FILED
16-0179
3/30/2017 11:03:35 AM
tex-16166728
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 16-0179

IN THE SUPREME COURT OF TEXAS

Century Surety Company,
Petitioner

v.

Jane Doe,
Respondent

On Petition for Review from the
Court of Appeals for the Fifth District of Texas at Dallas
Cause Number 05-01019-CV

BRIEF OF *AMICUS CURIAE* FEDERATION OF DEFENSE AND CORPORATE COUNSEL

Stephen P. Pate
Norton Rose Fulbright US LLP
Fulbright Tower
1301 McKinney
Suite 5100
Houston, TX 77010-3095
(713) 651-5151

IDENTITY OF PARTIES, *AMICUS CURIAE* AND COUNSEL

In compliance with Texas Rules of Appellate Procedure 52.3(a) and 11(a), the following is a list of all parties and the *amicus curiae*, and the name and address of counsel:

Petitioner/Relator

Century Surety Company

Attorneys for Petitioner/Relator

Wallace B. Jefferson
State Bar No. 00000019
wjefferson@adjtlaw.com
Dana Livingston
State Bar No. 12437420
dlivingston@adjtlaw.com
Alexander Dubose Jefferson & Townsend LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
(512) 482-9300—Telephone
(512) 482-9303—Facsimile

Charles T. Frazier, Jr.
State Bar No. 07403100
cfrazier@adjtlaw.com
Roger D. Townsend
State Bar No. 20167600
rtownsend@adjtlaw.com
Alexander Dubose Jefferson & Townsend LLP
4925 Greenville Avenue, Suite 510
Dallas, Texas 75206-4026
(214) 369-2358—Telephone
(214) 369-2359—Facsimile

Respondent (Petition for Review)/Real Party in Interest

Jane Doe

Attorneys for Respondent (Petition for Review)/Real Party in Interest

G. Michael Gruber
State Bar No. 08555400
mgruber@ghjhlaw.com
Tom "Trey" Crawford III
State Bar No. 24059623
tcrawford@ghjhlaw.co
Brian E. Mason
State Bar No. 24079906
bmason@ghjhlaw.com
Gruber Elrod Johansen Hail Shank LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
(214) 855-6800—Telephone
(214) 855-6808—Facsimile

Royce B. West
State Bar No. 21206800
royce.w@westllp.com
Veretta L. Frazier
State Bar No. 00793264
Veretta.f@westllp.com
West & Associates, L.L.P.
320 South RL Thornton Freeway, Suite 300
Dallas, Texas 75203
(214) 941-1881—Telephone
(214) 941-1399—Facsimile

Jeffrey S. Levinger
State Bar No. 12258300
jlevinger@levingerpc.com
Levinger PC
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
(214) 855-6817—Telephone
(214) 855-6808—Facsimile

Respondent (Petition for Writ of Mandamus)

Fifth Court of Appeals
George L. Allen, Sr. Courts Bldg.
600 Commerce Street, Suite 200
Dallas, Texas 75202-4658
(214) 712-3450—Telephone
(214) 745-1083—Facsimile

Other Interested Party—Defendant

Ajredin "Danny" Deari

Attorneys for Other Interested Party—Defendant

Gregory W. Mitchell
State Bar No. 00791285
greg@mitchellps.com
The Mitchell Law Firm, L.P.
12720 Hillcrest Road, Suite 625
Dallas, Texas 75230
(972) 463-8417—Telephone
(972) 432-7540—Facsimile

Other Interested Party—Defendant

Pastazios Pizza, Inc.

Attorneys for Other Interested Party—Defendants

Y.W. Peter Chen
State Bar No. 24065038
peter@chendotson.com
David R. Dotson
State Bar No. 24069625
david@chendotson.com
Chen Dotsdon PLLC
10455 North Central Expressway, Suite 109-348
Dallas, Texas 75231
(972) 251-2436—Telephone
(972) 476-1080—Facsimile

Joyce Lindauer
State Bar No. 21555700
joyce@joycelindauer.com
Joyce W. Lindauer Attorney, PLLC
12720 Hillcrest, Suite 625
Dallas, Texas 75230
(972) 503-4033—Telephone
(972) 503-4034—Facsimile

Other Interested Party—Trustee

Scott M. Seidel, Trustee of the Pastazios Pizza, Inc. Creditors Trust

Attorneys for Other Interested Party -- Trustee

Michael W. Huddleston
State Bar No. 10148415
mhuddleston@munsch.com
Davor Rukavina
State Bar No. 24030781
drukavina@munsch.com
J. Stephen Gibson
State Bar No. 07866000
sgibson@munsch.com
Thomas D. Berghman
State Bar No. 24082683

tberghman@munsch.com
Munsch, Hardt, Kopf & Harr, P.C.
3800 Ross Tower, 500 North Akard Street
Dallas, Texas 75201
(214) 855-7500—Telephone
(214) 855-7584—Facsimile

Amicus Curiae

Property Casualty Insurers Association of America

Attorneys for *Amicus Curiae* Property Casualty Insurers Association of America

Levon G. Hovnatanian
State Bar No. 10059825
hovnatanian@mdjwlaw.com
Martin, Disiere, Jefferson & Wisdon, L.L.P.
808 Travis, 20th Floor
Houston, Texas 77002
(713) 632-1700—Telephone
(713) 222-0101—Facsimile

Amicus Curiae

Federation of Defense and Corporate Counsel

Attorneys for *Amicus Curiae* Federation of Defense & Corporate Counsel

Stephen P. Pate
Norton Rose Fulbright US LLP
Fulbright Tower
1301 McKinney
Suite 5100
Houston, TX 77010-3095
(713) 651-5151—Telephone

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Federation of Defense & Corporate Counsel (FDCC) formed in 1936 and has international membership of 1,400 defense and corporate counsel. FDCC members work in private practice, as in-house counsel, and as insurance-claims executives. Membership is limited to attorneys and insurance professionals nominated by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. Its members have established a strong legacy of representing the interests of civil defendants.

The FDCC constantly strives to protect the American system of justice. Through its *amicus curiae* efforts, the FDCC seeks to assist courts in addressing issues of importance to its membership. Such issues include ensuring the integrity of the adversarial system and ensuring that the interests of all parties impacted by a judgment are represented in litigation.

The FDCC is the sole source of the fee to be paid for preparing this brief.

STATEMENT OF THE CASE AND FACTS

The FDCC adopts and incorporates by reference the Statement of the Case and Statement of Facts set forth in Relator Brief on the Merits.

SUMMARY OF THE ARGUMENT

In this case, Century Surety Company (Century) sought to intervene under the doctrine of virtual representation and mount an appeal from a $20 million judgment against its insured, Pastazios Pizza, Inc. (Pastazios). Century sought intervention when Pastazios's bankruptcy Trustee chose not to appeal, even when Century agreed to fully fund the appeal and even though the Trustee admitted that viable grounds for reversal existed. The Trustee's failure to appeal a remarkably infirm judgment further demonstrates that the parties conducted a non-adversarial proceeding before the trial court that reeks of collusion.

The court of appeals denied Century's motion to intervene without explanation. But the plaintiff, Jane Doe, and the Trustee vigorously encouraged the court to deny the motion based on four arguments: (1) Century's intervention was allegedly untimely; (2) Century brought a declaratory-judgment action in federal court seeking to resolve the coverage issues associated with Pastazios's insurance Policy; (3) Century allegedly "wrongfully" denied a defense; and (4) permitting Century to intervene on appeal would create more work for the parties and the court by multiplying the issues.

None of these arguments meets the criteria of relevant equitable considerations weighing against intervention, as required by this Court's virtual-representation jurisprudence. By denying Century's intervention motion based on irrelevant considerations, the court of appeals deprived Century of its ability to

protect its own interests, and furthered the original parties' perversion of the adversarial system by allowing the collusive judgment to stand at the expense of Century's interests.

The undermining of the adversarial system to produce an inflated judgment, and the subsequent refusal to allow an interested party to intervene to appeal and protect itself, is deeply troubling and has far-reaching implications beyond this single action. Allowing parties to subvert the course of justice at the expense of an interested but non-participating third party, and then refusing to allow that party to protect its interests where it meets the criteria to intervene, will set a dangerous precedent that will undermine the public trust in the judicial system. It will threaten the interests of all virtually represented parties, regardless whether they are insurance companies.

Texas has recognized the rights of virtually represented parties like Century to intervene at the appellate level. Texas courts have delineated certain facts that must be shown and factors to consider before allowing a party to intervene, but the courts are not unwilling to allow the involvement of previously uninvolved parties whose rights are impacted by the outcome of an appeal. Century meets the criteria of a virtually represented party here, and the relevant equitable factors do not weigh against allowing it to intervene.

For these reasons, the FDCC supports the positions of Relator Century, which sought to intervene before the court of appeals. The FDCC urges the Court

to reverse the court of appeals' denial of Century's intervention motion and to adopt the FDCC's reasoning set forth in the present brief.

ARGUMENT

I. The adversarial system of justice is crucial to finding truth and maintaining the public's trust in the courts.

Well-reasoned arguments by opposing parties, which play an integral role in our adversarial system of justice, are crucial to fair and trustworthy proceedings in the courts. That system was abandoned in this case, perverting the course of justice. It appears from the record that the original parties to the litigation discarded their traditional adversarial roles in that the defendants did not fear the outcome and the plaintiff pinned her hopes for recovery on a non-party insurer that remained the only potential source of funds. The record in this case reveals an alarming absence of adversarial proceedings at trial and on appeal, which raises the specter of a sham judgment and has far-reaching effects on our members.

A. The adversarial system is the proper mechanism for achieving a trustworthy judgment.

Faith in the truth and public trust form the basis of our adversarial court system. The courts must be constantly vigilant to protect the adversarial system from manipulation that circumvents the truth and erodes that trust. If our courts are to perform their truth-finding mission, the adversarial system must function properly and not be perverted to produce an engineered result.

The "adversarial system . . . is at the heart of litigation." 14 Tex. Prac., Texas Methods of Practice § 77:1 (3d ed.). It "is based upon the concept that two advocates, vigorously employing the rules of procedure and evidence in fighting for their clients, will ultimately ferret out the truth and, therefore, justice will prevail." *Id.*; *see also In re Anonymous*, 729 N.E.2d 566, 569 (Ind. 2000) (holding that "the heart of our adversarial system of justice is the opportunity for both sides of a controversy to be fairly heard"); *Com. v. Durham*, 446 Mass. 212, 232 (2006) (Cordy, J. dissenting) (explaining that the search for truth is "at the heart of our adversarial system"); A. Eric Bjorgum, *Pursuing Truth in the Adversary System: An Ideal Criterion*, 9 Geo. J. Legal Ethics 1211, 1218 (1996) ("[T]he chief justification for the adversary system is that it is the best way to reach the truth.").

The adversarial system is also an important unifying tool to achieve justice in our society. David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 Neb. L. Rev. 657, 709 (2000). It provides parties "the chance for an approximation of fairness and justice" and "operates as a release valve that keeps the pressures within the political system from becoming so great that they severely weaken or destroy the overall integrity of the community." *Id.*

Specifically, the adversarial system seeks truth by ensuring that *all* parties to an action are represented by advocates aggressively asserting their strongest positions. *See* Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L. Rev. 1007, 1035 (1990) ("The adversarial

process rests on a basic tenet: the truth will most often and most completely emerge through the tension between two equally armed advocates aggressively asserting their strongest positions."); *see also Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1227-28 (D. Neb. 1995) (explaining that "[t]he adversarial system has been embraced because it is believed that truth is best divined in the crucible of cross examination and adversarial argument") (citations omitted); *Lockhart v. Fretwell*, 506 U.S. 364, 377 (1993) (Stevens, J., dissenting) (noting that, without the "'crucible of meaningful adversarial testing,' there can be no guarantee that the adversarial system will function properly to produce just and reliable results") (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)).

As the Seventh Circuit stated in *McKeever v. Israel*, "our adversary system of justice works best when both sides are zealously and competently represented." 689 F.2d 1315, 1323 (7th Cir. 1982). Indeed, "[t]ruth . . . is best discovered by powerful statements on both sides" of an action. Silver, *supra,* at 1035.

But one side's lack of access to adequate legal representation hinders the adversarial system's search for the truth. *Bothwell*, 912 F. Supp. at 1228. "[E]ven the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." *Bounds v. Smith*, 430 U.S. 817, 826 (1977) (citations omitted).

Maintaining a functional adversarial system is important because "[t]he judicial branch of our government was created powerless to enforce its own

decisions; it relies on the respect of litigants for adherence to the law it declares." *Bothwell*, 912 F. Supp. at 1230 (citing *The Federalist* No. 78, at 393-94 (Alexander Hamilton) (G. Willis ed. 1982) ("The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment.")). If the public cannot trust in the process of the adversarial system, the judicial branch "will not be seen as a legitimate means to serve its purposes of peacefully resolving disputes." *Id.* Trust in the adversarial system is integral to the power and legitimacy of the courts.

B. Courts around the country routinely intervene to preserve the integrity of the adversarial system.

Courts intervene when trust in the adversarial system is threatened. *See* Barnhizer, *supra*, at 685 (explaining that "the role of the judge is to protect and apply the system's core principles"); *see also United States v. Sixty-one Thousand Nine Hundred Dollars & No Cents ($61,900.00)*, 2010 WL 4689442, at *4 (E.D.N.Y. Nov. 10, 2010) (holding that, when trust in the integrity and professionalism of the attorneys is reasonably questioned, the court can always step in and preserve the adversarial system).

Courts willingly intercede in proceedings in which the adversarial system is abused, including when a verdict is the result of collusion or a sham trial. *See, e.g.*, *In re Estate of West*, 415 N.W.2d 769, 785 (Neb. 1987) (holding that a court may vacate a verdict "if a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes intentional fraud or deceit and

results in a judgment adverse to the interests of the party"). For instance, in *Mullins v. Evans*, the Tenth Circuit vacated a conviction that resulted from a sham trial even though the defendant had consented to his attorney's plan to "throw" the case. 622 F.2d 504 (10th Cir. 1980). The court stated:

> [T]his is a classic case of a sham trial. . . . [D]efense counsel in the state criminal proceeding "threw the fight" and tried in every conceivable way to make certain that [defendant] was convicted of the highest grade of homicide, all because of some supposed advantage to be obtained as concerns eligibility for mere consideration for parole at some distant date in the future. . . . *The fact that defense counsel's conduct in [defendant]'s trial was purposeful, and done with [defendant]'s acquiescence, is in our view unimportant. The critical thing is that the trial itself was a charade.*

Id. at 506 (emphasis added).

And courts also do not sit idle when an attorney's conduct threatens judicial integrity and the public's trust. *See In re Anonymous*, 729 N.E.2d at 569 (disciplining an attorney for *ex parte* communications with the court, because "[i]mproper *ex parte* communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. [Such communications] threaten[ ] not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice.") (citations omitted); *In re Brand Name Prescription, Drugs Antitrust Litig.*, 1999 WL 301653, at *11 (N.D. Ill. Apr. 30, 1999) (stating the court could not, "in good conscience, ignore" counsel's mischaracterization of evidence at trial, because "[t]o do so would do an injustice to . . . the adversarial system within which we all operate").

Courts also actively protect the adversarial system from procedures that "present to the jury a sham of adversity," such as Mary Carter agreements, by which a plaintiff enlists one defendant's aid in its cause of action in exchange for a promise to share with that defendant any recovery from the other defendants. *See Dosdourian v. Carsten*, 624 So.2d 241, 244 (Fla. 1993) (remanding the matter for a new trial because "[i]f a case goes to trial, the judge and jury are clearly presuming that the plaintiff and the settling defendant are adversaries and that the plaintiff is truly seeking a judgment for money damages against both defendants").

Indeed, "[s]o careful is our court system in safeguarding its trustworthiness, that it has protected not only against improper practices, but also against those practices which might create an 'appearance of impropriety'; that is, those which cast doubt on the fairness of its decisions by appearing to allow improper motivations or influences to enter the decision-making process." *Bothwell*, 912 F. Supp. at 1230 (citations omitted). In other words, "[t]o become properly acquainted with a truth we must first have . . . disputed against it." Silver, *supra*, at 1035. Where counsel has not fulfilled its role as an advocate, the adversarial system is compromised unless the court intercedes to ensure fairness and justice.

C. Texas courts guard against the risk of improper judgments and orders resulting from non-adversarial proceedings.

The Texas Rules of Civil Procedure and the decisions of this court recognize that non-adversarial proceedings risk the issuance of unwarranted judgments and

orders. Texas courts guard against this risk by granting even a non-participating party certain protections in both the trial court and appellate court.

For example, a defaulting defendant in Texas does not lose its right to challenge a monetary judgment. A court must conduct an evidentiary hearing and find sufficient evidence to enter a judgment for an unliquidated award of damages. *See* Tex. R. Civ. P. 243; *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 185 (Tex. 2012) ("[T]he general rule in this state and elsewhere is that a defaulted party may participate in the post-default damages hearing." (citing *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83, 86 (Tex. 1992)); *Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993). A defaulting defendant may participate at the hearing and to challenge the plaintiff's evidence. *Ill. Emp'rs Ins. Co. of Wausau v. Lewis*, 582 S.W.2d 242, 246 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); *Rainwater v. Haddox*, 544 S.W.2d 729, 733 (Tex. Civ. App.—Amarillo 1976, no writ). "Not only may the defendant contest the plaintiff's proof, he may also present proof of his own on the issue of damages." *Mackey v. Bradley Motors, Inc.*, 871 S.W.2d 243, 247 (Tex. App.—Amarillo 1994) (citing *Fiduciary Mortg. Co. v. City Nat'l Bank of Irving*, 762 S.W.2d 196, 199 (Tex. App. Dallas 1988, writ denied), *rev'd on other grounds*, 878 S.W.2d 140 (Tex. 1994); *see also* Tex. R. Civ. P. 503.1(a)(2) (proofs required in the Justice Courts against a defaulting defendant).

Even where the defendant has completely failed to contest the matter in the trial court, the court must fulfill its proper role. It may not go beyond the allegations of the pleadings, nor may it grant damages for which the plaintiff does not present adequate evidence. *See Kao Holdings, L.P. v. Young*, 261 S.W.3d 60, 65 (Tex. 2008) (reversing entry of a default judgment against a general partner where only the partnership was sued); *Stoner v. Thompson*, 578 S.W.2d 679, 685 (Tex. 1979) ("[A]n absent party will not be considered to have tried an unpled cause of action by implied consent . . . where fair notice of that cause of action is not in the pleadings.").

Texas courts also protect against an unwarranted judgment by allowing a defaulting defendant to challenge on appeal the legal and factual sufficiency of evidentiary support for an award of unliquidated damages. *Argyle Mech., Inc. v. Unigus Steel, Inc.*, 156 S.W.3d 685, 687 (Tex. App.—Dallas 2005, no pet.); *Arenivar v. Providian Nat. Bank*, 23 S.W.3d 496, 498 (Tex. App.—Amarillo 2000, no pet.). This demonstrates that a defendant who fails to participate in a litigation does not lose its right to ensure that a judgment is both legally sound and supported by adequate evidence.

Texas also shields against misuse of the court's authority through *ex parte* proceedings. Detailed requirements and time limits regarding *ex parte* orders granting temporary restraints are set forth in Rule 680 of the Texas Rules of Civil Procedure. This rule provides "a critical safeguard against the harm occasioned by

a restraint on conduct that has yet to be subject to a truly adversarial proceeding." *In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 206-07 (Tex. 2002). And the issuing court must strictly comply with the procedural protections of the rule. *See In re Office of Attorney Gen.*, 257 S.W.3d 695, 697 (Tex. 2008).

Moreover, the courts supervise the adequacy and justice of settlements when the adversarial process by itself may not be sufficient to guarantee a fair result. *See* Tex. R. Civ. P. 42(e) (class action settlements); Tex. R. Civ. P. 44(2) (approval of the court is required for a minor's "next friend" to compromise a suit or agree to a judgment); Tex. R. Civ. P. 173(a) (authorizing the appointment of guardian ad litem where a conflict of interest may affect representation by the minor's "next friend"); *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996) ("The trial court must assume its role as guardian of the class . . . in approving settlements"); *Byrd v. Woodruff*, 891 S.W.2d 689, 696 (Tex. App.—Dallas 1994, writ denied) (describing the nature of a prove-up hearing to screen and approve a settlement on behalf of a minor).

Texas courts act to preserve their integrity when an appearance of impropriety taints the proceedings. For instance, in *In re Seven-O Corp.*, the court of appeals granted a writ of mandamus ordering the trial court to disqualify an attorney who represented both the plaintiffs and third-party defendants in a wrongful death and personal injury suit. 289 S.W.3d 384, 386 (Tex. App.—Waco 2009, orig. proceeding). The court determined that "the appearance of impropriety"

and "[t]he integrity of legal proceedings and fairness in the administration of justice," among other considerations, were "compelling reasons" to disqualify the attorney. *Id.* at 391.

Through each of these procedures, Texas courts assure that their judgments and orders will preserve the public's trust, especially where not all persons or entities with an interest in the matter are adequately represented or heard. The absence of a trustworthy adversarial process mandates that the court institute procedures that will protect its integrity and the essential fairness of the outcome.

Most relevant to this appeal, this court has consistently defended the integrity and trustworthiness of the judicial system against manipulated impositions of liability. In *State Farm Fire & Cas. Co. v. Gandy*, the Court invalidated a collusive pre-judgment assignment of an insured defendant's claim for coverage under his homeowner's policy. 925 S.W.2d 696 (Tex. 1996). The Fifth Circuit reached a similar result in *Ross v. Marshall*, 426 F.3d 745, 748 (5th Cir. 2005).

This court has also declined to enforce Mary Carter agreements. *See Elbaor v. Smith*, 845 S.W.2d 240, 247-48 (Tex. 1992) (orig. proceeding). In *Elboar*, the court there would not allow "settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment." *Id.* at 250. And the Court has invalidated an assignment of a plaintiff's

claim to a tortfeasor who then pursued the claim against a joint tortfeasor. *See Int'l Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 933-34 (Tex. 1988).

These decisions demonstrate that Texas courts carefully inspect and reverse collusive proceedings and remain ever attentive to maintaining judicial integrity and trustworthiness, particularly where the adversarial system has failed to assure a fair and just outcome.

II. The virtual-representation doctrine furthers the goals of the adversarial system by allowing non-parties to intervene at the appellate level when that party's interests will not otherwise be adequately protected on appeal.

In this case, the appeal of a questionable multi-million-dollar judgment was abandoned by the insured's bankruptcy Trustee. Because the parties in the trial court orchestrated a result designed to secure financial remuneration from a non-participating insurer, Century, the Court should be particularly vigilant in scrutinizing the legitimacy of that judgment. Because the Trustee abandoned the appeal, the only entity that has an interest in standing in as a true adversary is Century.

Texas has recognized a means by which an interested insurer[1] like Century may intervene on appeal. The virtual representation doctrine allows a party meeting the requisite criteria to further the goals of the adversarial system by

[1] In this section of the brief, we address the doctrine of virtual representation and its applicability to insurers who seek to intervene in an action at the appellate level. For ease of reference, we refer to all insurers who seek to intervene at the appellate level, for whatever reason, as "interested insurers."

stepping in on appeal to fill the void left by an original party in an effort to protect the intervening party's interests in the litigation. *See, e.g.*, *Ross*, 426 F.3d 745; *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015); *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006). The doctrine is not a rigid instrument to be applied in a uniform way. Instead, it is an equitable tool applied by courts based on the facts of each individual motion. The Court has addressed these issues before and has delineated certain conditions that must be met for virtual representation to exist such that an interested insurer may intervene on appeal:

> [A] litigant is deemed a party if it will be bound by the judgment, its privity of interest appears from the record, . . . there is identity of interest between the litigant and a named party[,] . . . . [and] equitable considerations do not weigh against allowing [the intervening party] to participate on appeal.

Id. at 722.

The first three conditions are fairly straightforward and discernible from the facts of each case. But the last condition—the equitable considerations—is more nebulous. With respect to the equitable considerations, Texas courts will allow post-judgment intervention "upon careful consideration of any prejudice the prospective intervenor might suffer if intervention is denied, any prejudice the existing parties will suffer as a consequence of untimely intervention, and any other circumstance that may 'militat[e] either for or against [the] determination.'" *Naylor*, 466 S.W.3d at 791 (quoting *Lumbermens*, 184 S.W.3d at 726). Each of

these considerations contemplates and is dependent on a healthy adversarial system to function as truly equitable considerations.

The purpose of considering these equitable factors is not to punish the interested party, but to ensure that the intervention does not prejudice the original parties. *Ross*, 426 F.3d at 754. Prejudice under the law is defined as "[d]amage or detriment to one's legal rights or claims." *Black's Law Dictionary* (10th ed. 2014). As a practical matter, the equitable considerations help the Court determine whether the intervention may cause harm or damage to the right of the original party defending the judgment on appeal to do so.

A. The equitable considerations proffered by the original parties in opposition to Century's intervention are not relevant when an interested insurer seeks to intervene on appeal under virtual representation.

Woven throughout Doe and the Trustee's briefs in the court of appeals[2] are four reasons they argue constitute the equitable considerations weighing against intervention:

1. Century's intervention was untimely.
2. Century chose to pursue a coverage action in federal court.
3. Century allegedly wrongfully declined to defend its insured, Pastazios.

[2] The court of appeals did not issue any memorandum in support of its order denying Century's motion to intervene, so although the standard of review of a denial of intervention is for abuse of discretion, we are left to guess as to its reason for the denial. But both original parties opposed Century's intervention, and it is reasonable to assume the court was persuaded by their arguments.

4. Century's intervention interferes with the jurisdiction of other courts and will multiply issues before this court.

These considerations simply are not prejudicial in the manner contemplated by the equitable-considerations factor, because they do not impact the defending party's right or ability to defend the judgment. These are not the types of equitable considerations the Court should weigh when deciding whether a party may intervene under virtual representation; rather, they merely serve to block appellate review of the judgment and further the unjust motives of the original parties at the expense of the integrity of the judicial system.

1. The timeliness argument obfuscates the purpose of considering equitable factors in determining whether to allow an interested insurer to intervene and do not raise any considerations weighing against intervention.[3]

The original parties' argument about the alleged untimeliness of Century's attempt to intervene fits neatly within the second equitable consideration listed in *Naylor*. The original parties contend that Century's purported untimeliness in participating in the trial and its purported untimeliness in seeking to intervene support denial of intervention. The former contention is not actually a timeliness argument. Instead, it directly relates to Century's initial provision of a defense to Pastazios under a reservation of rights and its subsequent withdrawal from litigation, which is the subject of the coverage action. *See infra* Part II.A.2.

[3] The potential prejudice posed by the timing of an intervention is an important factor in the analysis. While it touches on the issue, this brief is primarily concerned with the other considerations posed by Doe and the Trustee.

The other argument—that Century was allegedly untimely in seeking to intervene in the appeal—seeks to further the perversion of justice that the original parties have already perpetrated. Century had no reason to intervene in the appellate process earlier than it did because it had agreed, at the Trustee's request, to fully fund an appeal on behalf of the Trustee with all parties reserving their rights. Century did not know at the time it agreed to fund the appeal that Doe would threaten the Trustee and prevent him from appealing the judgment. By the time Century learned that the Trustee had not perfected an appeal, the deadline to appeal had lapsed. Before then, Century had no reason to intervene because it reasonably believed its interests were being represented by the Trustee. *See, e.g.*, *Lumbermens*, 184 S.W.3d at 726 ("While other equitable factors may weigh against allowing a virtually-represented party to invoke appellate rights, 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.").

Century had certain reasonable adversarial expectations to which the Trustee seemingly agreed. But the non-adversarial nature of the litigation was not predictable from the outside—what judgment debtor would not appeal a multi-million dollar judgment riddled with error when a third party has agreed to fully fund it and allow the defendant to control the appeal? The parties tried to bargain away the appeal at Century's expense—allowing the time period to appeal lapse—as support for their timeliness argument. But when an interested non-party to the

judgment is willing and able to step in to the breach the colluding parties created, the Court should not allow an infirm judgment to stand. To do so would undermine the truth-finding purpose of the system and sacrifice the integrity of the judicial system.

2. Century's coverage action has no bearing on the original parties' ability to defend their interests on appeal, and is not the only means by which Century may defend its interests.

It is appropriate to address both the coverage action and the erroneous argument that Century allegedly wrongfully denied a defense together.

A declaratory-judgment coverage action is the mechanism by which an interested insurer asks a court to determine coverage under its policy, including the question of whether the insurer owes a defense.[4] *See, e.g.*, *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 652 (Tex. 2009). It is disingenuous to argue that commencement of a coverage action should be an equitable consideration *at all*, much less one that weighs *against* allowing Century to intervene. An insurer is well within its rights to bring such an action to determine

[4] In fact, the federal district court determined that Century had no duty to defend or indemnify Pastazios under the Policy, so to state that Century wrongfully denied a defense is incorrect and barred by the doctrine of collateral estoppel. *See Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628-29 (Tex. 1992) ("Issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit."). The ruling by the federal court does not moot this intervention action, however, because both Doe and the Trustee have appealed that judgment. *See VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993) (stating that an appeal only becomes moot once a court's actions on the merits can no longer affect the rights of the parties).

its duties under an insurance contract. In fact, doing so is the means to resolve coverage disputes and is an appropriate adversarial proceeding. Further, the Texas Legislature has made it clear that an action on the merits is not objectionable simply because a declaratory judgment action also exists. *See* Tex. Civ. Prac. & Rem. Code § 37.003 ("A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.").

More importantly, the purpose of the coverage action is to determine Century's obligations under the Policy, and the risk associated with an adverse outcome of that proceeding is specific to the coverage issues. The purpose of intervening on appeal in this action is to protect Century's interests by challenging the collusive judgment that was the product of the plaintiff's overreaching, which Century may be responsible for paying if the Fifth Circuit were to reverse the coverage decision. To argue that Century's commencement of a coverage action equitably weighs against allowing it to intervene here ignores the purpose of the equitable considerations, which is not to punish Century as the intervening party, but to ensure that Century's intervention does not prejudice the original parties in this action.

Moreover, to deem "whether the interested insurer has sought a declaratory judgment to determine coverage" a valid equitable consideration militating against

virtual-representation intervention defeats the purpose of allowing interested insurers to intervene in the first place. The doctrine of virtual representation allows intervention by an interested insurer that is bound by the trial court's judgment by virtue of the fact that it has privity and an "identity of interest" with a party to the judgment. *See Lumbermens*, 184 S.W.2d at 722. And both this Court and the court in *Ross* recognized that the possibility or existence of a related coverage action had no bearing on the insurer's standing to intervene under virtual representation. *Id*. at 725; *Ross*, 426 F.3d at 759.

By its very nature, virtual representation should also apply to interested insurers who were not involved in the earlier litigation, and particularly when the insurer, although not involved at trial, offers to fully fund an appeal of an adverse judgment at the insured's request. To conclude that pursuing a declaratory judgment to determine coverage is prejudicial to the original parties and is therefore an equitable consideration weighing against intervention would render the entire virtual-representation doctrine irrelevant.

This argument also ignores the prejudice to an interested insurer if it is not allowed to intervene. An interested insurer can challenge an insured's argument that the insurer owes it a duty to defend and indemnify in a coverage action, but it can only challenge a judgment on the merits through an appeal of that judgment. In a typical adversarial action, even if the interested insurer is *not* defending the insured, the insured has an interest in defending itself and ensuring the

reasonableness of any judgment against it. *See Laster v. Am. Nat'l Fire Ins. Co.*, 775 F. Supp. 985, 995 n.5 (N.D. Tex. 1991) ("Even in those cases where the insurer has wrongfully refused to defend, the insured is unable to recover based on liability thereafter imposed on the insured unless he has conducted a reasonable defense."), *aff'd*, 966 F.2d 676 (5th Cir. 1992). But where an agreement between the insured and the plaintiff results in an unreasonable judgment and the insured refuses to appeal, the truth-finding function of the court is undermined. The insurer has no alternative but to seek intervention under the virtual-representation doctrine. Because, if an insurer is ultimately unsuccessful in the coverage action, it will be responsible for paying the judgment unless the judgment is reversed on appeal.

And any argument that the appellate court should have denied Century's intervention because it did not bond the judgment is also without merit. Bonding a judgment—whether up to policy limits or in excess of policy limits—makes the insurer liable to pay the judgment. Here, Century has thus far prevailed in its coverage action. Requiring an insurer who prevails in its coverage action to then attempt to recoup from the insured is contrary to the purpose of filing the declaratory action in the first place.

To allow an interested insurer's coverage action to function as an equitable factor weighing against virtual representation will result in the evisceration of the doctrine and a weakening of the integrity of the adversarial system. And with reference to this specific matter, using Century's coverage action as a reason to

deny intervention only furthers the original parties' contravention of the adversarial system for their own gain. The relevant consideration is not whether what happened before (i.e. denying defense) was fair, it is whether allowing Century to intervene harms the original parties' rights to protect their interests on appeal. Century's coverage action simply has no impact on the parties' ability to defend the judgment and should not equitably weigh against intervention.

3. Precluding Century's intervention because it will supposedly create more work for the original parties and the court only furthers the perversion of justice that occurred below.

The argument that allowing Century to intervene under the virtual representation doctrine will "multiply" the issues before the court, creating a greater workload for the original parties and the court, is similarly disingenuous. A party's ability to appeal a judgment is critical to the proper functioning of the adversarial system. Deari and the Trustee, as original defendants to the litigation, had the right to appeal the judgment, and like any party to the suit, they and Doe knew that an appeal was possible from the outset of the litigation. Texas appellate courts exist for the very purpose of reviewing judgments and appealable orders. *See* Tex. Gov't Code § 22.220(a) ("Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds

$250, exclusive of interest and costs."); *id.* at § 22.001(a) (delineating cases over which supreme court has jurisdiction).

When Doe and the Trustee argue that allowing Century to intervene will multiply the issues before the court of appeals, what they really mean is that the court will have to hear a meritorious appeal, despite Doe and the Trustee's attempts to prevent appellate review entirely. That does not constitute prejudice—"[d]amage or detriment to one's legal rights or claims"—to the original parties because the only thing that is damaged is Doe and the Trustee's ability to benefit without challenge to their collusive arrangement. It does, however, constitute prejudice to Century, because its interests will be left unprotected despite the infirm nature of the judgment. This militates in favor of intervention.

Moreover, arguing that it is Century's intervention that would multiply the issues before the court of appeals attempts to make Century culpable for merely appealing a final judgment, as though it is some aberration of the legal process that reasonable litigants could not predict. In fact, the original parties' collusion extends its perversion of the adversarial system into the appellate phase of litigation. The only reason the original parties to *this* litigation may not have foreseen an appeal—and therefore have any basis to argue that intervention creates more work for them or the court—is that the Trustee (an original *defendant* in the underlying action) agreed not to appeal a patently erroneous judgment.

Likewise, the multiplicity of issues before the Court is not a valid equitable consideration, particularly when the discussion is not really about waste of judicial resources. It is not a waste of judicial resources to allow intervention on appeal from an erroneous judgment, and even more so when that judgment is the product of collusion and a non-adversarial trial. Such a judgment—and closing the door to meaningful appellate review of that judgment—undermine the integrity of the judicial system. And it is not prejudicial for a plaintiff who was awarded judgment in a trial court to be required to defend that judgment on appeal. Allowing this argument to stand as an equitable consideration weighing against intervention serves only to undermine the public confidence in the adversarial system.

CONCLUSION AND PRAYER FOR RELIEF

An interested insurer in Century's position is not being afforded an improper advantage if it were permitted to intervene and appeal. Indeed, Century could still ultimately face a judgment upon conclusion of the appellate process. Although Century prevailed in its coverage action, that result is being appealed. But if Century is not permitted to intervene in *this* appeal, Century—the only party that stands to lose from the judgment—will have no recourse. Because the appeal was not fully adversarial, the Court should grant review from the appellate court's denial of the interested insurer's motion to intervene to appeal the highly irregular judgment.

Declining to consider the equitable considerations proffered by Doe and the Trustee will not result in an epidemic of insurers refusing to defend their insureds only to later attempt to intervene on appeal. Century's current position is not the type of position in which any interested insurer would ever *choose* to find itself. Asking a court to permit intervention on appeal is certainly less ideal than being involved in the litigation from the beginning. Indeed, an interested insurer would not find itself in this situation had the original parties not manipulated the system to pervert the course of justice.

In fact, the only reason an interested insured like Century feels compelled to step in here is that the original parties distorted the judicial process, resulting in an inflated and erroneous judgment. The Court should further define the virtual-representation doctrine by explaining that the relevant equitable factors undergirding it are considerations that actually prejudice the original parties on appeal. An interested insurer requesting permission to step in on appeal to fill the void left by an absent original party—to protect its interests by engaging in a truly adversarial proceeding—should not be prevented from doing so through application of irrelevant and non-prejudicial considerations.

It is only through a distortion of the judicial process that Doe was not facing an appeal in the first place. Both defendants abandoned an appeal in exchange for their release from personal responsibility, and Century's intervention motion only seeks to protect its interests through a true adversarial process in which each side

makes competing arguments in defense of its position. This is not prejudice, it is the fundamental basis of the judicial system.

The Court should grant review and reverse or vacate the court of appeals' denial of Century's motion to intervene.

Respectfully submitted,

/s/ *Stephen P. Pate*

Stephen P. Pate
Attorneys for *Amicus Curiae* Federation of Defense and Corporate Counsel

CERTIFICATE OF SERVICE

On March 30, 2017, I electronically filed this Brief with the Clerk of the Court using the eFile.TXCourts.gov electronic filing system which will send notification of such filing to the following:

Wallace B. Jefferson
State Bar No. 00000019
wjefferson@adjtlaw.com
Dana Livingston
State Bar No. 12437420
dlivingston@adjtlaw.com
Alexander Dubose Jefferson & Townsend LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562

Charles T. Frazier, Jr.
State Bar No. 07403100
cfrazier@adjtlaw.com
Roger D. Townsend
State Bar No. 20167600
rtownsend@adjtlaw.com
Alexander Dubose Jefferson & Townsend LLP
4925 Greenville Avenue, Suite 510
Dallas, Texas 75206-4026

G. Michael Gruber
State Bar No. 08555400
mgruber@ghjhlaw.com
Tom "Trey" Crawford III
State Bar No. 24059623
tcrawford@ghjhlaw.com
Brian E. Mason
State Bar No. 24079906
bmason@ghjhlaw.com

Michael W. Huddleston
State Bar No. 10148415
mhuddleston@munsch.com
Davor Rukavina
State Bar No. 24030781
drukavina@munsch.com
J. Stephen Gibson
State Bar No. 07866000
sgibson@munsch.com
Thomas D. Berghman
State Bar No. 24082683
tberghman@munsch.com
Munsch, Hardt, Kopf & Harr, P.C.
3800 Ross Tower, 500 North Akard Street
Dallas, Texas 75201

Levon G. Hovnatanian
State Bar No. 10059825
hovnatanian@mdjwlaw.com
Martin, Disiere, Jefferson & Wisdon, L.L.P.
808 Travis, 20th Floor
Houston, Texas 77002

Gruber Elrod Johansen Hail Shank LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

Royce B. West
State Bar No. 21206800
royce.w@westllp.com
Veretta L. Frazier
State Bar No. 00793264
Veretta.f@westllp.com
West & Associates, L.L.P.
320 South RL Thornton Freeway, Suite 300
Dallas, Texas 75203

Jeffrey S. Levinger
State Bar No. 12258300
jlevinger@levingerpc.com
Levinger PC
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

Fifth Court of Appeals
c/o Lisa Matz, Clerk
lisa.matz@5th.txcourts.gov
George L. Allen, Sr. Courts Bldg.
600 Commerce Street, Suite 200
Dallas, Texas 75202-4658

CERTIFICATE OF COMPLIANCE

This is to certify that this computer-generated brief of A*micus Curiae* Federation of Defense and Corporate Counsel contains 8,480 words.

Dated: March 30, 2017

/s/ *Stephen P. Pate*

Stephen P. Pate
Attorneys for *Amicus Curiae* Federation of Defense and Corporate Counsel

11462012.1