

# WARRING TEAMMATES: STANDING TO OPPOSE A COPARTY’S MOTION FOR SUMMARY JUDGMENT

*Jonathan A. Wolfson\**

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\* Law Clerk to the Honorable Edith Brown Clement, United States Court of Appeals for the Fifth Circuit; A.B., Washington University in St. Louis, 2005; J.D., University of Virginia, 2010. The Author wishes to thank Professor Thomas Nachbar for his insight and helpful comments on this paper. The advice, discussions, and feedback from Professor George Rutherglen and Brian M. Simmonds were also instrumental in thinking through various aspects of the paper. The discussions with and suggestions from Celia Cohen, Sabrina Guenther, Fiona McCarthy, Chris McCoy, Kendall Wangsgard, and Professors Julia Mahoney and Christopher Sprigman further clarified my perspective on these issues. Thanks also to my wife Kendall Wolfson for her love, patience, and support throughout the writing and editing processes. Finally, thanks to the staff of the *Drake Law Review* for their tireless efforts in editing and preparing this Article for publication. All errors are solely my own.

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## I. INTRODUCTION

Colin Sullivan, Matt Damon's character in the Academy Award winning crime drama *The Departed*, used his role in the Massachusetts State Police to assist the operations of Irish mobster Frank Costello, Jack Nicholson's character, in and around Boston.<sup>1</sup> Sullivan believes he and Costello are organized crime teammates until he discovers that Costello is an FBI informant.<sup>2</sup> Fearing exposure of his own illicit behavior, Sullivan takes an opportunity to kill Costello.<sup>3</sup> While the viewer certainly believes Costello and Sullivan are on the same side, in the end they each seek their own benefit even at the expense of fellow mobsters.<sup>4</sup> As Costello attempts to kill Sullivan and Sullivan kills Costello, there is no question the two men are no longer fighting for the same team.<sup>5</sup> This scenario is not only a compelling story on the silver screen, but it occurs in litigation across the country. Parties who are considered "teammates" merely because they share the title of "defendant" choose to take up proverbial "arms" against other parties on their own side of litigation. We most often think of such self-protecting behavior in the criminal context,<sup>6</sup> but this phenomenon is just as likely, if not as prevalent, in civil cases with multiple defendants.<sup>7</sup> This Article examines how courts react to such situations and offers suggestions for how courts ought to react in the future.

Filing, opposing, and arguing motions comprise a great deal of time in a litigator's career. While litigation's drama may be found in a well-timed cross-examination or thrilling closing argument, a case is often won, lost, or settled out of court due to the various filings prior to the trial itself. A

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1. THE DEPARTED (Warner Bros. Pictures 2006).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See Zafiro v. United States*, 506 U.S. 534, 543–44 (1993) (Stevens, J., concurring) (explaining the general situations and interests that arise when defendants turn against each other in the criminal context).

7. *See infra* Part III.

motion for summary judgment, the province of Federal Rule of Civil Procedure 56,<sup>8</sup> can be strategically employed to win a case without a costly trial. Because such a motion often ends the case,<sup>9</sup> those seeking to sustain the lawsuit will make their case through opposition to the motion. In most lawsuits, plaintiffs oppose defendant summary judgment motions.<sup>10</sup> When the plaintiff does not oppose one codefendant *A*'s motion and codefendant *B* wishes to oppose it, the permissibility of such coparty opposition is unclear—some courts refuse to find “standing” to oppose codefendant motions.<sup>11</sup> In the absence of cross-claims<sup>12</sup> between the defendants, they will not be “against” one another in any procedural sense because they are on the same side of the “v.”<sup>13</sup> As such, can courts permit codefendant *B*'s opposition to codefendant *A*'s motion for summary judgment? And, even if a plaintiff opposes the motion, should courts accept additional opposition from codefendants? This Article argues that coparties should have the opportunity to oppose codefendant motions.<sup>14</sup> Courts should accept filings in opposition to summary judgment and other motions by codefendants because the operative criterion for allowing the filing should not be controversy in the entire lawsuit—the “v.”—but adverse positions on a particular issue.

The thesis may initially seem obvious: any party to a lawsuit may file opposition to motions by other parties. The recently revised Federal Rule of Civil Procedure 56 grants parties the right to file both in favor of and in

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8. FED. R. CIV. P. 56.

9. See *Resolving Your Case Before Trial: Court Motions*, FINDLAW, <http://injury.findlaw.com/personal-injury/personal-injury-stages/personal-injury-stages-pretrial-court.html> (last visited Mar. 13, 2012) (“Summary judgment is described as a ‘blunt instrument’ that can abruptly terminate the litigation.”).

10. See *id.* (explaining the other party must provide opposing evidence to avoid dismissal of the suit).

11. See *infra* Part III.C.

12. BLACK'S LAW DICTIONARY 404 (8th ed. 2004) (defining cross-claim as “[a] claim asserted between codefendants or coplaintiffs in a case and that relates to the subject of the original claim or counterclaim”).

13. The “v.” is a helpful shorthand for parties on differing sides of the case as a whole. This shorthand differentiates between parties who are either “plaintiffs” or “defendants,” rather than codefendants who might have opposing views on a particular motion or position in a lawsuit.

14. See *infra* Part V. This Article discusses opposition to summary judgment motions as well as opposition to coparty motions generally. The main focus is on summary judgment, but the analysis and ultimate conclusions can and should be applied equally to opposing other various coparty motions, such as motions to dismiss.

opposition to summary judgment.<sup>15</sup> However, neither the rule nor the notes explain which parties to a lawsuit constitute a “party” as used in the rule. As this Article discusses, many courts do not consider codefendants to be parties to motions for summary judgment filed by fellow defendants.<sup>16</sup> Rule 56(e) gives the court the discretion to consider a fact undisputed or grant summary judgment if opposing parties do not properly respond to summary judgment motions.<sup>17</sup> This clause appears to oblige plaintiffs’ responses to defendants’ motions for summary judgment if they wish to continue the case and vice versa, but it says nothing in regard to coparties.<sup>18</sup> When parties seek to answer coparty summary judgment motions in court, federal judges have taken divergent paths, often noting the absence of a clear rule.<sup>19</sup> Some of the most recent cases to confront this issue denied the coparty’s right to file a motion opposing summary judgment.<sup>20</sup> The

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15. See FED. R. CIV. P. 56(c)(1) (providing the requirements a party must meet in order to support its assertion “that a fact cannot be or is genuinely disputed”).

16. See *infra* Part III.C (providing examples of courts denying standing to these codefendants).

17. FED. R. CIV. P. 56(e).

18. See *id.*

19. See, e.g., *Eckert v. City of Sacramento & Union Pac. R.R. Co.*, No. 2:07-cv-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655, at \*7 (E.D. Cal. Sept. 29, 2009) (denying standing to a codefendant and noting that “Union Pacific raise[d] a procedural question that has been infrequently addressed: ‘[i]n the absence of cross-claims, may one codefendant be the sole . . . opposition to another co-defendant’s motion for summary judgment?’” (alteration in original) (quoting *Blonder v. Casco Inn Residential Care, Inc.*, 2000 U.S. Dist. LEXIS 8054, at \*1 (D. Me. May 4, 2000))); *White v. Sabatino*, 415 F. Supp. 2d 1163, 1171–72 (D. Haw. 2006) (analyzing the different reactions by various district courts in concluding that the coparty could oppose the motion); *Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*3–4 (“In the absence of cross-claims, and in the absence of objection from the plaintiff, may one codefendant be the sole, successful, opposition to another codefendant’s motion for summary judgment? The Court has been unable to unearth any authority that decides the point. Moreover, Defendants The Casco Inn Residential Care, Inc.[] and Linda Symonds have failed to provide the Court with any authority for the proposition that they may oppose the Motion by their Codefendants. . . . Accordingly, the Court will disregard the Response by Defendants . . . objecting to the Motion.” (footnote omitted)).

20. See, e.g., *Thurman v. Wood Grp. Prod. Servs., Inc.*, No. 09-4142 Sec.: J(3), 2010 U.S. Dist. LEXIS 132190, at \*4–5 (E.D. La. Dec. 14, 2010) (“[C]o-defendants do not have standing to oppose a defendant’s motion for summary judgment when the motion is unopposed by the plaintiff.” (citing *C.F. Bean Corp. v. Clayton Indus., Ltd.*, No. 95-161, 1996 U.S. Dist. LEXIS 12182, 1996 WL 470633, at \*1 (E.D. La. Aug. 19, 1996))); *Hawes v. Blast-Tek, Inc.*, No. 09-365, 2010 U.S. Dist. LEXIS 67089, at \*3–7 (D. Minn. July 2, 2010) (adopting the *Blonder* rule and denying standing to a codefendant who opposed another codefendant’s motion for summary judgment); *Eckert*, 2009 U.S. Dist. LEXIS 95655, at \*8 (following the *Blonder* reasoning in denying standing to the

ongoing struggle for courts to determine such parties' right to file indicates a need for clarification on coparty standing. While standing is typically a question for those seeking to file a lawsuit,<sup>21</sup> standing for defendants, and especially codefendants, raises its own unique questions that are especially worthy of analysis.<sup>22</sup>

Questions of standing do not always make the most compelling courtroom drama, but recent high profile litigation has turned on the standing issue.<sup>23</sup> While lawsuits against President Obama's health insurance mandate remain pending, the importance of standing has become not only an interesting discussion among legal academics but has suddenly gained relevance to the public at large.<sup>24</sup> Discussions of standing's nuances have leapt from the circles of lawyers and the world of legal academia and landed squarely in the midst of public discussion. For example, when Judge Vinson ruled that the states had standing to challenge portions of the Affordable Care Act,<sup>25</sup> both supporters and critics of the bill took to the newspapers and airwaves to discuss their positions on the law's pros and cons as well as the legal arguments surrounding standing.<sup>26</sup> In the last term, the Supreme Court discussed standing while

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coparty).

21. Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 428 ("Standing, therefore, has traditionally been viewed as what the federal judiciary demands of those who wish to commence litigation.").

22. The issues raised in this Article have not been ameliorated by the recent revisions to the Federal Rules of Civil Procedure.

23. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 514–22 (2007) (whether petitioners had standing to challenge the EPA's denial of petitioner's rulemaking petition); *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 602–07 (E.D. Va. 2010) (analyzing whether the Commonwealth had standing to challenge the minimum essential coverage provision).

24. Major mainstream news sources have discussed the standing issue in the pending lawsuits. Rosalind S. Helderman, *U.S. Judge Allows Va. Health-Care Lawsuit To Move Ahead*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080205019.html> (discussing a district court's ruling rejecting arguments that Virginia did not have standing to challenge the new health care law); Julie Rovner, *Virginia Lawsuit Challenging Health Law Passes Key Hurdle*, SHOTS: NPR'S HEALTH BLOG (Aug. 2, 2010, 4:32 PM), <http://www.npr.org/blogs/health/2010/08/02/128935608/virginia-lawsuitchallenginghealth-overhaul-passes-legal-hurdle> (reporting on the Virginia judge's "kind comments for allowing Virginia standing to sue" on the healthcare reform act).

25. See Tom Brown, *Judge Lets States' Healthcare Suit Go Forward*, REUTERS (Oct. 14, 2010, 7:14 PM), <http://www.reuters.com/article/2010/10/14/us-usa-healthcare-states-idUSTRE69D5CO20101014>.

26. See, e.g., Rosalind S. Helderman, *Obama Administration Asks Judge to*

addressing some high profile issues, including greenhouse gas emissions and school vouchers.<sup>27</sup> Further, some scholars believe we may be in the midst of a shift that links political ideology to beliefs about standing, as those who used to argue for broad standing have reversed their positions and vice versa.<sup>28</sup> Standing's barrier to a party's ability to address issues they find important cannot be overlooked, regardless of whether that party seeks to bring a lawsuit or defend a position in a lawsuit. As these broad standing questions are discussed, the more narrow question of standing to oppose coparty motions as an avenue to protect particular party interests should not be overlooked.

Court actions with multiple plaintiffs, defendants, or both are not uncommon.<sup>29</sup> In some cases, entities on one side, coparties, have differing interests. When interests differ, cross-claims can turn parties who are

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*Dismiss Virginia Suit Against Health-Care Law*, WASH. POST (May 25, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052404073.html>; Ken Klukowski, *First Battle Over Obamacare Begins*, FOXNEWS.COM (June 1, 2010), <http://www.foxnews.com/opinion/2010/06/01/ken-klukowski-obamacare-severability>. Interestingly, the government recently conceded that one party challenging the Affordable Care Act had standing before the Sixth Circuit. See Letter from Neal Kumar Katyal et al., Acting Solicitor General, United States Dep't of Justice, to Leonard Green, Clerk, United States Court of Appeals for the Sixth Circuit, at 3–5 (May 23, 2011), available at [http://www.thomasmore.org/downloads/sb\\_thomasmore/LetterBrief--DOJ--filed.pdf](http://www.thomasmore.org/downloads/sb_thomasmore/LetterBrief--DOJ--filed.pdf).

27. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532–35 (2011) (discussing the history of standing addressed in *Massachusetts v. EPA* and noting that four justices—those adhering to the dissenting opinion—believed that Connecticut did not have standing); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440, 1449 (2011) (denying taxpayer standing to individuals in Arizona challenging a school voucher program for parochial schools).

28. See, e.g., Ilya Somin, *Are Right and Left Changing Where They Stand on Standing?*, THE VOLOKH CONSPIRACY (Aug. 18, 2010, 10:00 PM), <http://volokh.com/2010/08/18/are-right-and-left-changing-where-they-stand-on-standing/> (noting conservatives historically have sought more narrow standing and liberals have favored a more open approach to standing, but in the most recent decisions regarding gay marriage and healthcare reform it seems both sides have applauded or sought decisions of the opposite view).

29. Multiple plaintiff or defendant cases range in variety from multiparty torts to antitrust suits and even include § 1983 actions against municipal employees and their municipal employers. See, e.g., *FEC v. Akins*, 524 U.S. 11, 13–14 (1998) (involving a group of voters who brought action against the FEC); *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 80–81 (1981) (detailing the action brought against multiple unions for contribution under the Civil Rights Act of 1964); *Jordan v. Wilson*, 649 F. Supp. 1038, 1044–45 (M.D. Ala. 1986) (involving a suit brought by a class of female officers against government officials on claims of discrimination).

initially on the same side of litigation into opposing parties<sup>30</sup> in at least some sense.<sup>31</sup> However, there are other types of lawsuits, such as antitrust litigation, where cross-claims are highly unlikely or may even be disallowed, such as when contribution is forbidden.<sup>32</sup> In these cases, the interests of the coparties may not align. In fact, one party may believe a motion for summary judgment will enable them to avoid all liability, while the coparty would prefer to keep all potentially liable entities in the suit, thereby reducing the coparty's damages in the case of a loss.<sup>33</sup> In these somewhat rarely published cases, the acceptance or rejection of an opposition motion may have significant effects on the ultimate outcome of the case for the parties involved.<sup>34</sup>

This Article contends that the proper question when analyzing whether a party has standing to oppose a coparty's motion should not be whether the two parties stand opposed to one another in the lawsuit as a whole or whether they are on opposite sides of the "v."—focusing on the "v." provides an overly simplistic means of disposing of opposition to summary judgment. Rather, courts should determine if a party's opposition should be allowed by looking at the interests surrounding the particular issue in question.<sup>35</sup> The operative criterion ought to be whether parties are adverse on the particular issue, regardless of their position in the overall litigation.<sup>36</sup> Parties should be allowed to file, and courts should permit, opposition to summary judgment motions filed by codefendants.

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30. See BLACK'S LAW DICTIONARY 404 (8th ed. 2004) (defining a cross-claim as "[a] claim asserted between codefendants . . . in a case and that relates to the subject of the original claim or counterclaim").

31. Opposition in part may, however, still be insufficient to be able to oppose motions which do not directly address issues relevant to the cross-claim.

32. See *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632, 647 (1981) (holding that no right of contribution exists in antitrust under current statutory or common law); *Nw. Airlines*, 451 U.S. at 86, 98 (holding that the Court cannot afford the remedy of no right of contribution under the Equal Pay Act or Title VII of the Civil Rights Act of 1964).

33. While it is true the common law version of no right to contribution implied division of damage payments at the plaintiff's will, it is assumed for purposes of this Article the court will require division of damages in cases where joint tortfeasors are found liable for identical injury. See generally Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 331–37 (1980) (providing a historical analysis and explanation for the common law rule that serves as the basis for the assumption in this Article).

34. See *infra* Part III.

35. See *infra* Part V.B.

36. See *infra* Part V.B.

This Article proceeds in four parts. Part II discusses potential cases in which a coparty may seek to oppose a motion.<sup>37</sup> Part III reviews the caselaw addressing coparty standing to oppose a motion.<sup>38</sup> Part IV discusses how principles from both appellate standing and the right to intervene are derived and applied to coparty opposition standing.<sup>39</sup> Finally, Part V concludes that courts should grant standing to a party seeking to oppose a coparty's motion.<sup>40</sup>

## II. SETTING THE STAGE

Why would a party seek to oppose something a codefendant or coplaintiff wished to pursue in a courtroom? There might be strategic reasons, such as two insurance companies whose clients are jointly sued in a typical tort action—they might disagree about the value of making a contributory negligence argument or calling a particular witness to the stand. There may also be financial reasons, such as when one defendant of significant means wants to discourage future lawsuits and is thus willing to lengthen the trial while a codefendant of more modest means wishes to pursue a settlement or other expedited process.<sup>41</sup> But such differences in strategy or objectives are not grounds for outwardly opposing the codefendant. Instead, such differences might require bargaining and negotiation between the joint defendants, leading to some solution in which both parties feel they are being adequately represented. Barring such an agreement, the parties may seek severance or separate trials under Federal Rule of Civil Procedure 42(b).<sup>42</sup> A third and more intractable reason might be that the two parties do not believe their interests in the case align, or they may even believe their interests are contrary. Suppose

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37. See *infra* Part II.

38. See *infra* Part III.

39. See *infra* Part IV.

40. See *infra* Part V.

41. For example, the *New York Times* has a reputation for refusing to settle libel lawsuits and instead forces libel plaintiffs to pursue the *Times* in a court of law, which includes all the attendant costs and time-intensive work. See *Rules, Britannia! The Growing, Chilling Reach of Commonwealth Libel Laws*, THE AUTHORS GUILD, [https://www.authorsguild.org/publications/seminar\\_transcripts/rules.html](https://www.authorsguild.org/publications/seminar_transcripts/rules.html) (last visited Mar. 13, 2012) (quoting Floyd Abrams who stated, “The New York Times has a no settlement policy with respect to libel suits, and they mean it. A lot of other publications simply don’t settle libel suits.”).

42. FED. R. CIV. P. 42(b). The focus in this Article is on cases in which severance will not change the total liability, and as such, severance will not solve the problem motivating this Article.

party *A* believes an action taken by its codefendant *B* is likely to be harmful to *A* only and not the plaintiff, and the action may even benefit *B*. In such a circumstance, *A* will seek to oppose to protect its own interests. This possibility makes us ask whether coparties believe they have divergent interests.

#### A. Relationships Between Coparties

The question of divergent interests requires an examination of the relationship between coparties to determine when their interests may not align. In a normal lawsuit one might read in a first year torts class, two codefendants will be happiest with a finding of no liability for both of them.<sup>43</sup> Because the goal in this situation is winning “for the defense,” one might be inclined to believe the two parties on the same side of the “v.” share mutual objectives. However, while both hope to reduce their individual liability to zero, they do not always share the concern for reducing a coparty’s liability. In fact, both parties may have an incentive to point the finger at one another or at least find a way to keep fingers from pointing in their own direction.<sup>44</sup> The result is two parties with similar, but not identical, interests—the epitome of the prisoner’s dilemma.<sup>45</sup>

A prisoner’s dilemma exists when two parties have an incentive to blame one another in order to selfishly reduce their individual probable cost.<sup>46</sup> If the game is properly set up, both of the characters from *The Departed*, Sullivan and Costello,<sup>47</sup> would rather pin blame on the other than take a risk that a so-called “friend” would agree to testify against

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43. For example, in an action for an auto accident in which both the driver and owner of a vehicle are sued for injuries, both defendants will be happy if the jury finds no negligence and no liability.

44. It is for this reason that in some medical tort claims the courts require the defendants to demonstrate their nonliability rather than their liability; since other physicians and medical professionals are in the best position to determine who the real tortfeasor is, courts may require defendants to prove they are not liable rather than requiring an affirmative showing of the defendant’s liability by the plaintiff. See *Ybarra v. Spangard*, 154 P.2d 687, 690–91 (Cal. 1944) (explaining how multiple hospital professionals may be involved in one claim and those who had control of the defendant may be called to explain their actions).

45. See generally MERRILL M. FLOOD, U.S. AIR FORCE: PROJECT RAND RESEARCH MEMORANDUM RM-789-1, SOME EXPERIMENTAL GAMES (1952) (discussing the origins of the prisoner’s dilemma, also referred to as a “two-person zero-sum game,” and providing an introduction and summary of a number of examples of the game).

46. BLACK’S LAW DICTIONARY 1233 (8th ed. 2004).

47. THE DEPARTED, *supra* note 1.

them. The prisoner's dilemma is not only applicable to actual prisoners in a criminal context, but it is equally compelling and applicable to the context of civil litigation. Assume a lawsuit names two defendants who equally share blame. A win for the defendants results in a finding of no liability. If both defendants lose, each will be responsible for fifty percent of the damages.<sup>48</sup> If one defendant wins while the other defendant loses, the winning defendant will have no liability, but the losing defendant will have one hundred percent of the liability. A defendant's opportunity to reduce his overall liability to zero creates the incentive to quickly navigate out of the lawsuit, leaving the remaining codefendant holding the entire bag. The incentive to leave the lawsuit quickly is enhanced because both codefendants realize the most beneficial individual outcome as a codefendant is also to find a way to be removed from the lawsuit. The ability to quickly exit the lawsuit will also save attorney fees, thus making the differential greater and only strengthening the incentives to leave. This simple analogy is graphically displayed in Table 1.

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48. *See supra* note 33.

Table 1: Codefendant Prisoner's Dilemma<sup>49</sup>

(A, B)	B Wins (summary judgment or finding of not liable)	B Loses (found liable)
A Wins (summary judgment or finding of not liable)	(0, 0) [summary judgment] (-10, -10) [some court costs]	(0, -120)
A Loses (found liable)	(-120, 0)	(-60, -60)

*Note: Figure indicates gain/loss from alternative lawsuit outcomes. Summary judgment is the least expensive outcome, but even winning a grant of summary judgment has some cost.*

One would expect parties to have divergent interests when they file cross-claims against one another. For example, in a lawsuit naming both driver and manufacturer, the driver may file a cross-claim against the auto manufacturer for a defect alleged to be the but-for cause of the lawsuit.<sup>50</sup> In such an instance, while the parties might be codefendants in the initial tort case, the corollary cross-claim divides their interests. This is analogous to a defendant bringing an additional party into the litigation as a third-party plaintiff under Federal Rule of Civil Procedure 14<sup>51</sup> or permissive joinder under Federal Rule of Civil Procedure 20.<sup>52</sup> But suppose the parties cannot file cross-claims against one another yet their interests in a particular case diverge. Will the court allow one party to prevent a coparty from taking action?

49. Both *A* and *B* would prefer to obtain summary judgment in their favor. Unless the plaintiff's case is weak, only the first party to obtain summary judgment will be able to reach this optimal quadrant of the diagram.

50. See, e.g., *Codling v. Paglia*, 298 N.E.2d 622, 624 (N.Y. 1973) (involving an accident where the injured party sued the driver and manufacturer, yet the driver asserted a cross-claim against the manufacturer as well).

51. FED. R. CIV. P. 14.

52. FED. R. CIV. P. 20.

### B. Hypothetical Examples

Summary judgment offers an apt opportunity to address this particular question. A grant of summary judgment can bring one party's liability immediately to zero while saving significant litigation expense.<sup>53</sup> These benefits provide sufficient incentives for defendants to seek to remove themselves from the case regardless of the effect such removal might have on codefendants.<sup>54</sup> This section will briefly discuss three specific examples in which parties might desire to oppose a motion for summary judgment filed by a coparty: antitrust, property damage torts, and civil rights violations. All of these cases follow a basic formula: Parties *A* and *B* are sued by Party *C*;<sup>55</sup> both *A* and *B* have no direct claims against one another in the litigation and are thus sufficiently disconnected to prevent cross-claims; and either *A* or *B* can reduce their individual liability to zero through summary judgment, but doing so may increase the liability of the codefendant.

#### 1. Antitrust

Antitrust claims against multiple defendants are common. Plaintiffs may bring lawsuits to both enjoin anticompetitive behavior and collect treble damages provided under the Clayton Act.<sup>56</sup> Codefendants in such cases often appear to have the same interests, but in the course of litigation their interests may diverge. In antitrust suits there is no right of contribution, but rather each individual defendant is liable for the entire judgment.<sup>57</sup> This rule encourages defendants to remove themselves from litigation rather than incentivizing cooperation among defendants. One party might thus move for summary judgment despite its codefendant's protest.<sup>58</sup> If the motion is filed in furtherance of this goal, it is unclear

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53. See *supra* note 49 and accompanying Figure.

54. See *supra* note 49 and accompanying Figure.

55. *A* and *B* may be two defendants or simply placeholders for any number of codefendants.

56. See 15 U.S.C. §§ 9, 12, 15(a) (2006).

57. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632, 647 (1981) (holding there is no basis in statutory or common law for contribution).

58. Consider a hypothetical world in which the *Illinois Brick* doctrine from *Illinois Brick Co. v. Illinois* no longer holds as is recommended by the Antitrust Modernization Commission. See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 265–78 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) (providing the background and analysis for its recommendation that the court overrule *Illinois Brick* “to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal

whether codefendants may oppose that motion.

Consider a hypothetical antitrust plaintiff, Mr. Ross, the owner of a tourism company that brings thousands of students through Chicago each year. He files suit under the Clayton Act for alleged price fixing by three pizza restaurants: Mamma Sally's, Papa Tony's, and Cousin Uno's. If Ross wins the case, he will receive treble damages he has calculated at \$300,000.<sup>59</sup> Under the normal antitrust law, all three defendants are liable for the full \$300,000, which would be divided if they lose the lawsuit—all three would pay \$100,000.<sup>60</sup> Cousin Uno's files a motion for summary judgment, claiming he has never discussed pizza with the unsavory Mamma Sally's or the dishonest Papa Tony's and would never fix prices with such inferior pizzerias. Mamma Sally's and Papa Tony's are savvy pizza shops and realize their likely liability will increase from \$100,000 to \$150,000 if Cousin Uno's gets away with what they consider a dirty trick. To stop his shenanigans, they file oppositions to Uno's motion for summary judgment. However, Mr. Ross knows his case will go forward with only two defendants and his likely damage award will remain \$300,000.<sup>61</sup> Further, Mr. Ross knows Cousin Uno's refuses to settle any lawsuit and will go to great lengths to make the litigation as long and painful as possible, while Mamma Sally's and Papa Tony's hate courtrooms and would probably quickly settle. Armed with this knowledge, Mr. Ross does not file a reply to Cousin Uno's motion for summary judgment. Should the court entertain Mamma Sally's and Papa Tony's opposition motions?

## 2. *Tort to Property*

This situation is not unique to antitrust cases, although antitrust's treble damages may provide a significant financial incentive for removing oneself from the litigation.<sup>62</sup> Tort cases for alleged independent negligence

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antitrust law"). All parties in the distribution line are able to sue for antitrust violations. *See id.* at 270. In such a case, parties in the middle of the line might have incentives to point the finger at the initial seller as the lone price fixer, which would reduce the number of parties to the lawsuit. As the total treble damages award is limited to only the actual harm, the plaintiff may have little concern about losing these parties and may even encourage their removal should the summary judgment motion provide facts useful in pointing a finger at the initial price fixer. *See* 15 U.S.C. § 15(a).

59. Clearly these are Chicago-style pizzas of the highest quality and the price fixing conspiracy must have been pretty strong.

60. *See supra* note 56 and accompanying text.

61. *See* 15 U.S.C. § 15(a) (allowing for treble damages for the injury of the individual).

62. *See id.* (allowing persons injured "shall recover threefold the damages by

can also fit the pattern. Suppose two neighbors, Ed and Fred, are independently negligent in building fires that burn out of control and consume their neighbor Gus's crops.<sup>63</sup> The resulting lawsuit will pit Gus against defendants Ed and Fred. Both Ed and Fred will likely face joint and several liability if they cannot demonstrate their innocence.<sup>64</sup> The total liability each could face in the absence of the codefendant is the value of the lost crops—assume \$500,000.<sup>65</sup> If both parties remain in the suit and the jury finds negligence on both their parts, both Ed and Fred will pay \$250,000 in damages. If, however, Fred cleverly removes himself from the lawsuit, Ed will be left holding the bag for the entire \$500,000 in damages. Because both Ed and Fred would be independently liable for the full \$500,000, Gus may not care which neighbor is successful in obtaining summary judgment so long as one neighbor remains to be sued.<sup>66</sup> Can Ed file an opposition to Fred's motion for summary judgment? More importantly, will the court consider the opposition?

### 3. *Civil Rights Action*

Consider a third hypothetical case in which the plaintiff's incentive to fight the motion for summary judgment depends entirely on the party seeking to remove itself from the lawsuit: § 1983 civil rights claims against municipalities and municipal employees. One typical lawsuit against municipal employees and the municipality would be for police misconduct. If the police officer, Sullivan, and the city of Boston are sued by a § 1983 plaintiff, Costello, Costello's perspective on a summary judgment motion by Sullivan or Boston will depend on which party is seeking to remove

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him sustained").

63. See generally *Kingston v. Chi. & N.W. Ry. Co.*, 211 N.W. 913 (Wis. 1927) (considering a similar fact scenario in which two separately started fires combined to destroy the plaintiff's property).

64. See *id.* at 914 (“[W]here two causes each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other . . . each wrongdoer, in effect, adopts the conduct of his coactor . . .”) (quoting *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 74 N.W. 561, 566 (Wis. 1898)).

65. For the sake of keeping the case in federal court, assume Ed and Fred live in North Dakota and Gus lives in South Dakota. This provides diversity sufficient to obtain federal jurisdiction. See 28 U.S.C. § 1332(a) (2006).

66. A good lawyer would likely advise Gus to oppose the motions for summary judgment from either Ed or Fred as Gus may not yet know against which party proving negligence will be most difficult and allowing either party to exit the suit could be a risk. Notwithstanding such advice, the example would be sustained so long as one party is allowed to exit the litigation.

itself.<sup>67</sup> Sullivan has an incentive to file a motion for summary judgment in which he claims his actions were exactly in line with his training and any civil rights violation is solely the responsibility of the Boston policy.<sup>68</sup> Costello might be delighted to have what appears to be evidence of Boston's guilt and would further know that a suit against the municipality provides nearly strict liability,<sup>69</sup> a much less sympathetic defendant, and a much deeper pocket from which damages will be paid. Boston would clearly want to object to such a motion for summary judgment by Sullivan, but it is not clear that it could.

On the other hand, Boston may choose not to indemnify Sullivan, to turn upon him, and to seek summary judgment for the municipality. Costello appears more likely to object to such a motion for summary judgment because Boston has the deeper pocket from which to pay damages. However, if Sullivan has means sufficient to pay what Costello expects to win and if Costello believes Boston's attorneys are more formidable, Costello might be tempted to raise no objection to the motion and to face off against Sullivan only. Sullivan would be disappointed with any refusal by Boston to indemnify him,<sup>70</sup> as well as with the motion for

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67. See THE DEPARTED, *supra* note 1. The film scripts Sullivan as a Massachusetts State Police Detective. However, to avoid issues with sovereign immunity in the § 1983 context, I have altered the example to include Boston as a codefendant. See *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974) (reiterating the rule that “an unconsenting State is immune from suits brought in federal courts by their own citizens as well as by citizens of another State” even though the Eleventh Amendment does not explicitly provide such immunity (citations omitted)). This protection is not available for local governmental entities. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980).

68. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing a general shield to liability for government officials “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known” (citations omitted)).

69. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1052 (5th ed. 1984 & Supp. 1988) (providing states have either completely or nearly abolished municipal immunity).

70. See Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001) (noting that municipalities commonly indemnify their employees in § 1983 claims). On the issue of indemnification, Sullivan would indeed have the right to challenge that finding. See, e.g., *Wiehagen v. Borough of N. Braddock*, 594 A.2d 303, 307 (Pa. 1991) (reversing the trial court's determination in holding that the municipality was not only partially liable for indemnification); *Williams v. City of New York*, 476 N.E.2d 317, 318 (N.Y. 1985) (holding that municipality's decision not to indemnify officer “may be set aside only if it lacks a factual basis, and in that sense, is

summary judgment that would leave Sullivan as the sole defendant. However, it is unclear whether Sullivan would have any ability to challenge the motion for summary judgment.

In antitrust, property, and § 1983 civil rights lawsuits, the plaintiffs—Ross, Gus, and Costello, respectively—would have little incentive to fight a motion for summary judgment that only removes one defendant because the damages would remain the same and some of the litigation expenses could be reduced if less discovery is needed or fewer witnesses needed to be deposed.<sup>71</sup> If the plaintiff has little incentive to keep a defendant in the lawsuit, but another defendant wishes to maintain the current pool of defendants, the best step such a codefendant might take would be to oppose the motion for summary judgment. If this opposition is not permitted, the codefendant seeking to maintain the current parties to the lawsuit is unlikely to have further recourse.

### III. THE LAW TODAY

A codefendant seeking to maintain the cast of defendant characters is not only hypothetical; they exist in actual litigation. When parties recognize the benefits of leaving the litigation, they will seek to do so. A plaintiff that would prefer fighting only some of the defendants, maybe because of a willingness to settle, has little incentive to oppose the motion. In addition, if the plaintiff is not privy to information known by other codefendants that may cast doubt on the summary judgment motion, the plaintiff will be unable to adequately argue against the motion. This Part examines how courts react to opposition to summary judgment by coparties.

Several district court cases in the last forty years have considered and discussed situations similar to those outlined in Part II in which a party opposes its coparty's motion for summary judgment.<sup>72</sup> While the issue is

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arbitrary and capricious"). However, the choice to indemnify is not necessary to Boston's motion for summary judgment. *Cf.* *Hassan v. Fraccola*, 851 F.2d 602, 605 (2d Cir. 1988) (noting "the duty to defend is broader than the duty to indemnify").

71. It may not be wise to allow one potential defendant to exit the lawsuit because the more defendants there are, the greater the likelihood one can be forced to pay the damages award. But there might be strategic reasons for allowing one defendant to exit the lawsuit, and in such situations, this scenario certainly could play out. *See supra* note 65.

72. *See, e.g., Eckert v. City of Sacramento & Union Pac. R.R. Co.*, No. 2:07-cv-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655, at \*7-9 (E.D. Cal. Sept. 29, 2009) (refusing to grant standing to the city as a codefendant to oppose Union Pacific's

motion for summary judgment on a claim under California's Disabled Persons Act); *Cash v. Unocal Corp.*, No. 04-1648, 2008 U.S. Dist. LEXIS 70223, at \*7-8, \*11 (W.D. La. Sept. 16, 2008) (denying motion for summary judgment based solely upon arguments raised by a codefendant); *Travelers Prop. Cas. Co. v. Tomasella's Fire Extinguisher Co.*, No. 05-983, 2008 WL 108915, at \*1, \*3 (D.N.J. Jan. 7, 2008) (granting summary judgment to a defendant, assuming the codefendant had standing to oppose, based on the lack of evidence raised in opposition); *Thornton Drilling Co. v. Stephens Prod. Co.*, No. 06-2173, 2007 WL 2071604, at \*8 (W.D. Ark. July 19, 2007) (neglecting to rule on the standing of a codefendant who opposed another defendant's motion for summary judgment); *Hall v. Norfolk S. Ry. Co.*, No. 1:06-CV-0607-JOF, 2007 WL 2765540, at \*4 & \*9 n.1 (N.D. Ga. Sept. 18, 2007) (declining to decide whether a codefendant can oppose a defendant's motion for summary judgment where the plaintiff has adopted the codefendant's arguments); *White v. Sabatino*, 415 F. Supp. 2d 1163, 1170-72 (D. Haw. 2006) (allowing consideration of the opposing codefendant's arguments against the defendant's motion for summary judgment because to rule otherwise would deprive the codefendant of the right to contribution later); *Dailey v. J.B. Call & Co.*, No. 04-4114-RDR, 2006 WL 616634 at \*2, \*4 (D. Kan. Mar. 9, 2006) (granting standing to defendant who opposed codefendant's motion for summary judgment but ultimately denying the motion); *Brewer v. Dodson Aviation*, No. C04-2189Z, 2006 WL 3231974, at \*9 n.5 (W.D. Wash. Nov. 7, 2006) (ruling that the codefendant lacked standing and thus refusing to consider the codefendant's opposition to the defendant's motion for summary judgment); *Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631, 660 n.14 (E.D. Pa. 2004) (refusing to address standing where the codefendant's opposition duplicated the plaintiff's argument); *Fraioli v. Lemcke*, 328 F. Supp. 2d 250, 263 n.4 (D. R.I. 2004) (dismissing the codefendant's opposition to the motion for summary judgment due to lack of standing); *Royal Ins. Co. of Am. v. Zygo Corp.*, 212 F.R.D. 444, 447 (D. Conn. 2003) (finding opposition raised by a codefendant to a defendant's motion for summary judgment was not considered "opposition" where the only claim against the defendant was by the plaintiff and not the codefendant); *Blonder v. Casco Inn Residential Care, Inc.*, No. 99-274-P-C, 2000 U.S. Dist. LEXIS 8054, at \*1, \*3-4 (D. Me. May 4, 2000) (finding the codefendant did not have standing to oppose the defendant's motion for summary judgment regarding claims for injuries sustained in a fire); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Queen Carpet Corp.*, 5 F. Supp. 2d 1246, 1247-48, 1250 n.1 (D. Utah 1998) (holding standing to oppose a defendant's motion for summary judgment in a case for negligent installation of carpet required a cross-claim to be filed); *Dixon v. Cnty. of Alameda*, No. C 95-4617-SI, 1997 WL 220311, at \*7 n.8 (N.D. Cal. Apr. 18, 1997) (outrightly refusing to consider the codefendant's arguments made in the opposition to defendant's motion for summary judgment because codefendant lacked standing); *Farrell v. Nat'l Gypsum Co.*, No. 88CIV.8136 (CES), 1991 WL 95437, at \*2-3 (S.D.N.Y. May 24, 1991) (granting the defendant's motion for summary judgment after considering the codefendant's arguments in opposition); *Guthrie v. Radiac Abrasives, Inc.*, No. 89-333 (CSF), 1990 WL 193047, at \*3 (D.N.J. Nov. 5, 1990) (granting the motion for summary judgment after the codefendant failed to meet its burden); *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1399, 1404 (E.D. Pa. 1985) (denying the defendant's motion for summary judgment after thorough analysis of the codefendant and the plaintiff's opposition); *Jarrett v. Green*, 320 F. Supp. 1132, 1134 (N.D. Ga. 1970) (doubting

not the most prevalent one facing courts,<sup>73</sup> the infrequency and lack of consistent resolution often creates confusion and uncertainty.<sup>74</sup> Court confusion has spillover effects on negotiations between the many defendants in complex litigation. Unless all parties can anticipate a court's response when codefendants oppose one another, this uncertainty may make decisions by counsel more difficult and could even make them directly responsible for a prisoner's dilemma.<sup>75</sup> An analysis of the caselaw is useful to understand the main methods courts use to address this complicated problem.

Federal courts have taken minimal opportunity to address situations in which codefendants oppose one another's motions for summary judgment. The opinions highlight a lack of consensus among various federal trial courts on proper adjudication. Some courts are willing to accept any and all motions and opposition, effectively ignoring the standing question. Those courts that do address the standing question often agonize over it before making a determination.

#### A. Courts Ignoring the Standing Question

Many district courts avoid the standing issue. Some have pointed out the potential standing questions but ultimately decided the cases on unrelated grounds.<sup>76</sup> In 1970, a northern district of Georgia defendant

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whether codefendant had standing to oppose the defendant's motion for summary judgment in granting that motion).

73. This is possibly because many plaintiffs are unwilling to risk losing any defendants at such an early stage. Unless there is some significant difficulty they anticipate in building a case against that defendant—because the discovery would require multiple interviews of individuals overseas compared with a few local interviews, for example—it would seem most plaintiffs would want to oppose summary judgment motions.

74. See *Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*1 (finding no authority regarding the ability of a codefendant to oppose a defendant's motion for summary judgment).

75. See *supra* Part II.A.

76. See, e.g., *Travelers Prop.*, 2008 WL 108915, at \*3 (mentioning standing but ultimately granting summary judgment for failure to identify a genuine issue of material fact); *Hall*, 2007 WL 2765540, at \*4 n.1 (skirting the standing issue by noting the plaintiff completely adopted the codefendant's arguments); *Jarrett*, 320 F. Supp. at 1134 (avoiding the question of standing because the codefendant's opposition to the defendant's summary judgment did not refute the allegations made in the defendant's motion, which led the court to grant the motion absent evidence of an issue of material fact).

sought to oppose a motion for summary judgment filed by a codefendant.<sup>77</sup> The judge expressed “some doubt whether one co-defendant has standing to object to a motion for summary judgment filed by another co-defendant.”<sup>78</sup> This question appeared before the same court again in 2007 in *Hall v. Norfolk Southern Railway*.<sup>79</sup>

Hall filed a lawsuit to recover damages following injuries suffered when his train crashed into a truck stuck in a railroad crossing.<sup>80</sup> He sued the railroad, the truck’s owner, and the truck’s driver.<sup>81</sup> The driver and owner sought to oppose the railroad’s motion for summary judgment, noting they were “co-Defendants ‘with sufficient interest in keeping’ co-Defendant Norfolk Southern in the case” to resolve remaining questions of material fact.<sup>82</sup> Hall adopted the truck driver’s arguments in his opposition to summary judgment.<sup>83</sup> Norfolk Southern’s reply brief claimed the codefendants lacked standing to oppose the summary judgment motion.<sup>84</sup> Because Hall made the same factual arguments as the codefendant, the court found it unnecessary to consider whether a codefendant may oppose another defendant’s motion for summary judgment.<sup>85</sup>

Other district courts provide more cursory discussion of possible standing questions and simply proceed with the case. Some courts ignore standing questions entirely and adjudicate the motion based on the arguments presented.<sup>86</sup> In some instances, courts follow the codefendants’

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77. *Jarrett*, 320 F. Supp. at 1133–34.

78. *Id.* at 1134.

79. *See Hall*, 2007 WL 2765540, at \*4 & n.1 (deciding not to consider defendant’s argument “that it has not been established [by the court] that a co-defendant can oppose another defendant’s motion for summary judgment in the absence of the plaintiff’s opposition”).

80. *Id.* at \*1.

81. *See id.*

82. Defendants Butch Thompson Enterprises, Inc. and Jacob Shepherd’s Memorandum of Law in Opposition to Defendant Norfolk Southern Railway Company’s Motion for Summary Judgment at 2, *Hall*, 2007 WL 2765540.

83. *See Hall*, 2007 WL 2765540, at \*4 & n.1.

84. *See Reply Brief in Support of Motion for Summary Judgment* at 1 n.1, *Hall*, 2007 WL 2765540 (noting the issue of standing still remained “in doubt” before this court).

85. *Hall*, 2007 WL 2765540, at \*3 n.1.

86. *See, e.g., Thornton Drilling Co. v. Stephens Prod. Co.*, No. 06-2173, 2007 WL 2071604, at \*2, \*8 (W.D. Ark. July 19, 2007) (denying defendant’s summary judgment based on plaintiff’s arguments that the codefendant joined in); *Robinson v. Hartzell Propeller Inc.*, 326 F. Supp. 2d 631, 660–61 & n.14 (E.D. Pa. 2004) (relying on plaintiff’s arguments that were the same as the codefendants’ to reject summary

arguments and deny summary judgment without mentioning the standing question.<sup>87</sup> In *Cash v. Unocal*, the court accepted a motion in opposition to the codefendant's summary judgment that did not even allude to standing questions.<sup>88</sup> The codefendant's reply motion explicitly highlighted the lack of the opposing defendant's "dog in this fight," claiming such absence precluded standing to oppose.<sup>89</sup> Despite the question raised in the reply, the court ignored the standing question and made its decisions based on the merits of the pleadings.<sup>90</sup> Other courts have rejected codefendant arguments, ignored standing, and granted summary judgment.<sup>91</sup> The different approaches epitomize the lack of consensus or a clear standard upon which district courts rely.

### B. Courts Granting Standing to Oppose

District courts in Kansas<sup>92</sup> and Hawaii<sup>93</sup> have explicitly found standing

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judgment); *Farrell v. Nat'l Gypsum Co.*, No. 88 CIV.8136 (CES), 1991 WL 95437, at \*2-3 (S.D.N.Y. May 24, 1991) (granting summary judgment for three of the four motions without addressing standing); *Guthrie v. Radiac Abrasives, Inc.*, No. 89-333 (CSF), 1990 WL 193047, at \*2-3 (D.N.J. Nov. 5, 1990) (addressing codefendant's argument in summary judgment discussion without questioning standing to oppose the motion).

87. See *Cash v. Unocal Corp.*, No. 04-1648, 2008 U.S. Dist. LEXIS 70223, at \*7-8, \*11 (W.D. La. Sept. 16, 2008) (denying motion for summary judgment based solely upon arguments raised by a codefendant); *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1399 & n.1, 1404 (E.D. Pa. 1985) (basing its rejection of summary judgment on codefendant's motion in opposition, though the plaintiff also opposed summary judgment).

88. Opposition to Lytal's Motion for Summary Judgment, *Cash*, 2008 U.S. Dist. LEXIS 70223.

89. See Defendant Lytal Enters., Inc.'s Reply Memorandum at 1-2, *Cash*, 2008 U.S. Dist. LEXIS 70223 ("Plaintiff has sued Lytal and Lytal has moved for summary judgment on Plaintiff's claims. Neither the Plaintiff nor his employer as intervenor opposes Lytal's motion. The silence from those parties is deafening and very telling. However, despite the fact that Lytal has not made a cross claim against it, Max Welders is the only party opposing Lytal's motion for summary judgment seeking a dismissal of Plaintiff's claims. Several courts faced with a similar situation have held that the co-defendant did not have standing to oppose the motion for summary judgment." (footnote omitted)).

90. See *Cash*, 2008 U.S. Dist. LEXIS 70223, at \*7-8, \*11.

91. See *Guthrie*, 1990 WL 193047, at \*2-3 (rejecting codefendant-manufacturer's argument against summary judgment because it failed to meet the burden required).

92. *Dailey v. J.B. Call & Co.*, No. 04-4114-RDR, 2006 WL 616634, at \*1-2 (D. Kan. Mar. 9, 2006).

93. *White v. Sabatino*, 415 F. Supp. 2d 1163, 1172 (D. Haw. 2006).

to oppose a codefendant's motion for summary judgment. Both courts directly examined the potential standing issue before determining that codefendants ought to have the opportunity to oppose the summary judgment motion to reduce the potential for adverse outcomes.<sup>94</sup> In *White v. Sabatino*, the District Court of Hawaii granted a codefendant standing in order to prevent an unfair deprivation of the defendant's "right to contribution by a joint tortfeasor."<sup>95</sup>

A physician's injury from a collapsing medical stool forced the United States District Court for the District of Kansas to confront the standing question in *Dailey v. J.B. Call & Co.*<sup>96</sup> Two defendants, J.B. Call and Blickman, sought to demonstrate they were not the defective stool's manufacturer, a finding which would have eliminated liability.<sup>97</sup> In the course of the debate about who manufactured the product, defendant Blickman filed a motion for summary judgment that defendant J.B. Call and third-party defendant Hirsch opposed.<sup>98</sup> Blickman asserted the arguments opposing its motion were false, that a genuine issue existed as to who was the manufacturer, *and* that J.B. Call lacked standing to oppose the motion as a codefendant.<sup>99</sup> Judge Rogers, in an unpublished opinion applying the Ninth Circuit's reasoning from *Hoover v. Switlik Parachute Co.*, granted J.B. Call standing to oppose the codefendant's motion.<sup>100</sup> The court in *Hoover* found standing to contest a grant of summary judgment for a codefendant in a case involving cross-claims for indemnity and contribution.<sup>101</sup> Rather than barring arguments by coparties, *Hoover* permitted codefendants the opportunity to raise their arguments against their codefendant.<sup>102</sup> The court in *Dailey* found that the court's holding in *Hoover* granted codefendants the right to oppose the motion if the motion had potentially adverse effects on the coparties.<sup>103</sup> In *Dailey*, the specific adverse result would have been a finding that one company was the manufacturer of the defective product, thus pinning blame and liability on

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94. *White*, 415 F. Supp. 2d at 1172; *Dailey*, 2006 WL 616634, at \*2.

95. *White*, 415 F. Supp. 2d at 1172.

96. *Dailey*, 2006 WL 616634, at \*1–2.

97. *See id.*

98. *Id.*

99. *Id.* at \*2.

100. *Id.* (citing *Hoover v. Switlik Parachute Co.*, 663 F.2d 964 (9th Cir. 1981)).

101. *Hoover*, 663 F.2d at 965–66.

102. *Id.* at 965.

103. *See Dailey*, 2006 WL 616634, at \*2 (noting the court granted standing “[f]or the same reasons” as *Hoover*—because the codefendant was a party and would be aggrieved by the court's decision).

the codefendant.<sup>104</sup>

Both *White* and *Dailey* note that motions may result in adverse effects on a party, even in the absence of an adverse holding. For example, in *White*, the court feared the right to contribution might be lost if the opposition were disallowed.<sup>105</sup> In *Dailey*, the court did not want a finding clearing one party of liability while implicitly pointing the finger at the coparty.<sup>106</sup> These arguments in favor of granting standing are couched in terms of fairness and opportunity to be heard rather than by citing to some specific rule or doctrine.

### C. Courts Denying Standing to Oppose

In contrast to the courts that permit opposition to the summary judgment motions of codefendants, some courts have denied standing without further analysis in the absence of any cross-claims.<sup>107</sup> When a plaintiff does not oppose the motion for summary judgment, some courts rely on the objective of avoiding trial, as set out in Federal Rule of Civil Procedure 56;<sup>108</sup> if there is no opposition to the motion from the plaintiff, the argument goes, then there is no reason to continue the court battle on that particular question.<sup>109</sup> Some of these cases address standing, but their ultimate determinations are based on the facts presented and not on a rejection of the codefendant's standing to oppose.<sup>110</sup> In other cases there

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104. *See id.*

105. *White v. Sabatino*, 415 F. Supp. 2d 1163, 1172 (D. Haw. 2006).

106. *Dailey*, 2006 WL 616634, at \*2.

107. *See, e.g., Thurman v. Wood Grp. Prod. Servs., Inc.*, No. 09-4142 Sec.: J(3), 2010 U.S. Dist. LEXIS 132190, at \*4-5 (E.D. La. Dec. 14, 2010); *Hawes v. Blast-Tek, Inc.*, No. 09-365 (RHK/AJB), 2010 U.S. Dist. LEXIS 67089, at \*7-8 (D. Minn. July 2, 2010); *Eckert v. City of Sacramento & Union Pac. R.R. Co.*, No. 2:07-cv-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655, at \*8 (E.D. Cal. Sept. 29, 2009); *Brewer v. Dodson Aviation*, No. C04-2189Z, 2006 WL 3231974, at \*4 n.5 (W.D. Wash. Nov. 7, 2006); *Fraioli v. Lemcke*, 328 F. Supp. 2d 250, 263 n.4 (D.R.I. 2004); *Royal Ins. Co. of Am. v. Zygo Corp.*, 212 F.R.D. 444, 447 (D. Conn. 2003); *Blonder v. Casco Inn Residential Care, Inc.*, No. 99-274-P-C, 2000 U.S. Dist. LEXIS 8054, at \*3-4 (D. Me. May 4, 2000); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Queen Carpet Corp.*, 5 F. Supp. 2d 1246, 1250 & n.1 (D. Utah 1998); *Dixon v. Cnty. of Alameda*, No. C 95-4617-SI, 1997 WL 220311, at \*6 n.8 (N.D. Cal. Apr. 18, 1997).

108. *See* FED. R. CIV. P. 56.

109. *See Eckert*, 2009 U.S. Dist. LEXIS 95655, at \*7 (citing *Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*4); *Fraioli*, 328 F. Supp. 2d at 263 n.4.

110. *See, e.g., Brewer*, 2006 WL 3231974, at \*4 & n.5 (finding no standing to file a motion in opposition but rejecting the motion because it was based on an issue not before the court).

was no need for the court to discuss standing because it was unnecessary to the resolution of the case.<sup>111</sup> Three courts have recently faced this dispositive decision and found no standing.<sup>112</sup> Their conclusions conform to what is arguably the dominant school of thought in federal courts today.<sup>113</sup>

In 2000, the United States District Court for the District of Maine decided *Blonder v. Casco Inn Residential Care, Inc.*<sup>114</sup> Blonder filed suit against her care facility and its employees following a fire.<sup>115</sup> She did not object to motions for summary judgment when discovery led her to conclude certain employees were not liable for her injury.<sup>116</sup> Some remaining defendants, however, opposed the motions and urged the court to deny summary judgment.<sup>117</sup> The court rejected standing to oppose the motion, noting that “[r]equiring Plaintiff to prosecute her claims against Defendants . . . when she no longer believes such claims to be viable would be contrary to the principle of Rule 56 that trials (or portions thereof) should be avoided when appropriate.”<sup>118</sup> The court noted the facts were sufficient to grant summary judgment regardless of standing.<sup>119</sup>

More recently, the United States District Court for the Eastern District of California decided *Eckert v. City of Sacramento*.<sup>120</sup> In *Eckert*, a legally blind resident sued the City of Sacramento and Union Pacific Railroad for inadequate railroad crossing warnings.<sup>121</sup> Union Pacific’s motion for summary judgment was only opposed by the City, whom Union Pacific contended lacked standing to oppose the motion.<sup>122</sup> The court examined the procedural question by first noting it was “infrequently addressed.”<sup>123</sup> Citing *Blonder*, the court refused to find standing to oppose

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111. See, e.g., *Dixon*, 1997 WL 220311, at \*6 & n.8 (finding no standing to oppose a codefendant’s motion for summary judgment but granting summary judgment to both defendants because plaintiff lacked evidence to prove the case).

112. See *Thurman*, 2010 U.S. Dist. LEXIS 132190, at \*4-5; *Eckert*, 2009 U.S. Dist. LEXIS 95655, at \*8; *Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*3-4.

113. See *infra* Part III.C-D.

114. *Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*1.

115. *Id.* at \*1-2.

116. *Id.* at \*2.

117. *Id.* at \*3.

118. *Id.* at \*4.

119. See *id.* \*4 n.1.

120. *Eckert v. City of Sacramento & Union Pac. R.R. Co.*, No. 2:07-CV-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655 (E.D. Cal. Sept. 30, 2009).

121. See *id.* at \*1.

122. *Id.* at \*7.

123. *Id.*

a coparty's motion for summary judgment without *adverse* parties—focusing on the “v.”<sup>124</sup> The court did note that even without this procedural hurdle, the facts warranted an identical result.<sup>125</sup>

In late 2010, the United States District Court for the Eastern District of Louisiana rejected a codefendant's arguments that opposed another defendant's motion for summary judgment, to which the plaintiff filed a Memorandum of No Opposition.<sup>126</sup> The defendant seeking summary judgment claimed it was not negligent and no issue of material fact remained.<sup>127</sup> The plaintiff agreed, but the codefendant claimed the negligence question remained quite uncertain.<sup>128</sup> The judge ruled that only parties to the motion for summary judgment—those on opposing sides of the “v.”—were eligible to oppose the motion.<sup>129</sup> Because the codefendant raised no cross-claims, the court found it had no standing to oppose the motion.<sup>130</sup>

The concern running through *Blonder*, *Eckert*, and *Thurman* is ensuring that summary judgment performs its role of ending litigation without a trial.<sup>131</sup> The concern is that granting a coparty standing to oppose the motion would result in litigation going forward with potentially superfluous defendants.<sup>132</sup> Rather than allowing sole opposition to a motion by a coparty, these courts require that parties be adverse to one another on at least some claims in order to promote efficient disposition of trials.<sup>133</sup> Based on this logic, a party seeking to keep a codefendant involved in the lawsuit has two options: either the party can negotiate an agreement with the coparty to remain in the litigation unless both parties

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124. *See id.* at \*8.

125. *Id.* at \*8–9.

126. *Thurman v. Wood Grp. Prod. Servs., Inc.*, No. 09-4142 Sec.: J(3), 2010 U.S. Dist. LEXIS 132190, at \*4–5 (E.D. La. Dec. 14, 2010) (“[C]o-defendants do not have standing to oppose a defendant's motion for summary judgment when the motion is unopposed by the plaintiff.”).

127. *Id.* at \*4.

128. *See id.* at \*3–4.

129. *Id.* at \*4 (stating a codefendant is not a party to another defendant's motion for summary judgment without a cross-claim).

130. *Id.*

131. *See Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*4 (providing that the intention behind Rule 56 is summary judgment); *see also Eckert*, 2009 U.S. Dist. LEXIS 95655, at \*7–8 (citing *Blonder* for the same principle).

132. *See Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*4 (stating that requiring a plaintiff to prosecute claims it believes are unviable is contrary to Rule 56).

133. *See id.*

exit together through summary judgment,<sup>134</sup> or the party can urge the plaintiff to file an opposition to the summary judgment. In either scenario, the coparties are at least somewhat more likely to remain in the litigation.<sup>135</sup>

#### D. *Lack of Consensus Remains, but Blonder Consensus is Building*

Balancing the competing interests of coparties is an unenviable task. Judges facing opposition to summary judgment motions by codefendants attempt to justify their decisions to grant or deny standing on deeper principles than the text of a Federal Rule of Civil Procedure. Some recent opinions adopt the *Blonder* reasoning,<sup>136</sup> but it remains far from certain how any particular judge will rule on this issue. Whether judges allow opposition to avoid “adverse” outcomes or disallow opposition to expedite lawsuits, their logic is based on tenets that might be derived from other legal principles. In the next Part, two legal principles that are not applied by judges who support granting standing to oppose codefendant summary judgment motions are discussed.

### IV. APPLICABLE PRINCIPLES

The uncertainty of caselaw prompts a turn to principles from which a proposed solution might be derived. This Part examines standing to appeal and the right to intervene—two concepts that offer insight into the question of codefendant standing.

#### A. *Standing to Appeal—Aggrieved Parties*

When a party to litigation believes the outcome is legally erroneous, they may seek appellate review. Standing to appeal requires three elements: (1) injury in fact, (2) causal relationship between the injury and the challenged conduct, and (3) a likelihood the injury can be redressed by

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134. Such an agreement is subject to defection precisely of the type the prisoner’s dilemma anticipates. *See supra* notes 46–49 and accompanying text.

135. The second option seems less desirable for most defendants, but it seems it would be an option to keep one party in the litigation if they would otherwise be able to remove themselves.

136. *See Blonder*, 2000 U.S. Dist. LEXIS 8054, at \*2–4; *Thurman v. Wood Grp. Prod. Servs., Inc.*, No. 09-4142 Sec.: J(3), 2010 U.S. Dist. LEXIS 132190, at \*4–5 (E.D. La. Dec. 14, 2010); *Eckert v. City of Sacramento & Union Pac. R.R. Co.*, No. 2:07-CV-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655, at \*8 (E.D. Cal. Sept. 30, 2009).

a favorable ruling.<sup>137</sup> Injury in fact permits appeals of adverse trial decisions which “aggrieve” a party.<sup>138</sup> Only parties to the original suit satisfy the “aggrieved” test. “[I]t is indeed well settled that generally speaking no person, not a party to a suit, may appeal. The reason for this is that if not a party, the putative appellant is not concluded by the decree, and is not therefore aggrieved by it.”<sup>139</sup> Favorable judgments are generally not appealable because the favored side is unable to satisfy the aggrieved standard.<sup>140</sup> In some unique circumstances, adverse portions of otherwise favorable decisions may be appealed, but only to address particular unfavorable issues.<sup>141</sup>

Standing to appeal a summary judgment generally requires a party be aggrieved.<sup>142</sup> Unlike the codified definition of “aggrieved party” for purposes of the Uniform Commercial Code,<sup>143</sup> determining who is an aggrieved party for purposes of a right to appeal a grant of summary judgment is more nuanced and can only be determined by examining individual judicial decisions. While the aggrieved language is widely used

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137. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488 (9th Cir. 1996) (citations omitted).

138. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (citations omitted); see also BLACK'S LAW DICTIONARY 73, 1154 (8th ed. 2004) (defining “aggrieved” as “having legal rights that are adversely affected; having been harmed by an infringement of legal rights” and defining an “aggrieved party” as “a party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment”).

139. *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 623–24 (2d Cir. 1934) (citations omitted).

140. See *Alberty-Vélez v. Corporación de Puerto Rico para la Difusión Pública*, 361 F.3d 1, 5 n.4 (1st Cir. 2004) (citation omitted) (disallowing a cross-appeal where the party “received the entire relief that it sought from the district court); *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 603 (5th Cir. 2004) (citations omitted); *United States v. Vazquez*, 145 F.3d 74, 83 (2d Cir. 1998) (refusing to provide appellate relief where the lower “court grant[ed] the ultimate relief a party requested”).

141. See *Roper*, 445 U.S. at 347 (Powell, J., dissenting) (“There never has been any doubt that a party may appeal those aspects of a generally favorable judgment that affect him adversely.” (citations omitted)); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (“[A] collateral ruling may sometimes give rise to a right to appeal . . .”).

142. See *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981) (citations omitted).

143. U.C.C. § 1-201(2) (2010) (“‘Aggrieved Party’ means a party entitled to resort to a remedy.”).

in discussions of standing, it is very fact specific to each case.<sup>144</sup> Courts have expanded this definition to include various injuries.

The aggrieved standard is broadly defined by the courts. In the statutory context, the Supreme Court and other courts have noted that “[h]istory associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly.”<sup>145</sup> The courts require at least some form of injury,<sup>146</sup> but they are willing to grant standing following a showing of adverse effect.<sup>147</sup> The courts’ broad construction of “aggrieved party” appellate standing continues even beyond statutory interpretation. Indirect injury is inadequate to establish standing, but standing can be granted when rights are affected.<sup>148</sup> This generally broad grant of standing is not limited to significant harms but also to many instances of rights being limited or results one party opposes. In fact, such broad grants of standing and the unclear lines separating parties who may participate in a suit have been criticized.<sup>149</sup> Professor Chayes lamented just how little a party must show to be found “significantly . . . affected by the outcome” and thus granted standing to appeal.<sup>150</sup>

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144. See generally *Parr v. United States*, 351 U.S. 513, 516–17 (1956) (explaining that the determination of whether one is aggrieved must be made based on the independent facts of each case and procedural outcome, not by any separate proceedings).

145. *FEC v. Akins*, 524 U.S. 11, 19 (1998) (citations omitted); see also *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289, 1295 (D.C. Cir. 1982) (construing the aggrieved standard broadly).

146. See *Lopez v. Merced Cnty.*, No. 1:06-cv-1526 OWW DLB, 2008 WL 170696, at \*13 (E.D. Cal. Jan. 16, 2008) (requiring at least some kind of injury to be shown to fall within the otherwise broad allowance for standing).

147. See *Oil, Chemical & Atomic Workers Local Union*, 694 F.2d at 1294–95 (providing examples of the broad injury standard, including how any adverse effect, even that below a cognizable injury at law or equity, can establish standing).

148. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 428 (5th Cir. 2007) (“A party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants.” (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996) (footnote omitted))). *But see Scottsdale Ins. Co. v. Knox Park Constr., Inc.*, 488 F.3d 680, 684 (5th Cir. 2007) (noting an indirect financial stake in another party’s claim is not sufficient for standing).

149. Abram Chayes, *The Role of the Judge In Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976).

150. See *id.* (“And if the right to participate in litigation is no longer determined by one’s claim to relief at the hands of another party or one’s potential liability to satisfy the claim, it becomes hard to draw the line determining those who may participate so as to eliminate anyone who is or might be significantly (a weasel

The broad grant of standing under the aggrieved standard requires some cognizable harm. The harms may be to current or future rights, finances, property, time, or even to litigation position. For example, cognizable harm has been found in a district court ruling that affected a party's position in relation to other parties,<sup>151</sup> as well as in a court's decision that had potential collateral estoppel effects.<sup>152</sup> The Supreme Court has found aggrieved party standing for a winning party when some conclusions in the ruling are adverse to the otherwise victorious party's interests.<sup>153</sup> The Supreme Court has also granted standing to a winning individual plaintiff as an aggrieved party when class certification was rejected by the district court.<sup>154</sup>

The aggrieved standard does impose a threshold, but it grants significant latitude to parties claiming harm and to courts identifying harm. The Fifth Circuit found a decision that adversely affects rights or legal positions in relation to other parties was sufficient to meet the aggrieved standard.<sup>155</sup> The Ninth Circuit granted standing to a third party where the trial court's decision would have forced payment of damages even though the primary defendant chose not to appeal.<sup>156</sup> The Ninth Circuit limited the category of aggrieved persons in bankruptcy cases to those whose property is diminished, burdens are increased, or rights are detrimentally affected.<sup>157</sup>

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word) affected by the outcome—and the latest revision of the Federal Rules of Civil Procedure has more or less abandoned the attempt.” (footnote omitted)).

151. See *Custer v. Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996) (citing *HCA Health Servs. of Va. v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 124 (4th Cir. 1992)).

152. See *Klamath Strategic Inv. Fund v. United States*, 568 F.3d 537, 546 (5th Cir. 2009) (recognizing the court would grant standing “where the ultimate judgment in the case was ‘dependent’ on the earlier adverse ruling” that had collateral estoppel effect (citation omitted)).

153. See *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (“[T]hough the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction . . .”).

154. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 337–38 (1980) (granting standing to appeal the denial of class certification even though the parties received judgment in their favor).

155. See *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 427–28 (5th Cir. 2007) (explaining that an insurer was aggrieved when the trial court altered the scope of coverage in the insurer's contract, and finding that a party can be aggrieved when its legal position is adversely affected in this way).

156. See *Celanese Coating Co. v. Gullard*, 504 F.2d 466, 469 (9th Cir. 1974).

157. See *In re Fondiller*, 707 F.2d 441, 442–43 (9th Cir. 1983) (noting that the nature of bankruptcy litigation requires limits on standing); see also *White v. McGuirl*,

Likewise, being forced to litigate an issue in state court after a federal court disposition may also aggrieve.<sup>158</sup> Minimal adverse effect is adequate to meet the threshold and obtain standing to appeal as an aggrieved party.

### B. *Intervention—Interests and Representation*

Litigation may arise in which parties outside the suit wish to join. In such circumstances, the outsiders seek to intervene under Federal Rule of Civil Procedure 24(a).<sup>159</sup> Unless a statute provides an automatic intervention right,<sup>160</sup> an individual's right to join the litigation is contingent upon three criteria if the motion is timely: (1) having an interest in the subject matter of the litigation, (2) showing the interest will be impaired or impeded without intervention, and (3) demonstrating that the current parties do not represent the individual's interests.<sup>161</sup> These criteria ensure that intervening parties will provide a unique and valuable perspective in the case at hand.

Inadequate representation of an interest is a hurdle that a party seeking to intervene must jump. The intervenor must therefore answer two key questions: what interest, is at risk, and why is this interest unrepresented by the current parties.<sup>162</sup> These two questions employ the

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No. 93-7174, 1995 WL 364097, at \*1 (D.C. Cir. May 18, 1995) (citations omitted) (defining "person aggrieved" as one who suffers harm to finances, property, or other rights).

158. See *Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire*, 173 F.3d 909, 911–12 (3d Cir. 1999) (deciding a party could be aggrieved by federal district court's dismissal that transferred the case to state court); *Custer v. Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996) (finding the defendant was aggrieved when a federal court's dismissal presented "a certainty, rather than a mere hypothetical possibility, that [defendant would] be forced to incur considerable expense relitigating . . . in state court").

159. FED. R. CIV. P. 24(a)(2).

160. An intervention as of right is different from a permissive intervention, which is provided under Federal Rule of Civil Procedure 24(b). Compare FED. R. CIV. P. 24(a) (requiring the court to grant the motion if criteria are met), with FED. R. CIV. P. 24(b) (allowing the court to use its discretion in ruling on the motion for intervention).

161. *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999) (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (citing *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997)); *Sierra Club v. Espy*, 18 F.3d 1202, 1204–05 (5th Cir. 1994) (citations omitted); *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992) (citations omitted).

162. See *supra* note 160 and accompanying text

principles of “interest” and “adequacy of representation.” The cases forming the contours of the intervention right provide insight into both principles—what constitutes a protectable interest and who can sufficiently protect these interests.

A party may not intervene without sufficient interest in the matter at hand.<sup>163</sup> The interest required for an intervening party is more than a passing fancy, but it may not need to be sufficient to obtain independent standing.<sup>164</sup> While courts have held that standing would likely be sufficient to find a party interested,<sup>165</sup> the Supreme Court has thus far refused to articulate such a standard. The standard remains vague and very fact specific, as the Seventh Circuit noted in 1995.<sup>166</sup> Despite the uncertainty, some facts fall below the threshold to demonstrate sufficient interest. Courts have rejected both remote interests<sup>167</sup> as well as an interest based solely on the ability to enforce an unrelated judgment.<sup>168</sup> The interest

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163. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 537–38 (1972) (footnote omitted).

164. *See Dillard v. Chilton Cnty. Comm’n*, 495 F.3d 1324, 1330 (11th Cir. 2007) (explaining how an intervenor may be able to “piggyback” without fulfilling the full Article III requirements of standing). *But see In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 195 (2d Cir. 2000) (using the Article III standing test for intervenors). If a party wishes to intervene on appeal *after* the other parties with standing have chosen to abide by the decision, some circuits have required independent standing. *See Dillard*, 495 F.3d at 1330.

165. *See In re Holocaust Victims*, 225 F.3d at 195; *S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (turning to the issue of Article III standing to decide if the intervenor met the interest requirement); *cf. United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (noting there is a difference between the interest sufficient for standing under the Administrative Procedure Act and the interest sufficient for intervention).

166. *See Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380–81 (7th Cir. 1995) (“The ‘interest’ required by Rule 24(a)(2) has never been defined with particular precision.”); *see also San Juan Cnty. of Utah v. United States*, 503 F.3d 1163, 1190–1201 (10th Cir. 2007) (revising the long, somewhat confusing history and favoring a pragmatic and flexible test that weighs the equities); *Panola Land Buying Ass’n v. Clark*, 844 F.2d 1506, 1509 n.9 (11th Cir. 1988) (“Admittedly, there is no precise definition for the *interest* a would be intervenor must claim in order to qualify under Rule 24(a).”); Tobias, *supra* note 21, at 434–35 (explaining many judges have had difficulty defining interest, which creates a “cluster of ideas” over a large range).

167. *See, e.g., Am. Lung Ass’n v. Reilly*, 962 F.2d 258, 261–62 (2d Cir. 1992) (agreeing with the lower court that found “the utilities’ interests were too ‘remote from the subject matter of the proceeding’ and too ‘contingent upon the occurrence of a series of events’”).

168. *See, e.g., Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008–09 (8th Cir. 2007) (finding intervention to ensure that a defendant in a separate

requirement thus disposes of cases with only marginally interested parties. Parties who can show property interest in the outcome of the case have been considered interested.<sup>169</sup> Parties with financial or other direct interests will also pass the interest test for a right to intervene under current jurisprudence.<sup>170</sup> The standard remains quite broad—environmental groups and photographers have been found to be interested in suits about monuments and wildlife protection respectively.<sup>171</sup>

Defendant standing based on interest is uncommon, but it has arisen in the criminal context of Fourth Amendment challenges to searches. Such challenges require defendant standing based on a “legitimate expectation of privacy in the invaded place or in the property which is searched.”<sup>172</sup> The Supreme Court has held that only individuals may assert Fourth Amendment claims because they are “personal rights” to be protected.<sup>173</sup> The Court requires individuals to have an interest in the item and in the premises.<sup>174</sup> The expectation of privacy for an item is often adequate to show sufficient interest in the particular piece of property.<sup>175</sup> The rules

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suit maintained adequate financial resources was an insufficient interest).

169. See *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973 (3d Cir. 1998) (finding the potential loss of timber revenues to schools and municipalities was an adequate interest for the schools to have the right to intervene in a suit to restrict logging); *NL Indus. Inc. v. Sec’y of Interior*, 777 F.2d 433, 435 (9th Cir. 1985) (agreeing with the lower court’s decision to grant the owner of a mining claim a right to intervene in a case regarding other mining claims on the same property that was held by a company in opposition to the intervenor in another suit).

170. See *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (finding prisoners in a facility had a sufficient interest regarding how they were being detained and monitored); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (holding an insurance company’s interest was to recoup its losses, which was sufficient to satisfy the interest requirement). A party with interest must also show harm to that interest to intervene, but this standard is often grouped with the finding of an interest. See *Hobson v. Hansen*, 44 F.R.D. 18, 30 (D.C. Cir. 1968).

171. See *Utah Ass’n of Cnty. v. Clinton*, 255 F.3d 1246, 1251–53 (10th Cir. 2001) (holding the tourist and environmental protection concerns regarding a monument were interests sufficient to allow intervention); *Coal. of Ariz./N.M. Cnty. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 841–42 (10th Cir. 1996) (finding a wildlife photographer and amateur biologist had a sufficient interest to intervene into the suit regarding the decision to put a particular type of owl on the endangered species list).

172. See 68 AM. JUR. 2D *Searches and Seizures* § 8 (2010) (footnotes omitted).

173. See *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (citations omitted).

174. *Id.* at 134 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

175. See *Carka Rhoden*, Note, *Challenging Searches and Seizures of Computers at Home or in the Office: From a Reasonable Expectation of Privacy to*

requiring an interest are typically limited to an otherwise legally recognized interest in such things as one's person or property.<sup>176</sup> As in the civil context, direct interests can be sufficient to grant standing.<sup>177</sup> While this criminal standard can provide analogies to the civil context, its applicability in coparty standing questions will be left for a future discussion.

Even an interested party will be prevented from intervention if its interests are already represented by the current parties. While parties may have various interests, intervention requires a party to show that its interests are not addressed by the current parties to the litigation.<sup>178</sup> The party seeking intervention need not have a direct case against the opposing party to be permitted to intervene.<sup>179</sup> Though the burden to demonstrate inadequate representation belongs to the party seeking to intervene, the threshold to show inadequate representation is minimal.<sup>180</sup> This unique interest requirement prevents excessively complex multi-party litigation without any associated benefit to the court or the adjudicative process.

When the interests of the parties in litigation are not aligned with the individual seeking a right of intervention, courts have allowed intervention.<sup>181</sup> For example, in *Sierra Club v. Espy*, the Fifth Circuit

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*Fruit of the Poisonous Tree and Beyond*, 30 AM. J. CRIM. L. 107, 109–10 (2002) (analyzing how an individual's expectation of privacy in certain situations reflects on standing).

176. See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 52 & n.223 (2006) (discussing how the invasion of privacy is no longer sacrosanct when courts are dealing with domestic violence, but recognizing the standard for standing to contest home invasion still affects personal or property rights).

177. See Rhoden, *supra* note 174, at 109–10 (“A person clearly has a reasonable expectation of privacy at home. Thus it should not be difficult to establish a client's standing to challenge a search of a personal computer located in her home.”).

178. *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261–62 (2d Cir. 1992) (holding that an intervening party should ask for something new or different from other parties).

179. See Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 425 (2005) (noting a party may intervene as a defendant even if the plaintiff would have no case against the party so long as they are seeking to protect a legal right).

180. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citing 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 24.09-1[4] (1969)); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 482 (6th Cir. 2000) (Moore, J., dissenting) (citing *Trbovich*, 404 U.S. at 538 n.10).

181. See, e.g., *Sierra Club v. Espy*, 18 F.3d 1202, 1207–08 (5th Cir. 1994) (“Plaintiffs contend that the government adequately represents the movants' interest because the interests are essentially identical. We cannot agree with this position. The

allowed the timber industry to intervene in a suit where the federal government was a party because the government's interests were divergent from the timber industry's interest.<sup>182</sup> The court stated, "The government must represent the broad public interest, not just the economic concerns of the timber industry."<sup>183</sup>

Adequacy of representation is presumed, however, if the objectives of a current party and the applicant for intervention are the same.<sup>184</sup> Different interests are not present when trial strategies differ<sup>185</sup> or when the parties seek different remedies.<sup>186</sup> The threshold question is if the party seeking to intervene brings some new perspective to the litigation.<sup>187</sup> Courts use a practical approach in finding inadequate representation of interests and allow intervention upon the showing of a new perspective, so long as including additional parties will not harm the efficiency of the proceeding.<sup>188</sup> And if doubts remain about the adequacy of representation, courts typically allow the intervention.<sup>189</sup> But, some effort is required to

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movants have demonstrated . . . that the government's representation of their interest is inadequate. The government must represent the broad public interest, not just the economic concerns of the timber industry. Given the minimal burden on the movants to satisfy this requirement, we conclude that the government's representation of the intervenors' interest is inadequate.").

182. *See id.* (finding the industry's interest in future timber sales was different from the government's interests of the broad public interest).

183. *Id.* at 1208.

184. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citing *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997)); *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996).

185. *Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1019–20 (D.C. Cir. 2003) (noting the difference in litigation tactics does not demonstrate inadequacy of representation).

186. *Jenkins v. Missouri*, 78 F.3d 1270, 1275–76 (8th Cir. 1996) (holding that intervention is not justified when seeking an alternative remedy).

187. *See Prete v. Bradbury*, 438 F.3d 949, 956–57 (9th Cir. 2006) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)) (denying an intervention in part because the intervenor failed to bring a new perspective to the case).

188. *See Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) ("Since '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,' we conclude that movants had an interest sufficient to satisfy rule 24." (quoting *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n.10 (5th Cir. 1992))).

189. *See, e.g., Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993) (noting any doubt surrounding the adequacy of representation should favor intervention).

overcome the mild presumption of adequate representation and to demonstrate inadequate representation.<sup>190</sup> Thus, to be granted a right to intervene, a party must demonstrate the potential that its interests will be inadequately represented and the corresponding risk of harm.

## V. APPLICATION

The principles behind granting standing to appeal and standing to intervene provide justification for granting standing to oppose a codefendant's motion for summary judgment. A party seeking to oppose a coparty's motion can point to being aggrieved at a level sufficient to appeal, an interest in the disposition of the motion, and inadequate representation of its unique interests by current defendants. All three principles, gathered from the cases discussing principles of appellate standing and intervention rights, support granting such standing.

### A. Aggrieved Party Standing From Appellate Standing

Standing to oppose a motion may be inferred from standing to appeal for two reasons. First, traditional procedural rules of waiver preclude a party from raising an issue on appeal that was not raised at trial.<sup>191</sup> Second, summary judgment for one codefendant<sup>192</sup> is insufficient to trigger a final judgment necessary for appeal by the other defendant(s) facing the same claims.<sup>193</sup> Without a final judgment, courts may be forced to try the entire case without a party—a party the appellate court could find necessary to disposition. These arguments from procedure and policy justify inferring standing to oppose at trial.

If a party must raise an issue at trial in order to appeal, permission to

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190. See S.D. *ex rel.* Barnett v. U.S. Dep't of Interior, 317 F.3d 783, 785–86 (8th Cir. 2003) (requiring a party to explain at least some special interest that will not be represented by the other party if the intervention is not allowed).

191. See, e.g., McMillan v. United States, 112 F.3d 1040, 1047 (9th Cir. 1997) (citations omitted) (declining to consider the plaintiff's arguments that had been brought for the first time on appeal, finding the right to make them had been waived).

192. See FED. R. CIV. P. 54(b) (“[W]hen multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”).

193. Nat'l Metalcrafters v. McNeil, 784 F.2d 817, 821 (7th Cir. 1986) (“[A] judgment disposing of one of several claims is sufficiently final to be appealable immediately under Rule 54(b) only if the claims do not have a significant factual overlap.”); 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 202.06[2] (3d ed. 2011) (stating a partial adjudication is insufficient for finality under Rule 54(b)).

litigate the issue at trial ought to be inferred. The Ninth Circuit has noted that standing to appeal is contingent on standing at trial.<sup>194</sup> The district court in *Dailey* reasoned that standing should be granted because allowing opposition at trial would help prevent an appeal on the issue.<sup>195</sup> Because appeals of summary judgment are permitted,<sup>196</sup> an initial objection should also be allowed.

Final judgments affecting a party are a prerequisite to any appeal as of right.<sup>197</sup> Even if an appeal is permitted once the final adjudication has taken place, forcing an entire trial to proceed without one party's participation wastes court resources. If the appellate court determines that summary judgment wrongfully removed a party, the litigation may have to be repeated.<sup>198</sup> While there is no legal requirement of efficient use of court resources, a policy favoring efficiency is justified. Permitting arguments to be launched at trial prevents court resources from being drained.<sup>199</sup> While forcing a defendant to remain in litigation the plaintiff does not wish to pursue may waste court resources—as well as the resources of that defendant—the additional party's involvement in the briefing and arguments surrounding a particular motion is unlikely to consume as many court resources as a full retrial. Further, the efficiency argument focuses on the court taking time to accept, read, and consider opposition to the summary judgment motion. The judge may decide summary judgment is warranted and permit the defendant to leave, but doing so should not be based on ignoring the arguments of the codefendants solely on standing grounds.

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194. See *Goldie's Bookstore, Inc. v. Super. Ct. of Cal.*, 739 F.2d 466, 468 n.2 (9th Cir. 1984) (“In general, to have standing to appeal one must have been a party at the time judgment was entered and must be aggrieved by the decision being appealed.” (citation omitted)); *In re KRSM Props. LLC*, 318 B.R. 712, 715–16 (B.A.P. 9th Cir. 2004) (explaining that before appellate standing can be analyzed, standing at the trial court must be established).

195. *Dailey v. J.B. Call & Co.*, No. 04-4114-RDR, 2006 WL 616634, at \*2 (D. Kan. Mar. 9, 2006).

196. See *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 965 (9th Cir. 1981) (allowing appeal of summary judgment).

197. See *Goldstein v. Andresen & Co.*, 465 F.2d 972, 973 n.1 (5th Cir. 1972) (“The arguments in support of dismissal are all predicated upon the familiar principle that only a party aggrieved by a final judgment may appeal from it.” (citations omitted)).

198. See *Dailey*, 2006 WL 616634, at \*2 (noting that if the codefendant's argument was not allowed, the issue would just have to be litigated later).

199. See *id.*

Thus, standing to oppose may be found on one of two fronts. Either the party has express standing as an opposing party in the trial, or they have appellate standing because the ruling itself aggrieves them through an adverse judgment or by restricting the arguments they may make. Both situations should be construed to permit codefendant opposition to a summary judgment motion at trial.

The Ninth Circuit's *Hoover* decision granted codefendants the right to appeal a grant of summary judgment.<sup>200</sup> In *Hoover*, the court allowed an appeal because summary judgment would prevent a codefendant from challenging a finding by the court that the codefendant made the defective parachute.<sup>201</sup> The district court in *Dailey* extended this logic to permit a codefendant to oppose a motion for summary judgment that would result in an adverse impact.<sup>202</sup> The reasoning of these cases sheds light on the standing question at the trial level.

The grant of summary judgment to a codefendant could fall within the range of injuries recognized by the courts as aggrieving a party. In cases in which contribution by codefendants is not required, such as antitrust, intentional torts, or civil rights cases, codefendants may not claim financial injury from summary judgment because total liability is not contingent on the number of defendants.<sup>203</sup> However, such a ruling would clearly affect a party's relationship to other parties,<sup>204</sup> and it might result in statements harmful to a party's interests entering the court's decision.<sup>205</sup> The logic of *Electrical Fittings* could apply to summary judgment.<sup>206</sup> One issue—the parties to the case—would be fully resolved if summary judgment were granted. On this basis, any parties wishing to keep coparties in court would be aggrieved. Such a ruling may also have collateral estoppel effects<sup>207</sup>—if a separate state action or future class action could no longer be brought against the defendants who removed themselves via summary judgment, the other defendants would be aggrieved.

Consider our hypothetical § 1983 case where Costello sues Sullivan

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200. See *Hoover*, 663 F.2d at 965.  
201. See *id.* at 966.  
202. *Dailey*, 2006 WL 616634, at \*2.  
203. See *supra* notes 32–33 and accompanying text.  
204. See *supra* text accompanying note 154.  
205. See *supra* text accompanying note 152.  
206. See *supra* text accompanying note 152.  
207. See *supra* note 151 and accompanying text.

and the City of Boston.<sup>208</sup> The City of Boston would be the only party remaining to pay the civil rights damages if Sullivan were granted summary judgment. In addition, the steps by which Sullivan would remove himself from the litigation—namely pointing a finger at the city’s policies—would be a statement furthering the interests of the plaintiff and would be harmful to the City’s interests. Thus, summary judgment granted to Sullivan would be harmful to the City for these two reasons, and Costello has no incentive to oppose Sullivan’s motion. Not only will the statements against the City be entered into the record, but Costello now has a less sympathetic defendant to proceed against in a jury trial. The City should have little trouble demonstrating they would be aggrieved if the court grants summary judgment to Sullivan.

If a party has standing to appeal a grant of summary judgment, the efficient adjudication argument employed to deny standing to oppose codefendant summary judgment in *Blonder* and *Eckert* is undermined; both trial judges sought to grant the summary judgment rather than face an entire trial.<sup>209</sup> Yet if parties who were denied standing to oppose subsequently obtained appellate standing, either after their motion was rejected or after the disposition of the entire lawsuit, it seems any efficiency gained would be lost.<sup>210</sup> The more efficient adjudication is for the trial judge to permit the opposing motion and rule based on the arguments contained in all parties’ motions. This deeper analysis will provide a record for review rather than result in interlocutory appeal over whether the court ought to have considered the motion. The appellate standing principle thus favors granting standing to oppose coparty motions for summary judgment.

One of the strongest justifications in favor of standing to oppose the motion is the possibility that codefendants prevented from opposing summary judgment may be offended by the result. If they could translate

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208. See *supra* Part II.B.3.

209. See *Eckert v. City of Sacramento & Union Pac. R.R. Co.*, No. 2:07-cv-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655, at \*7–9 (E.D. Cal. Sept. 29, 2009) (granting summary judgment by applying the rationale of Rule 56 from *Blonder*); *Blonder v. Casco Inn Residential Care, Inc.*, No-99-274-P-C, 2000 U.S. Dist. LEXIS 8054, at \*3–4 (D. Me. May 4, 2000) (granting summary judgment based on the intent of Rule 56, which is “to avoid trial when appropriate and to bring about summary justice whenever legally proper”).

210. Further, courts of appeals may be a much less efficient forum in which to disentangle factual questions that often undergird standing disputes. Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 980.

offense into aggrieved party status, they would likely have appellate standing.<sup>211</sup> If a party would have appellate standing, it also ought to have standing to oppose a motion at the trial level. On a practical level, defendants opposing a codefendant's motion for summary judgment might need to go beyond stating contrary facts and may have to demonstrate the adversity they will face should summary judgment be granted.<sup>212</sup>

### B. *Party Interests and Adequacy of Representation from Intervention*

Intervention provides two principles with direct application to codefendant standing to oppose motions: interest and perspective. When one seeks to oppose a coparty's motion for summary judgment, she clearly believes her interests are at risk and that no one in the conversation offers her unique perspectives on a specific motion. The principles of intervention offer three justifications to permit summary judgment opposition standing.<sup>213</sup> First, the vague interest criteria is a sufficiently low bar most claims of a potential adverse result can overcome. Second, if one coparty stands to benefit from a result that negatively affects the other coparty's interests, the first party cannot represent all sides of the discussion. Third, bringing a new perspective to the litigation table justifies intervention. These intervention justifications bolster the case for granting standing to oppose a summary judgment motion by a coparty.

#### 1. *Interested Party*

The interest requirement for intervention is not a high bar and is quite vague.<sup>214</sup> The facts of each case will be determinative of the potential interests,<sup>215</sup> but so long as the party seeking to oppose a motion can point to its own interest at stake, intervention principles lean toward granting standing for the motion. When a party opposes a motion for summary judgment, one can safely assume that party believes its interests are at stake. The interest of a coparty seeking to oppose summary judgment may be the increased likelihood it will be forced to pay damages. The question

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211. See *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981) (stating a party "must be aggrieved" to have appellate standing).

212. See *Dailey v. J.B. Call & Co.*, No. 04-4114-RDR, 2006 WL 616634, at \*2 (D. Kan. Mar. 9, 2006) (holding a codefendant had standing, in part, because that party would be adversely affected by possible contradicting results obtained in a separate adjudication of the issue).

213. See *supra* Part IV.B.

214. See *supra* notes 162–70 and accompanying text.

215. See *supra* note 165 and accompanying text.

becomes whether the likelihood of future damages is a sufficient interest. Because damages are property, they should be sufficient to trigger the interest standard from intervention.<sup>216</sup>

Any attempt to demonstrate a party's lack of interest could require significant fact-based inquiry that may take up substantial judicial resources. Such potential difficulty may justify requiring parties to provide a brief explanation of their interest for the judge's evaluation in the initial opposition motion. There may be cases in which the interest is quite small and the court is well within its rights to reject such interest in finding the party should not be given the opportunity to oppose the motion.<sup>217</sup> However, if a party truly believes its interests will be violated by granting a coparty summary judgment, wisdom may caution at least evaluating the opposition.<sup>218</sup>

## 2. *Adequate Representation*

The interest requirement looks quite similar to appellate standing's aggrieved standard, which has been previously discussed.<sup>219</sup> Intervention's principle of adequate representation offers stronger justification for permitting a party to oppose a coparty's motion. When an individual seeks to oppose a coparty's summary judgment motion, both parties have opposing objectives. If for no reason other than Party *A*'s desire to end the litigation through summary judgment and Party *B*'s desire to continue the litigation, *A* and *B* do not represent the same perspective for purposes of the motion.<sup>220</sup> Differences over tactics, however, are insufficient grounds for finding inadequate representation.<sup>221</sup>

We must first determine if tactics are the only distinction between coparties in such scenarios. Return for a moment to our earlier example of Ed and Fred who jointly burned their neighbor's crops.<sup>222</sup> Fred's motion

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216. *See supra* text accompanying note 168.

217. *See supra* text accompanying notes 166–67.

218. Evaluation of a party's claimed harm along with the competing motions would provide a fact-based justification for rejecting standing to oppose the motion or rejection of the motion itself. Such facts will likely receive substantial deference should the holding be appealed. Thus, review of a party's justifications may be the best conservator of judicial resources.

219. *See supra* Part IV.A.

220. It is entirely possible Party *B* only seeks to keep Party *A* in the litigation as a means to obtain summary judgment for itself at Party *A*'s expense.

221. *See supra* note 184 and accompanying text.

222. *See supra* Part II.B.2.

for summary judgment does not stem from tactical differences with Ed such as choosing various defenses, calling witnesses, and other strategies.<sup>223</sup> If Ed and Fred's interests on a particular motion were to align, the decision to file a motion for summary judgment might be a tactical decision. However, as the tactical decision not to appeal has been used to demonstrate conflicting interests between the parties in intervention cases,<sup>224</sup> so too should filing a motion for summary judgment that would leave a coparty to answer for the entirety of damages.

As the dispute between the parties is not tactical, their interests are not aligned. Both Ed and Fred would likely face zero liability if granted summary judgment. However, unless both parties are permitted to participate in the various facets of the case, one of them might be able to eliminate his liability, likely at the expense of the other. This is the quintessential inadequate representation situation. To deny standing would be to leave Ed represented by someone who quite obviously does not share his best interests. Thus, both codefendants must be independently represented to avoid self-interested arguments that directly harm the coparty.<sup>225</sup>

### 3. *New Perspectives*

One final intervention principle that justifies codefendant standing to oppose a summary judgment motion is the additional perspective a new party would add to the summary judgment discussion without radically altering the current case or causing significant change in its complexity.<sup>226</sup> The perspectives of pizza shop owners Sally, Tony, and Uno are valuable

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223. See, e.g., *B.H. v. McDonald*, 49 F.3d 294, 297 (7th Cir. 1995) (holding that a disagreement over whether to have open hearings was not enough for intervention). Other disagreements might include questions to ask at deposition, which experts to hire, and the order of evidence presented at trial.

224. See *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984) (finding the choice to not appeal demonstrates a conflict justifying intervention because of the inadequacy of the interest otherwise being represented).

225. The fact that the plaintiff is the "master of his claims" does not change this analysis. See *Hawes v. Blast-Tek, Inc.*, No. 09-365, 2010 U.S. Dist. LEXIS 67089, at \*4 (D. Minn. July 2, 2010) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Plaintiffs may dismiss claims, but the court's duty is to ensure that all parties are given representation. Representation of each defendant may be necessary to truly determine whether there is a genuine issue of material fact, which is analogous to the inability of an attorney to represent two defendants in the same criminal trial.

226. See *supra* notes 186–87 and accompanying text.

to any summary judgment discussion in Ross's antitrust action.<sup>227</sup> While all three parties seek to demonstrate their own innocence or non-negligence, they may also provide valuable insight to the proceeding with information about the codefendant's behavior.<sup>228</sup> For example, Tony might have notes from a prior joint meeting of the three parties or financial records demonstrating his or his competitors' guilt or innocence. This information and participation will not add significant complexity to the lawsuit. Because all three parties are already part of the suit and the information they provide may actually be unique, the many perspectives likely benefit the lawsuit and should be encouraged.

#### 4. *Addressing Concerns*

A valid concern with such a broad understanding of intervention rights might be that defendants beyond the initial parties to the lawsuit are having their rights expanded. While it is true that secondary parties—tertiary and beyond—would be granted the opportunity to involve themselves in the lawsuit, it is unlikely parties would be willing to *enter* the lawsuit unless they truly believed a judgment for the plaintiff would compromise their interests. The opportunity to object to a codefendant's motion for summary judgment would be an inadequate incentive to encourage parties with tangential interests to seek a right of intervention; intervention would likely expose such a party to liability in the event the plaintiff wins the lawsuit.

Another concern would be that plaintiffs are required to maintain suits against parties they believe are not liable. The Minnesota District Court raised this concern in *Hawes*:

[The plaintiff] has concluded, based on the evidence adduced in discovery, that he lacks a good-faith basis to continue to press his claims against the moving Defendants. The Court does not believe that [the codefendant] can force Hawes to maintain those claims—in possible violation of *Federal Rule of Civil Procedure 11*—simply because it does not like the outcome if [the other defendants] are

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227. See *supra* Part II.B.1.

228. This is based on Federal Rule of Civil Procedure 56(f)(2), which permits the court to grant summary judgment “on grounds not raised by a party.” FED. R. CIV. P. 56(f)(2). Such permissive language should certainly be broad enough to permit the court to hear the new perspective and new evidence that a codefendant would likely bring to the litigation.

dismissed . . . .<sup>229</sup>

While initially a compelling argument, further analysis demonstrates its weakness. The court's refusal to grant summary judgment for one codefendant does not compel the plaintiff to pursue a case against that party. The court's role in granting or denying summary judgment is to determine whether there are genuine issues of material fact. If a codefendant can show that questions of fact remain on one defendant's liability despite the pleading of that defendant and the acquiescence of the plaintiff, the court should not grant summary judgment—so long as that finding of liability will benefit the codefendant.

### C. *Standing to Oppose Coparty's Summary Judgment*

The principles derived from appellate standing and the intervention right offer justification to permit coparty opposition to summary judgment motions even in the absence of cross-claims. When a party stands to face increased liability, even speculative liability, that party has likely met the aggrieved party threshold of appellate standing that could justify allowing such an argument to be resolved on the motions at trial rather than on appeal. The right of intervention allows parties to join a case if they bring unique perspectives to litigation that affects their interests.<sup>230</sup> Because a party left with additional potential obligations could point to an interest in the case,<sup>231</sup> bring a perspective not otherwise present to debate on the motion,<sup>232</sup> and remain involved without causing inefficient use of judicial resources,<sup>233</sup> the case for granting such a party standing to oppose appears strong.

Defendant standing ought to be more liberal than plaintiff standing. Limiting and restricting third-party standing is aimed at efficiency and effectiveness.<sup>234</sup> Courts usually seek to avoid excessive lawsuits or lawsuits

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229. *Hawes*, 2010 U.S. Dist. LEXIS 67089, at \*4.

230. *See* FED. R. CIV. P. 24(a)(2).

231. *See id.* (providing that a party seeking to intervene must “claim[] an interest relating to the property or transaction that is the subject of the action”).

232. *See* *Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006) (“Thus, the public interest group—intervening on the defendant’s side—might bring a perspective materially different from that of the present parties and was entitled to intervene.” (citation omitted)).

233. *See* *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (noting the resolution of Rule 24’s “interest test” must be “compatible with efficiency and due process” (citation omitted)).

234. *See* 15 MOORE ET AL., *supra* note 192, ¶ 101.51[3][b] (noting courts

on hypothetical issues; however, limiting defendant standing is unlikely to result in any fewer lawsuits. In some instances, denying a particular defendant standing in one case may result in a second case or appeal between the current plaintiff and the remaining defendant.<sup>235</sup> Because the lawsuit already exists when questions of defendant standing arise, the scrutiny given to standing of the various defendants need not be as strict as third-party or plaintiff standing. Allowing a defendant to oppose a codefendant's motion for summary judgment implicates none of the concerns that caution against a broadened conception of standing to oppose in general.

Faced with a situation in which Defendant *A*, Ed, seeks to oppose Defendant *B*'s, Fred's, summary judgment motion, the trial court should base its judgment on the arguments in the pleadings rather than on standing.<sup>236</sup> Such adjudication would result in hearing arguments that would be avoided by dismissing the opposition for lack of standing, but the judicial efficiency of such adjudication would be undermined if such a ruling were reversed by an appellate court—potentially after the conclusion of the entire suit.<sup>237</sup> Further, as many courts have recognized, the arguments presented in opposition to the summary judgment motion are often inadequate to defeat the motion.<sup>238</sup> For this reason, rejecting standing seems to add a unique wrinkle to an otherwise simple summary

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should not “unnecessarily” adjudicate rights of third persons not parties to the litigation).

235. See *Dailey v. J.B. Call & Co., Inc.*, No. 04-4114-RDR, 2006 WL 616634, at \*2 (D. Kan. Mar. 9, 2006).

236. “The court should state on the record the reasons for granting or denying the motion.” FED. R. CIV. P. 56(a). It is preferable for the reasons to be based on the merits rather than standing. See *id.* advisory committee's note 2010 (“The statement . . . need not address every available reason. But identification of central issues may help the parties to focus further proceedings.”).

237. See, e.g., *Minn. Mining & Mfg. Co. v. U.S. Rubber Co.*, 279 F.2d 409, 415 (4th Cir. 1960) (emphasizing that Rule 56 “provides a salutary and efficient instrumentality for the expedition of the business of the courts”).

238. See, e.g., *Travelers Prop. Cas. Co. v. Tomasella's Fire Extinguisher Co.*, No. 05-983, 2008 WL 108915, at \*3 (D.N.J. Jan. 7, 2008) (mentioning standing but ultimately granting summary judgment for failure to identify a genuine issue of material fact); *Hall v. Norfolk S. Ry.*, No. 1:06-CV-0607-JOF, 2007 WL 2765540, at \*4 n.1 (N.D. Ga. Sept. 18, 2007) (skirting the standing issue by noting the plaintiff completely adopted the codefendant's arguments); *Jarrett v. Green*, 320 F. Supp. 1132, 1134 (N.D. Ga. 1970) (avoiding the question of standing because the codefendant's opposition to the defendant's summary judgment did not refute the allegations made in the defendant's motion, which led the court to grant the motion absent evidence of a material issue of fact).

judgment order. If courts review the opposition filed by the codefendant and determine summary judgment is not warranted, they have only minimally increased their work load and reduced the risk of appellate reversal. If, on the other hand, courts allow the codefendant opposition and in light of those facts still grant summary judgment, the coparty will be unable to hold up the disposition with a future appeal.<sup>239</sup> By addressing the arguments on their merits, courts preserve the right to file for the codefendant while providing both parties the opportunity to press their cases.<sup>240</sup>

## VI. CONCLUSION

This Article has examined the scenario in which a defendant seeks to oppose a coparty's motion for summary judgment. The inconsistent treatment of this conflict in the past offers little insight into the likely outcome for courts facing this issue in the future. Further, the uncertainty may create a prisoner's dilemma for attorneys who seek to advance their client's interests while simultaneously cooperating with co-counsel to reach a common objective. This Article contends that granting standing to oppose codefendant motions is warranted and supported by principles from appellate standing and the right to intervene. Rather than rejecting party filings on standing grounds, courts ought to review oppositions to motions and make determinations based on the facts or lack thereof. The relevant question for analysis is not on which side of the case a party sits—the "v."—but rather on which side of an issue the party stands. Parties in opposition to one another or with differing interests on an issue should have standing to make arguments against one another, including opposing codefendant motions for summary judgment. Granting standing prevents appeals, does not unnecessarily impede courtroom efficiency, and protects the rights and interests of all parties to the litigation.

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239. Obviously abuse of discretion and other fact-based challenges would be permitted on appeal, but those are situations in which appellate courts typically defer to the judgment of the trial judge.

240. This would also comport with the 2010 revisions of the Federal Rules of Civil Procedure, which require the court to explain its reasoning behind the disposition of a motion. FED. R. CIV. P. 56 advisory committee's note 2010 ("Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment.").