the term "virtual representation" from class action procedure, rather than probate, Kilgarlin's first test of "bound by the judgment" nevertheless seems much closer to the preclusion rationale from probate law discussed in *Grohn*.[94]

Kilgarlin's second test of "privity of estate, title, or interest from the record" modified the rationale of *Smith* in that it was no longer independent from "legal representative," but a requirement of it.[95] The test was also made distinct from the third test, "identity of interest."[96] Logically, this contemplated a situation where a non-party's privity appeared in the trial record, but because the non-party in privity did not have an interest identical to the named in taking the appeal, the non-party is barred. Although Justice Kilgarlin's third test, "identity of interests" did not directly attribute the idea to class action jurisprudence, the proposition seems explicitly exported from the authority cited by Justice Kilgarlin in his analysis of class action.[97]

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members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.").

93. *See* Johnson, *supra* note 90, at 1306 ("This Comment explores the doctrine of virtual representation. . . . To this end, the Comment investigates the origin and present-day scope of virtual representation and its counterpart, privity. The Comment then compares the doctrine to another exception to the general rule against precluding non-parties: the class action."); Bone, *supra* note 62, at 205 ("[H]ow can we say that a person has had her day in court when litigation choices were made by someone else, her 'virtual representative,' without her consent? . . . The following analysis extends this work to virtual representation cases outside the class action setting.").

94. *Cf.* Mobil Exploration & Producing U.S. Inc. v. McDonald, 810 S.W.2d 887, 889 (Tex. App.—Beaumont 1991, writ denied) (praising *Grohn* as where "[t]he rationale for the doctrine of virtual representation is best expressed").

95. *See Huizar*, 740 S.W.2d at 432 (Kilgarlin, J., concurring).

96. *See id. But see* Hubbard v. Lagow, 567 S.W.2d 489, 490 (Tex. 1978) (interpreting *Gunn* as requiring only "identity of interests between the party in the trial court and the party seeking appeal").

97. *See Huizar*, 740 S.W.2d at 431-32 (Kilgarlin, J., concurring) (discussing, in the context of class actions, the concepts of binding in Lightle v. Kirby, 108 S.W.2d 896, 897 (Ark. 1937) (referring to virtually represented member of class as a "quasi party" who may be bound so long as the chosen representative's interests are not "antagonistic" thereto) and "an identity of interests" in Indus. Generating Co. v. Jenkins, 410 S.W.2d 658, 661 (Tex. Civ. App.—Austin 1967, no writ) ("It is the identity of interests which is of paramount importance in determining the applicability of the doctrine of virtual representation."); *see also* Knioum v. Slattery, 239 S.W.2d 865, 868 (Tex. Civ. App.—San Antonio 1951, writ ref'd) (explaining that to invoke "the principle of virtual representation" as a plaintiff against a class requires naming "such defendants as will

Notwithstanding the creation of these tests, Justice Kilgarlin seems to have continued to follow the concept, articulated in *Smith* that "authority from either party to disturb the judgment" is required for a non-party to have the right to appeal.[98] This adherence to the *Smith* rationale can be observed more vividly in the context of how Justice Kilgarlin's tests were applied to insurance jurisprudence.[99]

Justice Kilgarlin stated that the insurer failed the first, "bound by the judgment" test, because "Continental Casualty openly assert[ed] a policy defense of 'non-cooperation.'"[100] Justice Kilgarlin's jurisprudential inclination that insurers should drop all policy defenses as a requirement for the right to appeal its insured's case was underscored in his subsequent discussion of "non-waiver" agreements—by his own admission a generality, and not an issue in the case.[101] The corresponding argument in the dissent was that the insurer's right to appeal the judgment against insured is implied by the insured's conflicting with the insurer.[102]

Justice Kilgarlin kept privity from the record as a test, and explained how "[a] search of three volumes of transcripts reveals no mention of" the insurer, but did not explain any useful purpose behind the requirement that privity be a matter of record.[103] There was no contention that the insurer-insured relationship was not genuine.[104] Justice Kilgarlin took notice of

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insure adequate representation on behalf of all who are sued. This requirement is obviously not met by naming two persons as defendants who agree with the plaintiff's position in the litigation and who contest none of the allegations of the petition.").

98. Smith v. Gerlach, 2 Tex. 424, 427 (1838); *see also* Times Herald Printing Co. v. Jones, 730 S.W.2d 648, 649 (Tex. 1987) (holding that appeal by a newspaper, neither a party nor intervenor, but interested in unsealing trial court records of settling parties, should have been dismissed), *rev'g* 717 S.W.2d 933, 935-37 (Tex. App.—Dallas 1986) (recognizing the standing of a newspaper to challenge the agreement of parties to seal court records but declining to extend TEX. CONST. art I, § 8 beyond U.S. CONST. amend. I).

99. *Cf.* Arnold v. Nat. County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (holding, in the same year as *Huizar* was decided, that the insurance contract imposes a common-law duty of "good faith and fair dealing" on insurers).

100. *Huizar*, 740 S.W.2d at 432 (Kilgarlin, J., concurring).

101. *See id.* ("*[O]ther* instances exist when . . . 'non-waiver' agreements are *sometimes* utilized by insurance companies . . . .") (emphasis added).

102. *See id.* at 434 (Gonzalez, J., dissenting) ("It is, after all, Continental's exclusive control of the defense of its insured which is a predicate for the *Stowers* claim subsequently filed against Continental by SHWC and Huizar."); *see also* G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 548 (Tex. Com. App. 1929) (requiring insurer's "use of reasonable care in the exercise of its *exclusive control* over the negotiations") (emphasis added). *But see* State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 41 (Tex. 1998) (limiting the extent of *Stowers'* duty).

103. *See Huizar*, 740 S.W.2d at 432 (Kilgarlin, J., concurring).

104. *Cf.* Smith v. Gerlach, 2 Tex. 424, 426 (1838).

the existing insurer-insured relationship from the fact of other pending litigation but stated:

> Preventing Continental Casualty from continuing this appeal does not mean it is totally without right of redress. It still has its policy defense suit based on non-cooperation. Of course, were Continental Casualty a party to the lawsuit, it would have the right of appeal. . . . [T]he legislature . . . has bestowed on the Insurance Commission the power of approval of "no action" clauses in standard insurance policies. Those clauses contractually prohibit insurance companies from being named as parties in suits against their insureds.[105]

This statement echoed the sentiment in *Gunn* that the insurer was only entitled to one, not two remedies.[106]

Finally, Justice Kilgarlin's "identity of interest" test, once only an underlying rationale to be inferred from *Smith*, was stated explicitly in *Huizar*.[107]

3. *Motor Vehicle Board of Texas v. El Paso Independent Automobile Dealers Ass'n*

The Texas Supreme Court,[108] in *Motor Vehicle Board of Texas v. El Paso Independent Automobile Dealers Ass'n*, narrowed the scope of the applicability of the "waiver" rule from the majority opinion of *Huizar* and summarized Kilgarlin's tests for allowing appellate standing to non-parties under the doctrine of virtual representation:

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105. *Huizar*, 740 S.W.2d at 432 (Kilgarlin, J., concurring). Note that the State Board of Insurance was abolished by the legislature and replaced by the Texas Department of Insurance. *See* Tex. H.B. 72d Leg., R.S., Ch. 242 § 1.02 (1991), TEX. INS. CODE ANN. art. 1.01A, *repealed by* Acts 1999, 76th Leg., R.S., ch. 101, § 5 (current version at TEX. INS. CODE ANN. §§ 31.001-003, 007 (Vernon 2006)); *see also* Daniel Kruger, *Recent Changes to the Texas Insurance Code*, 64 TEX. B.J. 802 (2001) ("[T]he Texas Legislative Council, . . . is revising and renumbering the entire Texas Insurance Code. The goal . . . is not to make any substantive changes to the Insurance Code, but rather to rearrange it into a more logical order."). *See generally* TEXAS DEPARTMENT OF INSURANCE, TEXAS DEPARTMENT OF INSURANCE HISTORY, http://www.tdi.state.tx.us/general/history.html.

106. See discussion supra note 84 and accompanying text.

107. *Compare supra* notes 64-71 and accompanying text (inferring an "identity of interest" test as an underlying rationale) *with Huizar*, 740 S.W.2d at 432 (in which Justice Kilgarlin's concurring opinion explicitly mentions an "identity of interest" test).

108. For clarity, in this section of the note, the Texas Supreme Court refers to the presiding body that decided *El Paso Independent Automobile Dealers Ass'n*. Other sections maintain the usual convention.

> To claim virtual representation, an appellant must show that: (1) it is bound by judgment, (2) its privity of estate, title, or interest appears from the record; and (3) there is an identity of interests between the appellant and a party to the judgment.[109]

In *El Paso Independent Automobile Dealers Ass'n*, the apparent concern shifted from protecting judgments against disturbance by an unauthorized non-party, to obliging the named parties to adequately represent certain non-party interests.[110]

In *El Paso Independent Automobile Dealers Ass'n*, local automobile dealers sued to enjoin Local Officials from enforcing "[s]ections 728.001 through 728.004 of the Transportation Code—commonly known as the 'Blue Law'—[which] make it illegal to sell cars on consecutive weekend days" on the grounds that the "Blue Law" violated the Texas Constitution.[111] The Texas statute requires that "In any proceeding that involves the validity of a municipal ordinance or franchise . . . if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."[112] The Texas Attorney General, however, issued a letter stating, "Even though the constitutionality of a state statute is involved in this case, the Attorney General believes that the [Local Officials] can adequately present the issues to the court. For this reason, the Attorney General respectfully declines to participate in this

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109. Motor Vehicle Bd. of Tex. v. El Paso Indep. Auto. Dealers Ass'n, 1 S.W.3d 108, 110 (Tex. 1999) (citing *Huizar*, 740 S.W.2d at 432 (Kilgarlin, J., concurring)).

110. *Compare id.* at 111 (holding that the Attorney General's letter "was based on a belief that the statute would be defended by the Local Officials statutorily charged with its enforcement"), *with supra* notes 56-63 and accompanying text (explaining a major rationale for the *Smith* and *Dale* decisions was the fear of allowing parties "deemed insufficient" to bring writs of errors).

111. *El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 110; *see also* TEX. TRANSP. CODE ANN. §§ 728.001-.004 (Vernon 2006) (prohibiting, as a public nuisance, the sale of automobiles on the consecutive days of Saturday and Sunday); *cf.* McGowan v. Maryland, 366 U.S. 420, 426, 445 (U.S. 1961) (holding that states were within their discretion under the Fourteenth Amendment to require some, but not all businesses to close on Sunday, and such business regulations did not necessarily violate the Establishment Clause of the Constitution); State v. Spartan's Indus., Inc., 447 S.W.2d 407, 414 (Tex. 1969) ("It is only when a statute arbitrarily interferes with legitimate activities in such a matter as to have no reasonable relation to the general welfare, that this court may rule the statute to be unconstitutional . . . .").

112. TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b) (Vernon 2006).

case."[113] When the Local Officials subsequently decided that they agreed with the plaintiffs and did not contest the plaintiffs' conclusions of law, the trial court issued an order enjoining "all officials" from enforcing the law, and denied post-judgment efforts to intervene by the Attorney General and the Motor Vehicles Board of the Texas Department of Transportation.[114] When the Attorney General and the Board attempted to appeal, the El Paso Court of Appeals explicitly followed the concurring opinion of *Huizar* by finding that, irrespective of the doctrine of virtual representation, the Attorney General's letter waived any right to appeal.[115] But the Texas Supreme Court ultimately reversed the Court of Appeals, finding that the Attorney General's letter did not constitute a waiver.[116]

The Texas Supreme Court appears to have uncritically accepted the Court of Appeals' use of virtual representation.[117] The Court of Appeals took the view that the "identity of interest" test, even if not sufficient as the sole criteria, is nevertheless the underlying rationale for the doctrine of virtual representation.[118] Although the Texas Supreme Court did not directly discuss the importance of identity of interest, in the discussion of waiver the court observes, "The letter demonstrates the Attorney General's belief that the Local Officials would mount a defense to the Blue Law's constitutionality. Nothing about the letter indicates an intention to 'expressly renounce' . . . any right the Attorney General had to have the case fully defended or subsequently appealed."[119] Construing the Rules of Appellate Procedure "liberally," the Texas Supreme Court concluded, "this doctrine [of virtual representation] does not require that the named defendants perfect an appeal . . . ."[120] A reasonable synthesis of the two opinions is that allowing a virtually represented non-

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113. *See El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 111 (quoting Letter from Texas Attorney General to the Court (October 24, 1997) (on file with the Sup. Ct. of Tex.)).

114. *Id.* at 108.

115. *See* Att'y Gen. of Tex. v. El Paso Indep. Auto. Dealers Ass'n, 966 S.W.2d 783, 785-86 (Tex. App.—El Paso 1998), *rev'd*, 1 S.W.3d 108 (Tex. 1999) (citing *Huizar*, 740 S.W.2d at 431 (Kilgarlin, J., concurring)); *see also* Highland Church of Christ v. Powell, 640 S.W.2d 235, 236 (Tex. 1982) (holding that insurer's payment of judgment "under protest" was nevertheless sufficient to waive any rights to appeal).

116. *See El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 111.

117. *See id.* at 110 (citing *El Paso Indep. Auto. Dealers Ass'n*, 966 S.W.2d at 785-86).

118. *See El Paso Indep. Auto. Dealers Ass'n*, 966 S.W.2d at 785 (citing Stroud v. Stroud, 733 S.W.2d 619, 621 (Tex. App.—Dallas 1987, no writ) (finding that "identity of interest" is not met when the non-party's interest in the case exceeds the bounds of the named party's interest)).

119. *El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 111.

120. *Id.* at 111-12.

party to appeal can be a remedy for the non-party's disappointed expectation of adequate representation on the identical interest.

4. *City of San Benito v. Rio Grande Valley Gas Co.*

In *City of San Benito v. Rio Grande Valley Gas Co.*, the Texas Supreme Court explicitly emphasized that "whether the appellant is bound by the judgment" is the most important test for allowing a non-party the right to appeal under the doctrine of virtual representation.[121] The *City of San Benito* court, like the *El Paso Independent Automobile Dealers Ass'n* court, was primarily concerned about protecting the interest of inadequately represented non-parties.[122]

City of San Benito involved six cities that tried unsuccessfully at the trial court level to opt out of a class action settlement involving eighty cities which were attempting to collect municipal franchise fees from the Rio Grande Valley Gas Company and Rio Grande's successor in interest, Southern Union Gas company.[123] The six cities appealed, objecting to both the settlement and their unsuccessful attempt to opt out of it.[124] The *City of San Benito* court decided against requiring class members to intervene as a prerequisite for appellate standing.[125] Once the six cities prevailed in their appeal of the opt-out ruling, they were held by the court to no longer be members of the class and were therefore not bound by the settlement.[126]

City of San Benito, to some extent, departed from the idea expressed in *Smith* that the right to appeal requires "authority from either party to disturb the judgment."[127] The outcome, however, was not explicitly in conflict with *Smith* because the six cities, as described above, were not allowed to challenge the settlement.[128] Furthermore, the Texas Supreme Court had previously distinguished class-action settlements as requiring

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121. City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750, 755 (Tex. 2003); *see also* BASF FINA Petrochem. Ltd. P'ship v. H.B. Zachry Co., 168 S.W.3d 867, 870 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

122. *See El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 109-12; *see also supra* Part III.A.3.

123. *See City of San Benito*, 109 S.W.3d at 752-53.

124. *See id.* at 753.

125. *Id.* at 752 (holding that "an unnamed class member is not required to intervene in order to appeal its objections to a class settlement or its opt-out requests"); *id.* at 758 (affirming judgment against a city that never "filed a notice to opt out or . . . objected to the settlement in the trial court").

126. *See id.*

127. *See supra* note 56 and accompanying text (discussing Smith v. Gerlach, 2 Tex. 424, 427 (1838)).

128. *See City of San Benito*, 109 S.W.3d at 752, 758.

greater scrutiny than class-action judgments because "when a settlement occurs, the potential for class representatives and counsel to ignore differences among class members, or even collude with defendants at absent class members' expense, mandates that the trial court rigorously scrutinize Rule 42's typicality and adequacy-of-representation criteria."[129] Yet, the *City of San Benito* court offered neither rationale to explain the apparent departure from the general rule expressed in *Smith*.[130]

Instead, the *City of San Benito* court explicitly aligned the rationale for the Texas doctrine of virtual representation with the rationales supporting the U.S. Supreme Court's decision in *Devlin v. Scardelletti*.[131] In *Devlin*, a federal class action suit, unnamed class members were considered parties for purposes of appeal based on the facts that they were bound by the judgment and that they raised an objection at the fairness hearing.[132] *Devlin* is furthermore significant as authority for the *City of San Benito* court's opinion because *Devlin* rejected the proposition that it is an absolute requirement for the unnamed class members to successfully intervene in order to appeal, stating, "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context."[133] The *Devlin* court specifically addressed the contention made by the United States, as *amicus curiae*, that intervention is the only proper procedural remedy for an unnamed class member who feels inadequately represented.[134] The court found intervention in this case to be "of limited benefit."[135]

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129. McAllen Med. Ctr., Inc. v. Cortez, 66 S.W.3d 227, 233 (Tex. 2001) (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 847 (1999)); *see also* TEX. R. CIV. P. 42(a).

130. *See Smith*, 2 Tex. at 427. *See generally City of San Benito*, 109 S.W.3d 750.

131. *See City of San Benito*, 109 S.W.3d at 754-56 (quoting Devlin v. Scardelletti, 536 U.S. 1 (2002)).

132. *See Devlin*, 536 U.S. at 10, 11 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. . . . [T]he power to appeal is limited to those nonnamed class members who have objected during the fairness hearing."); *see also* FED. R. CIV. P. 23(e) (governing class action settlements, and providing that "[a]ny class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval").

133. *Devlin*, 536 U.S. at 10.

134. *See id.* at 10, 11-13.

135. *See id.* (explaining also that requiring all non-named members of a class "to intervene to preserve their claims" would defeat "one of the major goals of class action litigation—to simplify litigation"). *But see* Hansberry v. Lee, 311 U.S. 32, 44-45 (1940) ("It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be

The *City of San Benito* court accomplished alignment with *Devlin* by citing *El Paso Independent Automobile Dealers Ass'n*, *Gunn*, and *Grohn* as the authority defining the virtual representation doctrine and concluding, "Our virtual representation doctrine is thus quite similar to the U.S. Supreme Court's rule in *Devlin*. We agree with the Court's analysis that the most important consideration is whether the appellant is bound by the judgment."[136] The *City of San Benito* court did not take up the issue raised by Justice Scalia, writing for the dissent in *Devlin*, that the differences between federal and state civil procedure weaken the logic behind drawing such close analogies.[137] The *City of San Benito* court instead praised the pragmatism of the *Devlin* court's focus on the fairness hearing.[138]

The *City of San Benito* court further observed, "To preserve a complaint for appellate review, a party must complain in the trial court."[139] The court drew an analogy between the common concern of non-parties "laying behind the log" and its own concern that the complaint be a matter of record.[140] Although the *City of San Benito* court's concern was functionally similar to the concern expressed in *Smith* that "privity of estate, title or interest" not be from "a mere *ex parte* representation," the *City of San Benito* court's concern was focused on the outer parameters of non-party rights, and not on disturbing judgments.[141]

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deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.") (citations omitted).

136. *City of San Benito*, 109 S.W.3d at 755 (citing *El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 110 (Tex. 1999); Gunn v. Cavanaugh, 391 S.W.2d 723, 725 (Tex. 1965); Robertson v. Blackwell Zinc Co., 390 S.W.2d 472, 472 (Tex. 1965) (recognizing the existence of the virtual representation doctrine specific to the context of class actions through the Texas Rules of Civil Procedure, rather than through *Smith v. Gerlach*, or its progeny); but not citing Continental Cas. Co. v. Huizar, 740 S.W.2d 429 (Tex. 1987)).

137. *See Devlin*, 536 U.S. at 19 n.3 (Scalia, J., dissenting) (criticizing the majority's interpretation of 5 AM. JUR. 2D *Appellate Review* § 265 (1995) and stating, "this difference between the procedures of federal and state courts seemingly escapes the Court's attention").

138. *See City of San Benito*, 109 S.W.3d at 755-56 (citing *Devlin* for the proposition that "[r]equiring intervention prior to settlement fairness hearings creates more work for all involved with no corresponding benefit").

139. *Id.* at 756 (citing TEX. R. APP. P. 33.1(a)(1)(A)).

140. *See id.* at 755.

141. *See* discussion in text accompanying *supra* notes 56 and 62.

B. *The Present Case*: In re Lumbermens

The *Lumbermens* court's analysis of the right to appeal continued the shift in the direction of greater concern over protecting non-party rights and was an apparent repudiation of Justice Kilgarlin's concurring opinion in *Huizar*.[142] The *Lumbermens* court discussed its perspective on the path and direction of the virtual representation doctrine, stating, "On a few occasions, though, we have determined that a person or entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights."[143] Lest one believe this to be dicta, the *Lumbermens* court was forthright in the application of "vindicating important rights" to the virtual representation doctrine, stating, "[B]ecause the doctrine is equitable, we must determine whether other considerations weigh against applying the doctrine to allow Lumbermens' intervention on appeal."[144]

The first indication of the *Lumbermens* court's jurisprudential differences with Kilgarlin's analysis in *Huizar* was the omission of the three-element test of virtual representation from the section of the opinion marked "Virtual Representation Requirements."[145] Instead, the three-element test for virtual representation was accurately but perfunctorily stated in the "Standard of Review" section.[146] The *Lumbermens* court attributed the three-element test to *El Paso Indep. Auto. Dealers Ass'n*.[147] Although cited by Respondent Sonat, Justice Kilgarlin's concurring opinion in *Huizar*, was never once cited by the *Lumbermens* court.[148]

Like *Huizar*, *In re Lumbermens* is an insurance case, arising from a wrongful death action, against a contractor, where the insurance company was attempting to prevent the insured from effecting a settlement that involved both covered and uncovered

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142. *Compare In re Lumbermens*, 184 S.W.3d at 723-24 (Tex. 2006), *with supra* Part III.A.1 (discussing Smith v. Gerlach, 2 Tex. 424, 427 (1838), *and* Continental Cas. Co. v. Huizar, 740 S.W.2d at 430-32 (Kilgarlin, J., concurring)).

143. *In re Lumbermens*, 184 S.W.3d at 723 (characterizing the exceptions to the general rule that "only parties of record may appeal a trial court's judgment").

144. *Id.* at 725.

145. *Id.* at 723-25.

146. *See id.* at 722 ("Under [the virtual representation] doctrine, a litigant is deemed to be a party if it will be bound by the judgment, its privity of interest appears from the record, and there is an identity of interest between the litigant and a named party to the judgment.").

147. *Id.* (quoting *El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d at 110 (Tex. 1999)).

148. *Compare* Sonat's Response Brief, *supra* note 8, at 10, 14-17, 20, *with In re Lumbermens*, 184 S.W.3d 718.

liability.[149] The *Lumbermens* court's opinion included almost nothing about these close factual parallels.[150] Instead, the *Lumbermens* court cited Justice Gonzalez's dissenting opinion in *Huizar* as authority for the proposition that "[t]he identity of interest upon which the virtual representation doctrine in this case turns relates to protecting the funds that the underlying judgment puts at risk."[151]

Notwithstanding indications from the *City of San Benito* court that to satisfy standing to appeal under the doctrine of virtual representation, the only required test is "whether the appellant is bound by the judgment," the *Lumbermens* court explicitly discussed the "identity of interest upon which the virtual representation doctrine in this case turns."[152] As Sonat's brief on the merits contended only that the "identity of interests" element of the virtual representation test was not met, this was the only element that the court deemed to be dispositive.[153]

The other two elements of the virtual representation test were discussed, albeit indirectly. Sonat's brief on the merits forwarded an argument echoing the rationale of Justice Kilgarlin's concurring opinion in *Huizar* that an insurer is not truly bound by the judgment when a policy defense of non-cooperation is still available.[154] This was put forth as a rebuttal to Lumbermens' argument that due process requires allowing Lumbermens standing to appeal, rather than as an independent argument that the "bound by the judgment" test was not met.[155]

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149. *Compare supra* Part III.A.2 (discussing facts of Continental Cas. Co. v. Huizar, 740 S.W.2d 429 (Tex. 1987)), *with supra* Part II.A-B (discussing facts of *In re Lumbermens*, 184 S.W.3d 718).

150. *See In re Lumbermens*, 184 S.W.3d at 724 n.6 (observing instead that the *Huizar* majority did not include Chief Justice Hill).

151. *Id.* at 724 (agreeing with Lumbermens and finding that "Lumbermens . . . and Cudd's ultimate aim—to reverse the underlying judgment—remains the same;" citing as authority *Huizar*, 740 S.W.2d at 434 (Gonzalez, J., dissenting)).

152. *Compare* City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750, 755 (Tex. 2003), *with In re Lumbermens*, 184 S.W.3d at 724; *see also* BASF FINA Petrochem. Ltd. P'ship v. H.B. Zachry Co., 168 S.W.3d 867, 870 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (interpreting *San Benito* to require that "whether the appellant is bound by the judgment" be the most important determination for standing to appeal); *see also* Hopper, *supra* note 75.

153. *See In re Lumbermens*, 184 S.W.3d at 724; Sonat's Response Brief, *supra* note 8, at 13-16.

154. Sonat's Response Brief, *supra* note 8, at 16-17.

155. *Compare id.* ("[D]ue process concerns are not present because . . . [e]very policy of insurance contains a clause requiring an insured to cooperate with its insurer. Lumbermens does not deny that such a provision exists. Failure to comply with its duty to cooperate exposes an insured to a loss of coverage."), *with supra* note 100 and accompanying text (examining *Huizar* decision where Justice Kilgarlin acknowledges that "other instances exist when insurance carries are not automatically bound by judgments

Despite the positioning by Sonat, the *Lumbermens* court's discussion of this argument squarely addressed the "bound by the judgment" test.[156]

Sonat forwarded several variations on the basic argument that Lumbermens should have been required to intervene at the trial court level.[157] The *Lumbermens* court, in addressing these arguments re-framed the entire issue, which first arose in *Smith*, about why privity should be a matter of record, as an issue resolved only by requiring a fact-intensive inquiry into the functional relationship and the balance of equities between the interests of non-parties and named parties.[158]

1. "Identity of interest" becomes "formerly identical but now somewhat diverging" interest

The *Lumbermens* court, relying on *El Paso Independent Automobile Dealers Ass'n* and *City of San Benito* addressed the concept of "identity of interest" within the virtual representation doctrine in a manner favorable to allowing non-party standing to appeal. Sonat's Response Brief argued that the "identity of interest" element as stated in *El Paso Independent Automobile Dealers Ass'n* was not met because "[t]he party seeking to appeal/intervene must have a current identity of interest with respect to the issues on appeal, not an identity of interests at one time."[159] An additional risk suggested in Sonat's Response Brief is that appealing on extremely remote grounds under the Texas Rules of Appellate Procedure, even in good faith, is a sanctionable offense if the court of appeals finds those grounds to be frivolous.[160] The *Lumbermens* court candidly explained that a

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against their insureds. Such devices such as 'non-waiver' agreements are sometimes utilized by insurance companies . . . "); Lumbermens' Brief, *supra* note 8, at 18 (citing, amongst other sources, Johnson, *supra* note 90 at 1321, for the proposition that the preclusive effects of the virtual representation doctrine require the bound party to have the "opportunity to be heard").

156. *See In re Lumbermens*, 184 S.W.3d at 725.

157. *See* Sonat's Response Brief, *supra* note 8, at 17-22 ("3. Lumbermens Motion Was Untimely . . . 4. Policy Considerations Disfavor Intervention in the Appellate Court . . . 5. Intervention Prejudices Sonat's Rights.").

158. *Compare In re Lumbermens*, 184 S.W.3d at 722 ("[A]s a practical matter, one who seeks to invoke the virtual representation doctrine must take some timely, appropriate action to attain named-party status."), *with supra* note 62-63, 66-67 and accompanying text (discussing Smith v. Gerlach, 2 Tex. 424, 427 (1838)).

159. Sonat's Response Brief, *supra* note 8, at 14 n.24 (citing Indus. Generating Co. v. Jenkins, 410 S.W.2d 658, 661 (Tex. Civ. App.—Austin 1966, no writ)).

160. *See* TEX. R. APP. P. 45 ("Damages for Frivolous Appeals in Civil Cases"); Sonat's Response Brief, *supra* note 8, at 5 n.7 ("Cudd may have made this proposal [not to pursue an appeal on the choice-of-law issue] because a decision, issued after the judgment was entered in this case, from the Houston appellate court in *Chesapeake Operating v. Nabors*

conflict between a named and an unnamed party over how to protect an interest does not eliminate the interest being ostensibly "identical":

> [O]ur decisions in *El Paso Independent Automobile Dealers Ass'n* and *City of San Benito* illustrate that the position of one who relies on the virtual-representation doctrine to appeal and the party that formerly represented its interests will have often, if not always, diverged to some extent by the time the beneficiary of the doctrine invokes it.[161]

The *Lumbermens* court identified as the identical interest, the underlying liability judgment against the insured, stating "That different legal theories may be asserted to defend those funds does not defeat the identity of interest between Lumbermens and Cudd that the insuring contract creates and the virtual-representation doctrine protects."[162] In the description of the Local Officials' conduct in *El Paso Independent Automobile Dealers Ass'n*, the *Lumbermens* court implies that this protection for non-parties is somewhat remedial in nature: "Not until those attorneys *abandoned* their defense of the statute did the need arise for the Attorney General and the Board to directly participate in order to protect their interests."[163] This intimation of a duty of good faith was more explicit in the *Lumbermens* court's refutation of the suggestion that Lumbermens' grounds for appeal are not frivolous.[164] It may be reasonably inferred that once an identity of interest with a non-party is established, the named party is obliged, a matter of "good faith," to endeavor with sufficient vigor to protect the non-party's interest, under some circumstances in derogation of the

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Drilling USA, Inc., 94 S.W.3d 163 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (en banc), a case substantially similar to this one, made the prospect of a reversal on the choice-of-law issue extremely remote."); *see also* Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 2 S.W.3d 393, 397 (Tex. App.—San Antonio 1999, no pet.) ("We have no hesitancy in concluding Mid-Continent's appeal is objectively frivolous. No reasonable attorney could fail to conclude this court would uphold the trial court's summary judgment and its attorney's fees award."); Smith v. Brown, 51 S.W.3d 376, 380-81 (Tex. App—Houston [1st Dist.] 2001, pet. denied) (explaining that criteria for sanctions are broad and holding that a "frivolous appeal" does not require that it be made in "bad faith").

161. *In re Lumbermens*, 184 S.W.3d at 724.

162. *Id.*

163. *Id.* at 724 (emphasis added).

164. *See id.* at 728 ("[I]f Lumbermens is not permitted to intervene and the choice-of-law issue is meritorious, Cudd will have essentially foisted liability for uninsured claims onto its insurer."); *see also* discussion *infra* Part III.B.3. *But see* discussion *supra* Part III.A.1.

named party's own interest in having an undisturbed judgment and notwithstanding risk of sanction for a frivolous appeal.

In the context of insurance, *Lumbermens* seems to favor an outcome akin to what is advocated by Justice Gonzalez's dissenting opinion in *Huizar*—a contractual obligation of the insured to cooperate, backed by an equitable remedy of allowing named party status to the insurer if the insured's interest representation, becomes inadequate.[165] The *Lumbermens* court's response to Sonat's policy argument elucidates this point.[166] The *Lumbermens* court cited *Northern County Mutual Insurance Co. v. Davalos* as authority for the seemingly moderating proposition that "every disagreement between an insured and its liability insurer would not justify separate appeals . . . . [T]he insurance policy determines whether an insurer or its insured has the right to control litigation."[167] In context, rather than *Davalos* moderating the holding of *Lumbermens*, it seems more likely that *Lumbermens* may moderate the holding of *Davalos*. *Davalos* involves an insurer who retains the right to control the defense of its insured notwithstanding disagreement with the insured over procedural aspects of the case.[168] In finding for the insurer, the *Davalos* court clarifies:

> Under certain circumstances . . . an insurer may not insist upon its contractual right to control the defense. . . . [A]n insurer's right of control generally includes the authority to make defense decisions as if it were the client "where no conflict of interest exists." . . . Thus, the insured may rightfully refuse an inadequate defense and may also refuse any defense conditioned on an unreasonable, extra-contractual demand that threatens the insured's independent legal rights.[169]

Lumbermens is significant because it suggests that an insurer has a right of separate appeal that protects its interest in safeguarding against an indemnifiable judgment.[170] This

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165. *See* discussion of Continental Cas. Co. v. Huizar, 740 S.W.2d 429, 433-34 (Tex. 1987) (Gonzalez, J., dissenting) *supra* notes 79, 102 and accompanying text.

166. *In re Lumbermens*, 184 S.W.3d at 728 (dismissing the notion that the Court's holding will encourage insurers' "interfering with insureds' appellate strategy or raising issues contrary to their insureds' interests or colluding with their insureds.").

167. *Id.* (citing Northern County Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 688-89 (Tex. 2004)).

168. *See Davalos*, 140 S.W.3d at 686 (describing a dispute over choice of venue).

169. *Id.* at 688-89.

170. *See id.* at 689.

protection corresponds to that bestowed upon the insured in *Davalos* and protects against both "an inadequate defense" and threats to "independent legal rights."[171] Even if *Lumbermens* was not so intentionally or overtly formulated, the net result favors non-party insurers, and perhaps a broader set of others interested in judgments.

2. "Bound" does not mean precluded from attaining the same ends through separate litigation

The *Lumbermens* court observed that there is a crucial difference between waiving the right to appeal through voluntarily paying the judgment, and pledging a bond that creates the "obligation to pay the underlying judgment . . . in the event [the insured's] appeal is unsuccessful."[172] Although the *Lumbermens* court did not discuss the facts in *Huizar*, a major factual distinction between the two cases is that the insurer in *Lumbermens* secured the judgment with a $29 million bond, rather than paying "under protest."[173] The "bound" concept is therefore satisfied by the loss occurring when the appeal is lost.

Significantly, the concept of "bound" does not require the non-party to be precluded from having other remedies.[174] The *Lumbermens* court's analysis of the "bound by the judgment" element seems to directly contradict Justice Kilgarlin's intent to require insurers to drop potential policy defenses in order to have standing to appeal.[175]

There is a conceptual similarity between the *Lumbermens* court's paradoxical idea that "bound" doesn't necessarily mean "precluded" and the equally paradoxical idea that those with an "identity of interest" can have diverging interests.[176] That similarity is the further shift towards a greater concern over protecting a non-party's rights.

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171. *Id.*

172. *In re Lumbermens*, 184 S.W.3d at 725.

173. *Id.* at 721.

174. *Compare id.* at 725 ("Even if Lumbermens could eventually recoup the amount it has pledged through a potential coverage suit against Cudd, its obligation to pay the underlying judgment to Sonat is immediate and binding . . . ."), *with supra* notes 76-78 (discussing Continental Cas. Co. v. Huizar, 740 S.W.2d 429 (Tex. 1987)).

175. *Cf.* Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965) ("Surely there is no great constitutional consideration which requires that the parent, who acts within the six-month's [sic] period, should have two remedies, while the parent who, for some reason, does not act within such period, is restricted to one remedy only."). *Compare* discussion of *Huizar*, *supra* notes 100-101 and accompanying text, *with In re Lumbermens*, 184 S.W.3d at 725.

176. *See supra* note 160 (quoting *In re Lumbermens*, 184 S.W.3d at 724).

3. Privity of interest from record is reframed as "timely, appropriate action"

The *Lumbermens* court discussed how standing to appeal under the virtual representation doctrine may be satisfied if the non-party's attempt to invoke the right is done through a "timely, appropriate action."[177] The Texas Supreme Court held that the submission to the appellate court of a motion, equivalent to a trial court plea of intervention, was "a vehicle . . . consider[ed] appropriate to obtain named-party status if Lumbermens meets the requirements necessary to assert the virtual-representation doctrine, and if equitable considerations do not weigh against allowing Lumbermens to participate on appeal."[178] Sonat did not deny the insurer-insured relationship between Cudd and Lumbermens.[179] But neither was there any dispute that the attempt to intervene came after the trial court had rendered judgment.[180] The interpretation that privity from the record is no longer required might follow from one commentator's suggested interpretation of the situation.[181] But the *Lumbermens* court required that privity of interest be apparent from the record.[182] A better explanation is that the requirement is merely re-framed by the "timely, appropriate action" test.

The *Lumbermens* court characterized the test of "timely, appropriate action" as an equitable inquiry requiring a close look at the facts.[183] The *Lumbermens* court stated, "the mere fact that the party does not attempt to invoke those rights until after judgment, when the need to invoke them arose, is not dispositive."[184] The *Lumbermens* court instead adopted the following equitable considerations discussed in the 5th Circuit case *Ross v Marshall* to evaluate whether an insurer can intervene, under Federal Rule of Civil Procedure (24)(a)(2):

> A motion to intervene under Rule 24(a)(2) is proper when: (1) the motion to intervene is timely; (2) the

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177. *In re Lumbermens*, 184 S.W.3d at 722.

178. *Id.*

179. *See* Sonat's Response Brief, *supra* note 8, at 13-14 ("Sonat also acknowledges that Lumbermens has provided Cudd's defense.").

180. *In re Lumbermens*, 184 S.W.3d at 725-26.

181. *See* Hopper, *supra* note 75 and accompanying text.

182. *In re Lumbermens*, 184 S.W.3d at 722.

183. *See id.* at 725 ("[V]irtual representation is best understood as an equitable theory rather than as a crisp rule with sharp corners and clear factual predicates such that a party's status as a virtual representative of a nonparty must be determined on a case-by-case basis.") (citing Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 761 (1st Cir. 1994) (citation omitted)).

184. *In re Lumbermens*, 184 S.W.3d at 726.

> potential intervener [sic] asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest.[185]

Ross v. Marshall involved the insurer of a homeowner's policy who successfully intervened in order to argue that the insured was not vicariously liable (and therefore not requiring indemnification from his homeowners policy) for the civil rights complaint brought against the insured's son and his dinner guests for burning a cross on the insured's neighbor's lawn.[186] The *Ross* court found that the insurer was entitled to intervene as a "real party in interest."[187] In formulating its equitable balancing tests, the *Ross* court observed that "the interest 'test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[188]

All of the *Ross* factors weighed in favor of the insurer in both *Ross* and *In re Lumbermens.*[189] That the *Lumbermens* court weighed the *Ross* factors like the *Ross* court did is perhaps a less important analysis than why the *Ross* test was chosen at all. By relying so heavily on a test designed to involve "as many apparently concerned persons as is compatible with efficiency and due process,"[190] the *Lumbermens* court follows an approach that seems very much at odds with *Smith.*[191] One commentator has ascribed this to a general difference between nineteenth and twentieth century jurisprudential approaches.[192] Irrespective of

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185. Ross v. Marshall, 426 F.3d 745, 753 (5th Cir. 2005); *see also In re Lumbermens*, 184 S.W.3d at 726; FED. R. CIV. P. 24(a)(2).

186. *See Ross*, 426 F.3d at 745.

187. *Id.* at 757.

188. *Id.* (quoting Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994)).

189. *See id.* at 753-61; *In re Lumbermens*, 184 S.W.3d at 725-29.

190. *Ross*, 426 F.3d at 757.

191. *See* discussion *supra* Part III.A.1.

192. *See* Bone, *supra* note 62, at 212 (suggesting that somehow pragmatism was disfavored until the twentieth century); *see also, e.g.*, O.F.L. v. M.R.R., 518 S.W.2d 113, 120-21 (Mo. App. 1974) (holding that under Missouri law, even when there is not "privity[] in the classic legal sense[,]" a party may be bound, as virtually represented, if "the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them."). *But see O.F.L*, 518 S.W.2d at 121 ("The doctrine of virtual representation, well recognized in equity, is based

whether this is an accurate characterization, that other courts have taken a functional and fact-intensive approach, is readily observable.

For example, in *Aerojet-General Corp. v. Askew*, considered by commentators (and *Lumbermens*) to be a leading case on the application of the virtual representation doctrine to federal civil procedure, the Fifth Circuit held that when interests are closely aligned, a non-party is bound as virtually represented.[193] *Aerojet* characterized this interest alignment as a question of fact;[194] In the case of *Pollard v Cockrell*, however, the Fifth Circuit held that closely aligned interests alone are not enough, and that a legal relationship in which parties are accountable to non-parties is also required for non-parties to be bound as virtually represented.[195] In *Pollard*, massage parlor patrons who were not party to an action brought by massage parlor owners were not precluded by the doctrine of virtual representation from bringing an action in their own name.[196] That the massage parlor patrons had retained the same lawyer as the massage parlor owners to pursue separate actions over the same issue did not create a sufficient legal relationship between the two independent parties.[197]

Daigle v Portsmouth addressed the "functional relationship" issue in the context of an indemnification agreement requiring that "at a minimum, the interests of the non-party were in fact represented and protected in the prior litigation" by the named party.[198] The *Daigle* court suggested, "when an employee takes control of the defense of a *respondeat superior* claim against his employer based on his own acts" as an example of such representation.[199] At least one other state has applied the *Daigle* analysis of federal preclusion law to its state substantive

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upon considerations of necessity and paramount convenience and may be invoked to prevent a failure of justice.") (quoting Brown v. Bibb, 201 S.W.2d 370, 374 (Mo. 1974)); Johnson, *supra* note 90, at 1310-14.

193. Aerojet v. Askew, 511 F.2d 710, 719 (5th Cir. 1975) (interpreting the federal law of res judicata); *see* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1037 n.103 (describing *Aerojet* as the "seminal case"); Hopper, *supra* note 75, at 568 n.61 (noting that *Aerojet* has been quoted in nearly every federal court to review the doctrine of virtual representation); Lumbermens' Brief, *supra* note 8, at 12-13 (crediting *Aerojet* with the twentieth century re-emergence of the doctrine of virtual representation).

194. *See Aerojet*, 511 F.2d at 719.

195. Pollard v. Cockrell, 578 F.2d 1002, 1008 (5th Cir. 1978).

196. *See id.* at 1006 (finding, however, that the patrons did not have a justifiable interest in the contest before that court to have standing).

197. *See id.* at 1009-10.

198. Daigle v. Portsmouth, 534 A.2d 689, 694 (N.H. 1987) (interpreting federal law).

199. *Id.*

jurisprudence. In *Public Service Co. of Colorado v. Osmose Wood Preserving*, the court found that under Colorado law, a non-party may be bound if the functional relationship was such that the non-party had a "full and fair opportunity" to participate.[200] Notwithstanding that this line of cases, including *Ross*, from courts of other jurisdictions seems to follow a cogent logic, because the issue addressed therein is one of preclusion rather than standing to appeal, some underlying connection must be inferred to explain why *Lumbermens* adopted the *Ross* factors.

One possible connection between the *Ross* preclusion line of cases and *Lumbermens* was articulated in the Harvard Law Review:

> [T]he most forceful arguments for estoppel are those which make the interest of a "day in court" less compelling. . . . In determining whether a nonparty's interest in litigating an issue identical to one litigated in a previous action is more or less compelling, the crucial element is the extent to which the nonparty may be thought to have had a vicarious day in court. Two aspects of this question can be identified. First, to what extent did the nonparty participate in or control the prior action; second, to what extent can the issue be said to have been fully and fairly litigated in the first action in a manner which protects the interests of the nonparty.[201]

Although at least one commentator has criticized the "day in court" ideal as irrational,[202] the *Lumbermens* court explicitly invoked it.[203] To the extent that equity governs the evaluation of the functional relationship between a named party and a non-party for purposes of the virtual representation doctrine, the preclusion application is that the "day in court" has happened through litigation, whereas the standing to appeal application seems to be that the "day in court" is not yet over.[204]

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200. Pub. Serv. of Colo. v. Osmose Wood Preserving, Inc., 813 P.2d 785, 787 (Colo. Ct. App. 1991).

201. Note, *Collateral Estoppel Of Non-Parties*, 87 HARV. L. REV. 1485, 1499-1500 (1974).

202. Bone, *supra* note 62 at 196 ("The 'day in court' is often invoked in talismanic fashion to oppose nonparty preclusion without any explanation of why the values underlying the ideal support the result.").

203. *See* In re Lumbermens Mut. Cas. Co., 184 S.W.3d 718 at 727 (Tex. 2006) ("It is essential to our system of justice, that litigants should have their day in court") (alterations removed) (quoting United Airlines v. McDonald, 432 U.S. 385, 395 (1977)).

204. *See supra* text accompanying notes 196-97.

C. *A "Substantially Aggrieved" Standard is More Effective than the Virtual Representation Doctrine for Achieving the "Vindicate Important Interest" Ideal*

Although the "vindicate important interest" concept sounds expansive, the *Lumbermens* court cautions that the scope of the virtual representation doctrine should be expanded incrementally: "We reiterate that whether a would-be intervenor is entitled to appeal under the virtual-representation doctrine is an equitable determination that must be decided on a case-by-case basis."[205] Announcing a right with uncertain parameters such that a "would-be intervenor" does not know whether she or he has that right, however, seems at odds with the Texas Supreme Court's ongoing concern that the right to appeal be implemented effectively.[206] The suggestion of this Note is that having arrived upon a "vindicate important interest" objective from incremental shifting,[207] it is now more effective to adopt a bright line rule, such as Colorado's rule wherein "[a] non-party has standing to appeal an order of the trial court following entry of final judgment if it appears that the non-party was substantially aggrieved by the order."[208]

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205. *In re Lumbermens*, 184 S.W.3d at 728-29.

206. *See id.*; *supra* note 46 and accompanying text ("[T]he right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule."); *supra* note 65 and accompanying text (observing that the Texas Supreme Court has long been concerned that the rules of appellate procedure be effective so as to preserve the right to appeal); *cf.* Tice v. American Airlines, Inc., 162 F.3d 966, 970 (7th Cir. 1998) ("[T]he doctrine of virtual representation is amorphous. Indeed, in our view the term itself illustrates the harm that can be done when a catchy phrase is coined to describe a perfectly sensible result. The phrase takes on a life of its own, and before to long, it starts being applied to situations far removed from its intended and proper context.").

207. *See supra* Part III.A.1-4.

208. Bush v. Winker, 907 P.2d 79, 81 (Colo. 1995). Note that Colorado is not the only state to have a "substantially aggrieved" rule. *See, e.g.*, *In re* Allen, 800 S.W.2d 715, 717 (Ark. 1990) ("[T]he Arkansas Supreme Court recognized the right of those interested, i.e. pecuniarily *affected* to perfect an appeal where action had been taken without notice to the one complaining."); St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., 896 A.2d 304, 313 (Md. 2006) ("In situations where the aggrieved appellant, challenging a trial court discovery or similar order, is not a party to the underlying litigation in the trial court, or where there is no underlying action in the trial court but may be an underlying administrative or investigatory proceeding, Maryland law permits the aggrieved appellant to appeal the order because, analytically, it is a final judgment with respect to that appellant."); Federated Mut. Ins. Co. v. McNeal, 943 So. 2d 658, 662-63 (Miss. 2006) (citing SEC v. Forex Asset Mgmt LLC, 242 F.3d 325, 329 (5th Cir. 2001) for its approach wherein the right to appeal is granted where "the non-party actually participated in the proceedings below, the equities weigh in favor of hearing the appeal, and the non-party has a personal stake in the outcome"). Also, this is not the only context for aggrieved non-parties having the right to appeal. *See, e.g.*, U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying

The Colorado "substantially aggrieved" rule would work well in Texas. Under the Texas rules, frivolous appeals are to be avoided.[209] The current doctrine of virtual representation, under *Lumbermens*, also looks for prejudice to the interest of the non-party created by the inadequate representation by the named party.[210] The Colorado rule addresses both of these concerns:

> Appeals are not allowed for the mere purpose of delay, or to present purely abstract legal questions however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation. Only parties aggrieved may appeal. The word 'aggrieved' refers to a substantial grievance; the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation.[211]

Rather than examine how functional the relationship between the named party and the non-party was, and then speculate over what amount of representation might have been adequate, the Colorado "substantially aggrieved" requirement looks directly at actual harms.[212] Under the Colorado "substantially aggrieved" rule, the functional relationship between the non-party and the named party is not totally ignored, rather it is considered in the context of harms which often follow imposed obligations commensurate with that relationship.[213] If clearly defining what it means to satisfy the

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action."); *see also* 23 AM. JUR. 2D *Appellate Review* § 265 and criticism thereof, *supra* note 137 and in accompanying text. *But see* Ark. Dept. of Human Svcs. v. Strickland, 970 S.W.2d 311 (Ark. App. 1998) (noting how the rule in *Allen*, 800 S.W.2d 715, is a narrow exception). The Colorado rule was picked, in part, because Colorado also considers issues of adequate participation by non-parties, *see supra* note 198, and in part for the reasons stated in this section *infra*.

209. *See* discussion of TEX. R. APP. P. 45 and cases cited *supra* note 159.

210. *See supra* notes 162-64, 185, 197-98 and accompanying text.

211. *In re* Macky's Estate, 102 P. 1088, 1089 (Colo. 1909); *see also* AMCO Ins. Co. v. Sills, (explaining that mere adverse circumstances arising from the judgment does not make one substantively aggrieved, but "a nonparty may be substantially aggrieved when a judgment creates for the nonparty an enforceable liability that did not otherwise exist").

212. *Compare Macky's Estate*, 102 P. at 1089, *with* Ross v. Marshall, 426 F.3d 745, 757 (5th Cir. 2005) ("We have held that in order to meet this requirement, an applicant must point to an interest that is 'direct, substantial, [and] legally protectable.' This requires a showing of something more than a mere economic interest; rather, the interest must be 'one which the substantive law recognizes as belonging to or being owned by the applicant.'").

213. *See, e.g.*, People *ex rel.* C.A.G., 903 P.2d 1229, 1233 (Colo. Ct. App. 1995) (holding that the obligations imposed on a County Department of Social Services as the legal, but not physical, custodian of a juvenile delinquent to educate the delinquent made

"vindicate important rights" test encourages more non-parties to appeal, the appeals will ostensibly occur because the trial-level non-party appellants understand their rights, and thus are in service of the objective from *Ross* to formulate "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[214]

IV. CONCLUSION

In proposing that Texas, with respect to standing to appeal, replace the virtual representation doctrine with a bright line rule substantially similar to Colorado's "substantially aggrieved" rule, this Note has emphasized how the rule has shifted. In doing so, it is understood that a bright line rule is contradictory to the "case by case" approach that the Texas Supreme Court has prescribed in *Lumbermens*.[215] Admittedly, the benefits of inductive reasoning inherent with a "case by case" approach were endorsed by no less than Oliver Wendell Holmes, Jr.:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than syllogism in determining the rules by which men should be governed.[216]

But, one of the "felt necessities" expressed in *Lumbermens* is the need to formulate a test to determine who is entitled to equitable relief.[217] Having used experience to discern the "equitable theory" that informs the purposes of the virtual representation doctrine, let us now use logic to create a bright line rule to effectively achieve those purposes.[218] Perhaps when

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the Department substantially aggrieved—thus able to bring an appeal in its own name, although not a party to the trial).

214. Text accompanying *supra* note 185 (quoting *Ross*, 426 F.3d at 757); *In re* Lumbermens Mut. Cas. Co., 184 S.W.3d 718, 723 (Tex. 2006).

215. *See supra* notes 181-201 and accompanying text (quoting and discussing *In re Lumbermens*).

216. HOLMES, *supra* note 70 at 1.

217. *Id.*; *see supra* note 143, accompanying text, and subsequent discussion in the introduction section of Part III.B of the formulation of the test *in re Lumbermens* for determining who is entitled to equitable relief under the doctrine of virtual representation.

218. *See* cases cites *supra* note 180 and accompanying text.

the virtual representation doctrine's applicability next comes before the Texas Supreme Court, the court will do just that.

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