The Enigma of Standing Doctrine in Texas Courts

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I. INTRODUCTION ...................................................................... 35
II. FEDERAL JURISPRUDENCE .................................................... 37
III. THE DEVELOPMENT OF TEXAS STANDING DOCTRINE ............ 43
IV. RELATIONSHIP OF STANDING TO CAPACITY .............................. 58
V. CONCLUSION ........................................................................ 69

I. INTRODUCTION

As a general rule, Texas law traditionally has required a claimant to possess a common law or a statutory right of action, or in public rights cases, to have a personal interest in the enforcement of the public right distinct from and more palpable than the general public’s interest before commencing a civil action.¹ Beginning with the Texas Supreme Court’s decision in Texas Ass’n of Business v. Texas Air Control Board, a majority of the Texas Supreme Court appears to have replaced these traditional ideas with federal standing doctrine and to have elevated the law of standing to jurisdictional status.² The court’s new approach to standing complicates Texas

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1. See infra notes 41–47 and accompanying text.
2. 852 S.W.2d 440, 445–46 (Tex. 1993) (“We therefore hold that standing, as a component of subject matter jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.”); see id. at 444–46 (using federal standing doctrine as a guideline to standing in Texas, noting that “we look to the more extensive jurisprudential experience of the federal courts on [standing] for any guidance it may yield”); see also DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 304 (Tex. 2008) (“A court has no jurisdiction over a claim by a plaintiff without standing to assert it.”).

A lack of standing under Article III of the Constitution, which limits federal judicial power to the resolution of “Cases” and “Controversies,” deprives a court of subject matter jurisdiction. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62, 569 n.4 (1992) (discussing the requirement of standing under Article III). Prudential standing limitations recognized by the Supreme Court, as opposed to Article III standing limitations, are not regarded as jurisdictional because these are
procedural law by embracing a complex body of federal constitutional law without clearly explaining whether a claimant must possess a legal injury resulting from the breach of a legal duty, or whether some other type of interest or injury is sufficient to satisfy Texas’s standing requirements.

3. See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (Rehnquist, J.) ("We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency . . . ."); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 STAN. L. REV. 1371, 1372 (1988) ("One of the traditional criticisms of [federal] standing law is that it is confusing and seemingly incoherent."); see also Heather Elliott, The Functions of Standing, 61 STAN. L. REV. (forthcoming 2008), available at http://ssrn.com/abstract=1109177 (discussing the failure of the federal standing doctrine to "promote the very principles that are said to justify its existence"); William A. Fletcher, The Structure of Standing, 98 YALE L. J. 221, 221 (1988) (proposing abandonment of the current structure of standing law, which has been described as incoherent, in favor of treating standing as a question on the merits of plaintiff’s claim).

4. See Tex. Ass’n of Bus., 852 S.W.2d at 446 ("The general test for standing in Texas requires that there ‘(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.’" (quoting Bd. of Water Eng’rs v. City of San Antonio, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955))). The “general test” set forth in Texas Ass’n of Business, and taken from Board of Water Engineers, gives incomplete guidance in that it does not clarify what type of injury or interest, if any, is needed for a plaintiff to have standing. In Board of Water Engineers, which concerned a statute’s constitutionality and the prohibition against the issuance of advisory opinions, there was no discussion of the type of interest claimants must possess to have standing. A recent opinion concerning the standing of class representatives explains that the injury must be “concrete” and “particularized” as well as “actual” or “imminent,” but it is still unclear whether a legal injury is required or if, for instance, an injury in fact is sufficient. See DaimlerChrysler Corp., 252 S.W.3d at 304–05 ("[T]he law is not well developed on the degree to which the defect must actually manifest itself before it is actionable.").
Another troublesome byproduct of the court’s 1993 decision in Texas Ass’n of Business involves Texas’s capacity defenses.\(^5\) Texas Supreme Court decisions prior to Texas Ass’n of Business treated the concepts of capacity and standing as essentially synonymous.\(^6\) This is no longer possible after Texas Ass’n of Business. The elevation of standing to a jurisdictional doctrine requires a clear line of demarcation between the doctrines of capacity and standing. No such line has been established; instead, Texas appellate decisions exhibit incoherence and confusion.

This Article examines federal and Texas standing doctrine and makes recommendations for the principled application of the traditional nonjurisdictional approach of the procedural defense of standing under Texas law for common law claims and statutory rights of action and for the concomitant restriction of the jurisdictional aspects of standing to litigation brought by private persons and governmental units to enforce public rights or compel the performance of public duties. This Article also explains how the concepts of standing and capacity can be reconciled and harmonized.

II. FEDERAL JURISPRUDENCE

Article III of the Constitution limits the judicial power of the federal courts to the resolution of “Cases” and “Controversies.”\(^7\) Those two words currently impose a number of limits on the exercise of judicial power by eliminating some important disputes from the federal judicial sphere. Thus, as the Supreme Court recently summarized in Massachusetts v. Environmental Protection Agency:

[N]o justiciable “controversy” exists when parties seek adjudication of a political question, when they ask for an advisory opinion, or when the question

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5. See Tex. R. Civ. P. 93(1) (“That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.”); R. 93(2) (“That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.”).

6. See Light v. Wilson, 663 S.W.2d 813, 814 (Tex. 1983) (defining capacity to sue as a party’s “standing to assert or defend the action before the Court” (emphasis added)); Conrad v. Artha Garza Co., 615 S.W.2d 238, 240 (Tex. Civ. App.—Dallas 1981, no writ) (treating capacity and standing as synonymous).

7. U.S. Const. art. III, § 2.
sought to be adjudicated has been mooted by subsequent developments.\(^8\)

In addition, "[t]he rules of standing . . . are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."\(^9\)

In other words, the rules of standing determine whether a litigant has the right type of interest to maintain an action in federal court. Constitutional standing is "one of the controlling elements in the definition of a case or controversy under Article III."\(^10\) Under federal law, a lack of Article III standing deprives a court of subject matter jurisdiction.\(^11\)

The fundamental requirement that claimants must have standing is not a mere pleading rule. As Justice Scalia's majority opinion in \textit{Lujan v. Defenders of Wildlife} explains:

\begin{quote}
[The elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff has the burden of proof, \textit{i.e.}, with the manner and degree of evidence required at the successive stages of the litigation.\(^12\)
\end{quote}

Under current federal law, constitutional standing requires that a "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particula-

\begin{footnotesize}
\begin{enumerate}
\item 127 S. Ct. 1438, 1452 (2007) (citations omitted). The timeliness, or "ripeness," of an action is also constitutionally significant. For example, the ripeness requirement bars courts from considering issues prematurely, such as before an act or statute being challenged has had a direct adverse effect on the person making the challenge. \textit{See Nat'l Park Hospitality Ass'n v. Dep't of the Interior}, 538 U.S. 803, 807-08 (2003); \textit{Abbott Labs v. Gardner}, 387 U.S. 136, 148-49 (1967), \textit{abrogated on other grounds by Califano v. Sanders}, 430 U.S. 99, 105 (1977).
\item Warth v. Seldin, 422 U.S. 490, 517-18 (1975).
\item ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989).
\item \textit{Id.} at 561.
\end{enumerate}
\end{footnotesize}
rized, and (b) 'actual or imminent,' not 'conjectural' or 'hypotheti-
cal.'\textsuperscript{13} Additionally, "there must be a causal connection between the injury and the conduct complained of" and "it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'"\textsuperscript{14}

In \textit{Lujan}, the Supreme Court held that certain organizations dedicated to wildlife conservation and other environmental causes did not have Article III standing to challenge a rule promulgated by the Secretary of the Interior interpreting a section of the Endangered Species Act of 1973.\textsuperscript{15} The rule interpreted the statute as requiring federal agencies to consult with the Secretary only for actions taken in the United States or on the high seas, but not for actions taken in foreign nations.\textsuperscript{16} The Court held that the plaintiffs were not among the injured merely because they had toured foreign regions in which federally funded projects threatened the habitats of Egyptian crocodiles and Sri Lankan elephants, and planned to return as tourists to the places they had visited previously at some time in the future.\textsuperscript{17} "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."\textsuperscript{18} The Court went on to note the following:

Standing is not "an ingenious academic exercise in the conceivable," but . . . requires . . . a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of

\textsuperscript{13.} \textit{Id.} at 560.
\textsuperscript{14.} \textit{Id.} at 560–61 (citations omitted).
\textsuperscript{15.} \textit{Id.} at 557–59, 578.
\textsuperscript{16.} \textit{Id.} at 558–59.
\textsuperscript{17.} \textit{Id.} at 562–64.
\textsuperscript{18.} \textit{Id.} at 564; see also \textit{id.} at 564 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes . . . .")
that species with which he has no more specific connection. ¹⁹

In contrast, in Massachusetts v. Environmental Protection Agency, the Supreme Court held that Massachusetts had standing to challenge the Environmental Protection Agency’s denial of a petition to begin regulating the emission of greenhouse gases, including carbon dioxide, under § 202(a)(1) of the Clean Air Act because the Commonwealth of Massachusetts is a sovereign state and not, as the appellees in Lujan, a private individual. ²⁰ Specifically, the Court found that Massachusetts “owns a substantial portion of the state’s coastal property” that will be permanently or temporarily lost through storm surge and flooding if sea levels continue to rise as predicted, and as such Massachusetts “has alleged a particularized injury in its capacity as a landowner.” ²¹ The Court also noted that the fact “[t]hat these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.” ²²

The injury-in-fact component of Article III standing is relatively new. ²³ Although the Supreme Court long ago recognized that advisory opinions are outside the federal jurisdictional limits of Article III, ²⁴ the injury-in-fact requirement is rooted in the Supreme Court’s 1970 decision in Ass’n of Data Processing Service Organizations v. Camp. ²⁵ In Camp, the Court replaced the traditional notion that a person was required to have a cause of action—or an injury in law—with the considerably more lenient, but nonetheless abstract, idea that the claimant was required to have sustained an injury in fact. ²⁶

¹⁹. Id. at 566–67.
²¹. Id. at 1455–56.
²². Id. at 1456. Another line of standing cases holds that the interests of federal taxpayers who seek to enjoin the unlawful expenditure of tax revenue are considered to be too generalized to authorize taxpayer standing. See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 476–79 (discussing Supreme Court decisions regarding taxpayer standing).
²³. See supra notes 13–14 and accompanying text.
²⁴. Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792).
²⁶. See id. at 152 (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”).
The injury-in-fact standard is described in broad terms. Not only is it distinct from the "legal interest" test, which "goes to the merits," an injury in fact "may reflect 'aesthetic, conservational, and recreational' as well as economic values." In other words, the injury-in-fact test is not moored to the concepts of "legal interest," "legal injury," or "legally cognizable claims."

In addition to constitutional limits on the exercise of judicial power, the Supreme Court has traditionally recognized prudential standing limitations, barring many third-party suits, preventing plaintiffs from prosecuting suits for generalized grievances shared with other members of the public generally, and requiring plaintiffs to be within the "zone of interests" that the relevant statute or governmental regulation seeks to protect. The line between prudential standing and constitutional standing limitations under federal

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27. Id. at 153–54; see also Linda R.S. v. Richard D., 410 U.S. 614, 616–17 (1972) ("Recent decisions by this Court have greatly expanded the types of 'personal stake(s)' which are capable of conferring standing on a potential plaintiff.").

28. See, e.g., Tileston v. Ullman, 318 U.S. 44, 46 (1943) (holding that doctor had no standing to challenge statute on ground that its enforcement would harm patients); cf. United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 557–58 (1996) (discussing "wide variety of ... contexts in which a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another, even where damages are sought"). See generally Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277 (1984) (discussing judicial views on third-party standing).

29. See FEC v. Akins, 524 U.S. 11, 23–24 (1998) (noting that the "generalized grievance" limit on standing "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law'"); see also, e.g., DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343–46 (2006) (denying taxpayers standing to challenge granting of local and state tax credits); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209–11, 217–20 (1974) (holding that present and former members of the Reserves who challenged members of Congress as violating Constitution by simultaneously belonging to Congress and the Reserves had no standing because same interest was shared by all citizens); Frothingham v. Mellon, 262 U.S. 447, 486–87 (1923) (denying taxpayer standing to sue to enjoin expenditure of funds). But see Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (holding that taxpayer had standing to challenge expenditure because "the Establishment Clause ... specifically limit[s] the taxing and spending power conferred by Art. I, [§] 8").

law is a hazy one, especially in the context of generalized grievances. Under the most recent Supreme Court case law, it is probable that a generalized grievance about governmental action cannot satisfy the basic injury-in-fact requirement because it is not concrete and particularized.\textsuperscript{31} In contrast, governmental action that is directed at a large group of citizens arguably could cause each of them an injury in fact.\textsuperscript{32} Unlike constitutional standing, prudential standing is not an element of federal subject matter jurisdiction; therefore, an appellate court can ignore the prudential standing argument if it is raised for the first time on appeal and instead decide the case on the merits.\textsuperscript{33}

The apparently contemplated adoption of federal prudential standing doctrine by the Texas Supreme Court\textsuperscript{34} will avoid some of the procedural difficulties that jurisdictional standing rules create,\textsuperscript{35} but it will not reconcile traditional legal interest standing jurisprudence with the jurisdictional branch of federal standing doctrine.

\begin{itemize}
\item 32. Lujan, 504 U.S. at 561–62 ("When the suit is one challenging the legality of government action or inaction . . . standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed."); see also CHEMERINSKY, supra note 31, at 91 ("[T]he bar against generalized grievance standing is inapplicable if a person claims that he or she has been denied freedom of speech or due process, even if everyone else in society has suffered the same harm. However, if the plaintiff alleges a violation of no specific constitutional right, but instead claims an interest only as a taxpayer or a citizen in having the government follow the law, standing is not allowed."); Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[W]hen an individual who is the very object of a law’s requirement or prohibition seeks to challenge it, he always has standing.").
\item 33. Finstuen v. Crutcher, 496 F.3d 1139, 1147 (10th Cir. 2007).
\item 34. See supra note 2 and accompanying text.
\item 35. See infra notes 93–97 and accompanying text.
\end{itemize}
Further, it is clear that although adoption of the federal concept of prudential standing may be helpful, the adoption of its complex and uncertain details will cause additional procedural difficulties.

III. THE DEVELOPMENT OF TEXAS STANDING DOCTRINE

Although there is no "Case" or "Controversy" provision in the Texas Constitution as there is in Article III of the United States Constitution, Texas courts have long recognized constitutional limits on the exercise of judicial power established by the Texas Constitution. One of the primary limits on the exercise of judicial power is the prohibition against the rendition of advisory opinions. It has been repeatedly held that Article 5, § 8 of the Texas Constitution does not empower courts to render advisory opinions. As explained by Chief Justice James W. McClendon of the Austin Court of Appeals, "the expression 'advisory opinion' ordinarily connotes the practice that existed in England ... of extrajudicial consultation of the judges by the Crown and the House of Lords."

Accordingly, one important prerequisite to the exercise of judicial power is a requirement of a justiciable controversy—a real controversy between the parties that actually will be resolved in the litigation. In addition, before the term "standing" was used by Texas courts to label the type of interest or injury needed by a claimant to bring a lawsuit, a claimant was usually required to have

36. Alamo Express, Inc. v. Union City Transfer, 158 Tex. 234, 252, 309 S.W.2d 815, 827 (1958); see also Firemen's Ins. Co. of Newark, N.J. v. Burch, 442 S.W.2d 331, 333 (Tex. 1969) (citing Texas cases that have held that "the judicial power does not embrace the giving of advisory opinions"), abrogated on other grounds by Farmers Texas County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 83 (Tex. 1997); United Serv. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 859–60 (Tex. 1965) (same).


39. Although the term "standing" appears in some earlier Texas Supreme Court opinions, the first case that essentially treats it as a synonym for the term "justiciable interest" is Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984) ("In order for any person to maintain a suit it is necessary that he have standing to litigate the...
a common law cause of action or a statutory right of action. In other words, in order to have a “justiciable interest” the claimant generally was required to have a “legal interest”—a cause of action—and to have sustained a legal injury as the result of the defendant’s breach of a common law or a statutory duty.

Texas also recognized two important exceptions to the legal interest requirement—the public rights exception and a taxpayer exception. Under the public rights exception, in limited circumstances, a private person is permitted to assert a public right or to challenge a government action that neither grants a legal interest nor legally injures the person. In this situation, claimants are required to have a “particular personal interest which separates them from the general public.” The earliest Texas case to recognize and limit this public rights exception to the legal interest rule is City of San Antonio v. Strumberg. In Strumberg, the City of San Antonio

40. See, e.g., Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976) (“[O]nly the person whose primary legal right has been breached may seek redress for an injury.... Without a breach of a legal right belonging to the plaintiff no cause of action can accrue to his benefit.”); Am. Nat’l Ins. Co. v. Hicks, 35 S.W.2d 128, 131 (Tex. Comm’n App. 1931, judgm’t adopted) (“The right to maintain an action depends upon the existence of what is termed a cause of action, which involves the combination of a right on the part of the plaintiff and a violation of such right by defendant.”); All Seasons Window & Door Mfg., Inc. v. Red Dot Corp., 181 S.W.3d 490, 496–97 (Tex. App.—Texarkana 2005, no pet.) (plaintiff did not have standing to sue for usury because it was not a party to the contract at issue and “usury remedies are personal to the debtor”); Exxon Corp. v. Pluff, 94 S.W.3d 22, 26–27 (Tex. App.—Tyler 2002, pet. denied) (holding that plaintiff had no standing in property damage suit against oil company because injury occurred before plaintiff bought land and deed contained no assignment of any cause of action; in other words, there was no breach of any legal right belonging to plaintiff).

41. See Hunt, 664 S.W.2d at 324 (“Plaintiffs have shown a particular personal interest which separates them from the general public.”); City of San Antonio v. Strumberg, 70 Tex. 366, 368, 7 S.W. 754, 755 (Tex. 1888) (“We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law that no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself.”).

42. Hunt, 664 S.W.2d at 324.

43. 70 Tex. 366, 7 S.W. 754. It is important to note that the South Western Reporter spells the defendant’s name as “Stumburg” instead of “Strumberg.” The cases are identical other than the disparate spelling of the defendant’s name. Strumberg is used throughout this Article for consistency.
passed a resolution to erect a city hall on the Military Plaza, an open space within the city limits. Strumberg filed a suit to enjoin the construction. Although he was a resident property owner and taxpayer, his property did not abut the plaza and he was not specially injured by the project. Based on an "elementary" doctrine derived from a very influential secondary source, the Texas Supreme Court held that Strumberg could not maintain the action.

Another long recognized exception to the "legal interest" rule provides that taxpayers have standing under Texas law to sue in equity to enjoin the unlawful expenditure of public funds, without showing a distinct interest or injury. In contrast, taxpayers with no special injury distinct from the general public do not have standing to challenge expenditures that are merely "unwise or indiscreet," to sue to recover funds that have already been expended, or to prohibit a governmental entity from paying for goods or services that the government has already received and placed in permanent use. Further, "for prudential reasons," the Texas Supreme Court has determined that paying sales tax does not confer taxpayer standing because such a rule would permit virtually any person "to come into court and bring the government's actions under judicial review."

Beginning with the Corpus Christi Court of Appeals' 1976 decision in *Housing Authority of Harlingen, Texas v. State ex rel. Velasquez*, several Texas courts of appeals, under the influence of developing federal standing principles, began to articulate the following alternative requirements for a person's standing to sue:

44. Id. at 366, 7 S.W. at 754.
45. Id.
46. Id.
47. Id. at 368, 7 S.W. at 755 ("We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law that no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself. As applied to public measures the doctrine is elementary." (2 Cooley's Blackstone, [122 (1884)])).
49. Id.
50. Hoffman v. Davis, 128 Tex. 503, 508, 100 S.W.2d 94, 96 (1937).
53. 539 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).
1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; 2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; 3) he has a personal stake in the controversy; 4) the challenged action has caused the plaintiff some injury in fact, either economic, ethic [sic], recreational, environmental, or otherwise; or 5) he is an appropriate party to assert the public’s interest in the matter, as well as his own interest.\(^{54}\)

Under *Velasquez* and similar subsequent cases,\(^{55}\) Texas standing doctrine appears to have embraced evolving federal standing jurisprudence, including the broad injury-in-fact standard announced in *Camp*.\(^{56}\) Appearances, however, are sometimes deceiving. It is altogether unlikely that the Corpus Christi Court of Appeals in *Velasquez*, or the courts of appeals that have adopted *Velasquez*’s standing requirements, appreciated the significance of the 1970 doctrinal change in federal standing law or intended to make a similar modification of Texas law without the benefit of any Texas Supreme Court decision authorizing the courts of appeals to do so.\(^{57}\)

Another subsisting line of Texas cases that is solidly rooted in Texas’s traditional “legal interest” jurisprudence equates standing with the existence of a legally cognizable claim.\(^{58}\) Under this ap-

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54. *Id.* at 913–14 (citing Ass’n of Data Processing Serv. Orgs. v. Camp., 397 U.S. 150 (1970)).


56. See *supra* notes 23–26 and accompanying text.

57. *Velasquez*, 539 S.W.2d at 913 (citing “legal interest” cases, for example, Am. Nat’l Ins. Co. v. Hicks, 35 S.W.2d 128 (Tex. Comm’n App. 1931, judgm’t adopted)).

58. See Denman v. Citgo Pipeline Co., 123 S.W.3d 728, 732 (Tex. App.—Texarkana 2003, no pet.) (“Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate.”); *Hicks*, 35 S.W.2d at 131 (“The right to maintain an action depends upon the existence of what is termed a cause of
proach, "only the person whose primary legal right has been breached may seek redress for an injury." Of course, this line of cases represents the original conception of what constitutes a justiciable interest needed by a plaintiff to prosecute a court action. Occasionally, Texas intermediate appellate courts have insensibly combined this traditional legal interest standard with the injury-in-fact formulation developed and applied by the Supreme Court, even though under federal standing doctrine an injury in fact need not be a legal injury resulting from a breach of a legal duty.

The first time that the Texas Supreme Court embraced federal standing jurisprudence was in Texas Ass’n of Business v. Texas Air Control Board. In Texas Ass’n of Business, the Texas Supreme Court held that the Texas Association of Business (TAB) had standing to seek a ruling that statutes empowering the Texas Air Control Board and the Texas Water Control Board to levy civil penalties for violations of their regulations were unconstitutional under the Texas Constitution. The court based its decision on the following findings related to the three-prong test in Hunt v. Washington State Apple Advertising Commission: (1) TAB members had standing to sue on their own behalf because individual members had been assessed administrative penalties pursuant to the challenged enactments; (2) the TAB was chartered to “represent the interests of its members on issues which may impact its members’ businesses”; and (3) the TAB’s claim did not require the participation of its members because it did not need to prove any

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60. See supra notes 38–40 and accompanying text.
61. See, e.g., Velasquez, 539 S.W.2d at 913–14 (noting that “[i]t is a fundamental rule of law that without a breach of a legal right belonging to the plaintiff, no cause of action arises or can accrue to his benefit” while holding that “some injury in fact, either economic, ethic [sic], recreational, environmental, or otherwise” is required for a plaintiff to have standing).
62. See supra notes 13–14, 23–27 and accompanying text.
63. 852 S.W.2d 440 (Tex. 1993).
64. 432 U.S. 333, 343 (1977) (“[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”).
individual circumstances of its members in that it sought only prospective relief and raised only issues of law.\textsuperscript{65}

Although the recognition of "associational standing" based on federal standing doctrine itself did no harm to Texas jurisprudence in the context in which \textit{Texas Ass'n of Business} arose, namely because it fit nicely into the public rights exception,\textsuperscript{66} the majority opinion nevertheless created several serious problems. First, the opinion, written by then-Justice John Cornyn, vaguely states that both federal and Texas standing doctrine require the claimant to have suffered an injury but does not clearly describe the kind of injury that is required.\textsuperscript{67} There is an implication that the Texas Supreme Court embraced federal standing principles,\textsuperscript{68} including the type of injury needed, but the "general test" for standing articulated by the court avoids explicitly doing so because the opinion rests largely on traditional Texas jurisprudence applied in public rights cases.\textsuperscript{69} Second, the court held that because standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal.\textsuperscript{70} This holding, which rests on the court's interpretation of the separation of powers and the open courts provisions of the Texas Constitution,\textsuperscript{71} expressly overruled previous Texas case law, which held that lack of standing must be asserted by the opposing party in the trial court in order to preserve error and avoid waiving the standing issue.\textsuperscript{72} In

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\item \textit{Tex. Ass'n of Bus.}, 852 S.W.2d at 447–48.
\item See supra notes 41–47 and accompanying text.
\item \textit{Tex. Ass'n of Bus.}, 852 S.W.2d at 444 ("To comport with Article III, a federal court may hear a case only when the litigant has been threatened with or has sustained an injury. Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury." (citation omitted)).
\item \textit{Id.} ("Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.").
\item See supra notes 41–47 and accompanying text.
\item \textit{Tex. Ass'n of Bus.}, 852 S.W.2d at 445–46.
\item \text{TEX. CONST. art. II, § 1; id. art. I, § 13.}
\item \textit{Tex. Ass'n of Bus.}, 852 S.W.2d at 446 ("We are aware that this holding conflicts with \textit{Texas Industrial Traffic League v. Railroad Commission}, 633 S.W.2d 821, 823 (Tex. 1982) (per curiam). The analysis that leads us to the conclusion we reach here, however, compels us to overrule \textit{Texas Industrial Traffic League} and disapprove of all cases relying on it to the extent that they conflict with this opinion.").
\end{enumerate}
combination, these two holdings have spawned an increasing use of jurisdictional standing doctrine to cover cases in which plaintiffs simply do not have or cannot prove legally cognizable claims.

According to Justice Comyn's opinion, *Texas Industrial Traffic League*, and all cases relying on it, were overruled because of three undesirable consequences that could result from the inability to raise standing for the first time on appeal:

First and foremost, appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits. Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury.\(^7\)

In retrospect, it is difficult to see why any of these dire consequences would result from the failure to make standing a jurisdictional issue. Certainly, appellate courts could reverse decisions made by lower courts in excess of their authority as well as collusive suits. Similarly, the preclusive effect of decisions is also well within judicial control. Nevertheless, subsequent Texas Supreme Court cases have adopted other aspects of federal standing doctrine, but also without identifying the type of interest or injury required to satisfy Texas's newly adopted standing requirement.\(^7\)

A purported resolution of this problem appears in the Texas Supreme Court's opinion in *Austin Nursing Center, Inc. v. Lovato*,\(^7\)

\(^7\) *Id.* at 445.

\(^7\)4. See DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 304 (Tex. 2008) (citing federal cases for the proposition that, for standing, plaintiff's injury must be "concrete and particularized"); Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001) ("To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" (quoting Raines v. Byrd, 521 U.S. 811, 818-19 (1997))); id. ("The United States Supreme Court has 'consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute' and that the injury suffered is 'concrete and particularized.'" (quoting Raines, 521 U.S. at 819)).

\(^7\)5. 171 S.W.3d 845, 848 (Tex. 2005).
a case in which the court attempted to reconcile the twin doctrines of standing and capacity.\textsuperscript{76} Citing a well-recognized federal treatise and earlier cases that attempted to perform the same feat,\textsuperscript{77} the court stated that "[t]he issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome."\textsuperscript{78} Although the supreme court ultimately held that a decedent's estate had a "justiciable interest" and standing to prosecute a survival action because the decedent had a personal injury claim that became part of the decedent's estate at death, the court gave no clear guidance about the overall meaning of the term "justiciable interest."\textsuperscript{79} All that we know for sure is that a "justiciable interest" is the kind of interest that is required for a claimant to go to court. Hence, the definition is completely circular. As explained below, \textit{Lovato} also provides only a limited reconciliation of the doctrines of standing and capacity.\textsuperscript{80}

More recently, the Texas Supreme Court has confused the merits of common law claims with the concept of jurisdictional standing. In \textit{Allstate Indemnity Co. v. Forth}, a policyholder sued her insurer for settling her medical bills "in what the insured considered to be an arbitrary and unreasonable manner."\textsuperscript{81} Although Forth sought no damages in her petition, she claimed that Allstate had not paid so-called Personal Injury Protection benefits in compliance with her insurance policy, which required payment of "reasonable expenses incurred for necessary medical and funeral services."\textsuperscript{82} She sought an injunction requiring Allstate to conduct an honest review

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\textsuperscript{76} The relationship of standing and capacity is the subject of Part IV, \textit{infra}.

\textsuperscript{77} See \textit{Nootsie, Ltd. v. Williamson County Appraisal Dist.}, 925 S.W.2d 659, 661 (Tex. 1996) ("A plaintiff has \textit{standing} when it is personally aggrieved regardless of whether it is acting with legal authority; a party has \textit{capacity} when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.").

\textsuperscript{78} \textit{Lovato}, 171 S.W.3d at 848 (quoting 6A CHARLES ALLEN WRIGHT ET AL., \textit{FEDERAL PRACTICE AND PROCEDURE} § 1559, at 441 (2d ed. 1990)); \textit{id.} ("A plaintiff has \textit{standing} when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has \textit{capacity} when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.").

\textsuperscript{79} \textit{Id.} at 850.

\textsuperscript{80} See \textit{infra} notes 144–49 and accompanying text.

\textsuperscript{81} 204 S.W.3d 795, 795–96 (Tex. 2006) (per curiam).

of her "actual charges without using [an] automatic computer reduction program" and to ultimately "compensate her for lost policy benefits." In other words, Forth's claim was for breach of contract, but she sought only declaratory and injunctive relief rather than damages. The Texarkana Court of Appeals ruled that Forth had standing because "[a]nything less than the payment of a reasonable amount of [medical] expenses [resulting from a motor vehicle accident] would result in a distinct injury to Forth—that is, receiving less than the sums for which she contracted." On further appeal, the Texas Supreme Court summarily reversed the court of appeals because Forth had not suffered a threatened or actual injury resulting from the manner in which Allstate settled her claim. Thus, Forth had no standing and the trial court had no jurisdiction.

The real question is whether the Texarkana Court of Appeals and the Texas Supreme Court should have regarded this issue as a problem with the substantive merits of Forth's claims against Allstate rather than a jurisdictional problem. What the courts should have said is that Forth had standing to sue Allstate for breach of contract, but Allstate did not breach the contract because it satisfied its policy obligations and Forth suffered no legal injury. Allstate's plea to the trial court's jurisdiction should have been overruled because the problem with Forth's claim should not have been regarded as a jurisdictional problem. It was a problem concerning the merits of her claim that should have been addressed in a motion for summary judgment, or in a conventional trial on the merits, not by a plea to the jurisdiction.

In another recent case, the Texas Supreme Court again equated the existence of a cause of action with the plaintiffs'...
standing to litigate a common law claim. In that case, a resident of Kingsville and a nonprofit association brought a declaratory judgment action against a conservation district concerning rates charged to the City of Kingsville under a contract between the district and the City of Kingsville, allegedly made to directly benefit Kingsville residents. The plaintiffs claimed that the rates charged under the contract were "excessive and discriminatory, causing Kingsville rate payers to bear a disproportionate percentage of operating expenses" compared to others who were also served by the conservation district. The trial court ruled that neither plaintiff had standing. The court of appeals determined that the Kingsville resident had standing as a citizen and taxpayer of the City of Kingsville. On further appeal, the Texas Supreme Court first concluded that the plaintiffs did not have standing as third-party-beneficiaries of the contract under common law principles because there was nothing in the contract that conferred "donee- or creditor-beneficiary standing upon the plaintiffs to challenge the contract's terms." The court also applied traditional general standing principles to conclude that neither the resident nor the association had standing because neither the resident nor any member of the association had sustained a particularized injury "distinct from that suffered by the public at large." Again, with respect to the third-party-beneficiary claim, what the supreme court should have said is that the plaintiffs do not have a third-party-beneficiary claim under the substantive law, not that they had no standing to assert such a claim. On the other hand, with respect to the denial of the resident's citizen and taxpayer standing, the court's approach rests on a more solid foundation under both Texas and federal law.

By treating the issues as jurisdictional ones in Forth and Lomas, the Texas Supreme Court has implicitly validated the use of a jurisdictional standing defense wherever a claimant's attempted common law claim does not constitute a viable cause of action. Under this approach, standing doctrine expands to the limits of the claims asserted in the action, and a plea to the jurisdiction can be used to assert that the claimant has no case, depriving the trial and appellate courts of jurisdiction over the merits. What is worse,

88. Id. at 306.
89. Id. at 307.
90. Id.
because the problem concerns the trial court’s subject matter jurisdiction, it can be raised for the first time on appeal and possibly at any time thereafter in a collateral attack on the trial court’s judgment.

It is more than mildly ironic that the Texas Supreme Court has recently abandoned the longstanding doctrine that the requirements of a statutory cause of action, created in derogation of the common law, are jurisdictional, precisely because “a judgment will never be considered final if the court lacked subject-matter jurisdiction.” As Chief Justice Tom Phillips’s opinion explains, “the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.”

If Texas law has been so thoroughly infused with the idea that the concept of standing must be addressed in every case, it would be far better to differentiate cases involving common law claims, and cases involving statutory rights of action, from cases in which a particular person or governmental unit brings suit to enforce public rights or to compel the performance of public duties.

Although the imposition of a standing requirement is justifiable and even sensible in public rights cases, in the mine run of conventional litigation it makes no procedural sense to treat the legal or factual validity of a claim as a jurisdictional prerequisite to the maintenance of the action. If a claimant asserts a common law claim or a statutory right of action, but the claimant has no such claim under the law, the absence of a viable claim should not be a jurisdictional concern for several reasons.

First, it is a very bad idea to treat a claimant’s failure to plead and prove a common law or a statutory claim as a jurisdictional problem because jurisdictional problems can be raised for the first

92. Id. (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e, at 113 (1982)). Since Dubai Petroleum, the Texas Supreme Court has reinforced the view that a statutory requirement is not jurisdictional, but merely a substantive prerequisite to relief, unless the legislative intent so indicates. Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser, 140 S.W.3d 351, 366 (Tex. 2004); Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 183–84 (Tex. 2004).
93. See, e.g., Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist., 46 S.W.3d 880, 884 (Tex. 2001) (“A party must have both standing and capacity to bring a lawsuit. And while standing as an issue cannot be waived, capacity can be.”).
time on appeal, thereby bypassing all of the other procedural prerequisites to raising complaints on appeal.94

Second, claimants in such cases should be regarded as having a sufficient interest to go to court and to obtain a disposition "on the merits" if they plead a common law cause of action, even if their claims are without merit. If unmeritorious claims succeed they are subject to review on appeal or potentially to other direct attacks.

Third, in such cases there is no benefit to be derived from complicating the adjudicative process by imposing duplicative threshold assessments concerning the claimant's standing to be in court in the first place. Common law actions and actions authorized by statute require claimants to have a legally cognizable claim under the substantive law. There is no need for courts to engage in additional esoteric assessments of a claimant's right to prosecute such claims.95

Fourth, the characterization of the claimant's failure to plead or prove a common law or a statutory claim as a jurisdictional problem may also restrict the jurisdiction of an appellate court to decide the case as well as the preclusive effect of the ultimate judgment in the case. Under Texas law, if a trial court lacks subject matter jurisdiction, an appellate court may make no order other than reversing the trial court's judgment and ordering the case dismissed.96 The dismissal of the case for lack of subject matter jurisdiction also severely limits the preclusive effect of the judgment.97


95. Injuries to rights recognized at common law are sufficient for standing under federal law. CHEMERINSKY, supra note 31, at 70.

96. City of Garland v. Louton, 691 S.W.2d 603, 605 (Tex. 1985); see Douglas v. Delp, 987 S.W.2d 879, 882 (Tex. 1999) (dismissing plaintiff's claims for lacking subject matter jurisdiction). Even if the evidence is legally sufficient to support the claimant's common law or statutory claim, dismissal also appears to be required if the court of appeals concludes that the evidence is factually insufficient. See Cessna Aircraft Co. v. Aircraft Network, L.L.C., 213 S.W.3d 455, 460–61, 465–66, 469 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (dismissing claims because the evidence was factually insufficient).

97. RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) (stating that a dismissal for lack of jurisdiction does not bar another action by the plaintiff on the same claim); id. cmt. b (stating that rules of issue preclusion do apply to dismissals
The same analysis should be applied to common law and statutory claims in actions for declaratory relief. A claimant must have a "justiciable interest" in the subject matter of the action to maintain an action for a declaratory judgment. This means that the plaintiff must have sustained a "distinct injury" and there must be a "real controversy" that will be actually determined by the judicial declaration that is sought. Accordingly, the same analysis that applies to common law or statutory damage claims should be applied to declaratory judgment actions that involve the declaration of common law or statutory rights and duties. In other words, the inability of a claimant to establish a common law duty or a statutory right as a basis for obtaining declaratory relief should also not be regarded as a jurisdictional issue. In contrast, as explained below, declaratory judgment actions that concern the declaration of public rights should be evaluated under the same principles applied in other cases involving the adjudication of public rights.

In cases involving the adjudication of public interests, the issue is more complex because whether the claimant is a suitable

for want of jurisdiction); see McCarney v. Ford Motor Co., 657 F.2d 230, 233–34 (8th Cir. 1981) (holding that dismissal of suit for lack of standing did not bar separate action based on same operative facts); Cayer Enters., Inc. v. DiMasi, 852 A.2d 758, 760–61 (Conn. App. Ct. 2004) (holding that dismissal for lack of subject matter jurisdiction was not a judgment on the merits and did not raise the defense of res judicata); Watkins v. Resorts Int'l Hotel & Casino, Inc., 591 A.2d 592, 602–05 (N.J. Sup. Ct. 1991) (holding that a dismissal based on lack of corporate shareholder's ability to assert one statutory claim did not preclude separate action on another claim even if arising out of identical set of facts).

98. See Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex. 1996) (holding that the Uniform Declaratory Judgments Act does not confer jurisdiction on trial court, but makes relief available for a cause of action within the court's jurisdiction); see also Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.001–011 (Vernon 2007) (providing an action for declaratory judgment); Cobb v. Harrington, 190 S.W.2d 709, 713 (Tex. 1945) (holding that an action for declaratory judgment is neither legal nor equitable).

99. Brooks v. Northglen Ass'n, 141 S.W.3d 158, 163–64 (Tex. 2004); see TEX. CIV. PRAC. & REM. CODE ANN. § 37.003(c) (Vernon 2007) (noting that a court can exercise general power and offer "declaratory relief" to "terminate the controversy or remove an uncertainty").

100. See Brooks, 141 S.W.3d at 163–64 ("A judicial decision reached without a case or controversy is an advisory opinion, which is barred by the separation of powers provision of the Texas Constitution."); see also Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001) ("[S]tanding limits subject matter jurisdiction to cases involving a distinct injury to the plaintiff and 'a real controversy between the parties.'" (citation omitted)).
public representative must be determined. In public rights litigation, such a determination may be more sensibly regarded as jurisdictional under the separation of powers rationale to avoid judicial usurpation of legislative and executive prerogatives. In addition, the selection of a suitable person to represent the public interest helps to ensure the presence of an actual controversy. Thus, in public rights cases, Texas courts could wholeheartedly embrace the federal injury-in-fact standard, together with the requirements of causation and redressability, as a jurisdictional prerequisite. For example, in the Texas Ass’n of Business case itself, the specific issue concerned the association’s standing to obtain declaratory relief that an administrative enforcement scheme administered by the Texas Air Control Board and the Texas Water Commission was unconstitutional. Because some of the TAB’s members had been subjected to civil penalties assessed by the Air Control Board and the Water Commission, the court determined that “TAB’s members have standing to sue in their own behalf.”

Further, the court also reasoned that TAB’s allegation that other of its members remained at substantial risk of penalties was also sufficient to ensure that they had a sufficient interest in the controversy to have individual standing. Accordingly, the court held that the association had “standing to sue on behalf of its members [because] ‘its members would otherwise have standing to sue in their own right.’”

Similarly, in Nootsie, Ltd. v. Williamson County Appraisal District, the court held that the appraisal district had a justiciable interest in a controversy involving the constitutionality of an exemption statute, not because the statute violated the district’s constitutional rights, but “because it is charged with implementing a statute that it believes violates the Texas Constitution” which “provides the district with a


102. Id. The court also ruled that the interests TAB seeks to protect are germane to the organization’s purpose and that neither the claim nor the relief requested requires the participation of individual members in the lawsuit. Id. In the mid 1990’s, the Supreme Court ruled that the first two prongs of associational standing are constitutional and jurisdictional, but that the third prong (neither the claim nor relief requested requires participation of individual members) is prudential. United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 554–58 (1996).
sufficient stake in this controversy to assure the presence of an actual controversy that the declaration sought will resolve.”

Cases in which judicial review is sought of an administrative agency’s actions also typically involve the adjudication of public rights and interests. Such cases squarely present the right of claimants to represent the public interest in approving or disapproving agency action. In 2004, the Texas Supreme Court resolved a split of authority in the courts of appeals and held that § 2001.171 of the Texas Government Code confers a right to judicial review unless express statutory language prohibits judicial review or “specific legislative history or other reliable evidence of intent” demonstrates a “legislative intent to prohibit judicial review.”

Significantly, in addition to satisfying the other prerequisites for judicial review of administrative action in contested cases, a party must be

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103. 925 S.W.2d 659, 662 (Tex. 1996); see also Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 774–75 (Tex. 2005) (“But the school districts have alleged the very same injury that the appraisal district alleged in Nootsie and the city in Proctor [v. Andrews, 972 S.W.2d 729, 734 (Tex. 1998)], which is that they are being required to implement unconstitutional statutes. And this is also the same injury that gives the districts standing to complain that local ad valorem taxes have become a state property tax in violation of article VIII, section 1-e [of the Texas Constitution].”).

104. “A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision on a contested case is entitled to judicial review.” TEX. GOV’T CODE ANN. § 2001.171 (Vernon 2008); cf id. § 2001.038 (noting that a declaratory judgment action can be used to challenge an administrative rule if the rule threatens to impair a “legal right or privilege of the plaintiff”).

105. Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 195–99 (Tex. 2004) (disapproving Employees Retirement System v. Foy, 896 S.W.2d 314, 316 (Tex. App.—Austin 1995, writ denied), which held that § 2001.171 is a “procedural” provision which does “not create right to judicial review where the right does not exist by reason of another statute specifically granting the right”).

106. Under the prudential doctrine of primary jurisdiction, a party must seek an initial administrative determination of a matter delegated by statute to an administrative agency. See Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 219–21 (Tex. 2002) (distinguishing between primary jurisdiction and exclusive jurisdiction). In addition, a party must ordinarily exhaust all available administrative remedies, see Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser, 140 S.W.3d 351, 361–62 (Tex. 2004) (“A requirement of exhaustion of remedies ensures a decision on the merits by the authority designated to make it.”), unless there is only a pure law question involved in the determination of the administrative case, cf. Cameron Appraisal Dist. v. Rourk, 194 S.W.3d 501, 502
“aggrieved by a final decision in a contested case.” The Texas Supreme Court has explained that the statutory language requires that a person must show a “justiciable interest,” without providing a more precise definition. Even more significantly, the Austin Court of Appeals has held that such an interest or injury “need not affect ‘vested’ property rights . . . ; the harm may be economic, recreational, or environmental.” This requirement, together with the remainder of the general test for standing embraced in the Texas Ass’n of Business case, mirrors the federal injury-in-fact test and arguably should be regarded as a jurisdictional prerequisite to the maintenance of such actions.

Another type of case in which a private person may bring an action to redress an injury to the public involves an action to abate a public nuisance. Although Texas cases are not numerous, following English practice, a private person may bring an action to abate a public nuisance, but only if the person had suffered “particular harm” or a “special injury” differing in kind from the harm suffered by the general public. Use of the same kind of injury-in-fact approach used in cases challenging agency action is also a sensible approach in public nuisance cases.

IV. RELATIONSHIP OF STANDING TO CAPACITY

The court’s elevation of standing to a jurisdictional doctrine in Texas Ass’n of Business makes it necessary to differentiate

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110. A public nuisance is a condition that amounts to “an unreasonable interference with a right common to the general public.” Jamail v. Stoneledge Condo. Owners Ass’n, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979)).
111. Id. (citing RESTATEMENT (SECOND) OF TORTS § 821C cmts. f, j).
between a party’s standing to bring an action and the party’s capacity to do so.\textsuperscript{112}

Failure to raise a capacity defense in a sworn pleading during the pretrial phase of the litigation waives the defense.\textsuperscript{113} Prior to 1993, the same approach applied to a lack of standing defense.\textsuperscript{114} Accordingly, the defenses were harmonious and served the same salutary procedural objective, the elimination of questions about whether the right parties are before the trial court by requiring parties to raise and resolve the problem or by applying procedural waiver principles if the problem was not raised prior to trial.

There has been considerable confusion in the use of the terms \textit{capacity to sue} and \textit{standing to sue}.\textsuperscript{115} The terms blur, for example, when the challenging party uses the term \textit{standing} to assert a flaw that actually is a question of \textit{capacity}. For example, in \textit{Shepherd v. Ledford}, the Texas Supreme Court addressed the right of an heir to sue on behalf of a decedent’s estate as an issue of standing,\textsuperscript{116} but subsequently, in \textit{Austin Nursing Center, Inc. v. Lovato}, the court changed its mind and concluded that “the issue is more appropriately characterized as one of capacity.”\textsuperscript{117}

Many other courts in Texas and elsewhere have had considerable difficulty in differentiating between the twin doctrines.

\textsuperscript{112} See \textit{Austin Nursing Ctr., Inc. v. Lovato}, 171 S.W.3d 845, 848 (Tex. 2005) ("The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a ‘justiciable interest’ in its outcome, whereas the issue of capacity ‘is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate.’" (citations omitted)).

\textsuperscript{113} See \textit{Nootsie, Ltd. v. Williamson County Appraisal Dist.}, 925 S.W.2d 659, 662 (Tex. 1996) ("Texas Rule of Civil Procedure 93(1) requires a party to file a verified pleading if it argues that ‘the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.’" (citation omitted)). Capacity defenses are of two types under Texas procedural law. First, a plaintiff or a defendant may lack the capacity to sue or be sued. \textit{Tex. R. Civ. P. 93(1)}. A second type of capacity defense is that the plaintiff is not entitled to recover in the capacity in which he sues, or the defendant is not liable in the capacity in which the defendant is sued. \textit{Tex. R. Civ. P. 93(2)}.


\textsuperscript{115} See \textit{Lovato}, 171 S.W.3d at 848 & n.1, 849–51 (citing 5 \textit{William V. Dorsaneo III, Texas Litigation Guide § 70.06[2] (2005)}) (discussing courts’ confusion over the use of capacity to sue and standing to sue).

\textsuperscript{116} 962 S.W.2d 28, 31 (Tex. 1998).

\textsuperscript{117} 171 S.W.3d at 851 n.3.
of standing and capacity. Confusion also results because “capacity to sue” has been defined as a party’s “standing to assert or defend the action before the Court.”

Texas law requires verification of two categories of allegations concerning capacity. The first category of allegations includes any assertion that the plaintiff lacks the legal capacity to sue or that the defendant lacks the legal capacity to be sued. Actions may be brought by and against parties only if they actually or legally exist and are legally capable of being sued. Dead persons, decedents’ estates, trusts, infants, and incompetents, for example, lack the capacity to sue or be sued. This capacity defense is relatively easy to recognize because it concerns whether the claimant is competent to prosecute any action on the claimant’s own behalf and causes no particular difficulty.

The second capacity defense, that the plaintiff is not entitled to recover in the capacity in which the plaintiff sued or that the defendant is not liable in the capacity in which the defendant was sued, is much more problematic. In this context, capacity refers to

118.  Id. at 848 n.1 (“Although the parties have argued the issue before us and below as one of standing, the real issue is Coastal’s capacity to sue.” (quoting Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist., 46 S.W.3d 880, 884 (Tex. 2001))); id. (“The capacity addressed in Rule 93(c), Tex. R. Civ. P., is Light’s standing to assert or defend the action before the Court.” (quoting Light v. Wilson, 663 S.W.2d 813, 814 (Tex. 1983))); id. (“Appellants’ challenge that appellee lacks standing is, in actuality, a challenge to appellee’s capacity to sue.” (quoting Freedman v. Briarcroft Prop. Owners Inc., 776 S.W.2d 212, 215 (Tex. App.—Houston [14th Dist.] 1989, writ denied))).

119. See Light, 663 S.W.2d at 814 (“Light’s capacity to be sued is not in issue, but the merit of the Wilsons’ suit was placed in issue by Light’s general denial.”); see also Conrad v. Artha Garza Co., 615 S.W.2d 238, 240 (Tex. Civ. App.—Dallas 1981, no writ) (treating capacity and standing as synonymous).

120. Tex. R. Civ. P. 93(1), (2).

121. Tex. R. Civ. P. 93(1); see Lovato, 171 S.W.3d at 849 (“[M]inors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities.”).


123. Tex. R. Civ. P. 93(2). The origins of Rule 93(2)’s second capacity defense are unclear. The capacity defenses first appeared as Article 1265 in the Revised Civil Statutes of 1879, but no original source is mentioned in the Report of Commissioners to Revise Laws of Texas appointed under the Act of July 28, 1876. Report of Commissioners to Revise Laws of Texas, reprinted in 6 Tex. L. Rev. 327, 337–42 (1927–1928). Although the origins of the first capacity defense
the authority of the party to assert or defend the particular action that
is before the court, such as the legal authority of a personal repre-
sentative to prosecute a decedent’s cause of action or the legal
authority of a bankruptcy trustee to enforce payment obligations
owed to the debtor.\textsuperscript{124}

The distinction between the second capacity defense and the
defense that a claimant lacks standing is frequently difficult to
identify because both of the defenses contend that the claimant is the
wrong person to bring the action. The difficulty is reflected in the
interpretation of the second capacity defense that is expressed in a
line of Texas cases usually identified with the Texas Supreme
Court’s opinion in \textit{Pledger v. Schoellkopf}.\textsuperscript{125}

In that case, Pledger brought suit against Hunt and
Schoellkopf for fraud and tortious interference.\textsuperscript{126} The jury returned
a verdict for Pledger and judgment was rendered on the verdict.\textsuperscript{127} On appeal, the Dallas Court of Appeals reversed the trial court’s
judgment, holding that the causes of action asserted by Pledger
belonged to Midway Aircraft Sales, Inc., a corporation in which
Pledger, Schoellkopf, and Hunt were shareholders.\textsuperscript{128} The Dallas
Court reasoned that the Schoellkopfs had not waived this defense by
failing to file a verified denial of Pledger’s capacity to prosecute the
corporate cause of action against them because Pledger was “not
suing in any capacity other than his own,” and Pledger did not
establish that he suffered any damages.\textsuperscript{129} The Texas Supreme Court
reversed.\textsuperscript{130} The supreme court explained that the appellate court’s
holding that “Rule 93(2) applies only when a party is seeking

can be identified by referencing common law and Code pleading rules that have
been carried forward into Rule 9(a) of the Federal Rules of Civil Procedure, Rule
93(2) has no exact counterpart as a capacity defense in the federal rulebook. As
originally promulgated, both capacity defenses concerned objection to the
plaintiff’s capacity only. In contrast, Rule 93 extended the requirements to pleas
questioning the capacity either of plaintiffs or defendants. TEX. R. CIV. P. 93.

\textsuperscript{124} E.g., Jenkins v. Jenkins, 991 S.W.2d 440, 444 (Tex. App.—Fort Worth
1999, pet. denied); Shiffers v. Estate of Ward, 762 S.W.2d 753, 755 (Tex. App.—
Fort Worth 1988, writ denied).
\textsuperscript{125} 762 S.W.2d 145 (Tex. 1988) (per curiam).
\textsuperscript{126} \textit{Id.} at 145.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} Schoellkopf v. Pledger (\textit{Schoellkopf I}), 739 S.W.2d 914 (Tex. App.—
\textsuperscript{129} \textit{Id.} at 921–22.
\textsuperscript{130} \textit{Pledger}, 762 S.W.2d at 145.
recovery in a representative capacity” was too narrow an interpretation.131 Instead the supreme court ruled that “Rule 93(2) requires that a verified plea be filed anytime the record does not affirmatively demonstrate the plaintiff’s or defendant’s right to bring suit or be sued in whatever capacity he is suing. Its application is not limited to cases of representative capacity only. The rule means just what it says.”132

If Pledger had been seeking damages for Midway, as its representative, it could have been much easier to accept the supreme court’s per curiam decision because the issue would clearly be “authority to act for Midway.” But there is no question that the court went further by not limiting the rule’s application to cases of representative capacity, presumably to preclude technical arguments from being made about whether the right parties are before the court when it is too late in the litigation process to correct the problem, at least without granting a new trial.

Thus, in the absence of a sworn denial of capacity, the claimant’s ownership of the claim is established.133 The ownership of the claim is a question of capacity, not one of the elements of the plaintiff’s claim, and certainly not a question of jurisdictional standing. The Texas Supreme Court’s per curiam opinion flatly rejects the court of appeals’ reasoning that “[t]he burden is on the plaintiff to prove the elements of his claim, including his ownership of it.”134

A large number of cases have followed the court’s interpretation of the second capacity defense.135

131. Id. at 146.
132. Id. (citation omitted).
133. See Schoellkopf v. Pledger (Schoellkopf II), 778 S.W.2d 897, 899 (Tex. App.—Dallas 1989) (treating Midway’s claim as in issue, but not Pledger’s ownership of the claim).
134. Schoellkopf I, 739 S.W.2d at 921 (“The defendant is not burdened with disproving that element of the plaintiff’s claim.”).
135. See, e.g., Swinnea v. ERI Consulting Eng’rs, Inc., 236 S.W.3d 825, 833 (Tex. App.—Tyler 2007, no pet.) (“A party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.”); Landry’s Seafood House—Addison, Inc. v. Snadon, 233 S.W.3d 430, 433–34 (Tex. App.—Dallas 2007, pet. filed) (failure to raise issue of ownership of claim for amounts due under commercial lease by verified denial waives complaint); King-Mays v. Nationwide Mut. Ins. Co., 194 S.W.3d 143, 145 (Tex. App.—Dallas 2006, pet. denied) (“A challenge to privity is a capacity issue, not standing, and requires compliance with rule 93.”); Spurgeon v. Coan & Elliot,
The Texas Supreme Court has also held that if a defendant is sued individually along with the defendant's corporation and there is no verified denial of individual liability, the individual's capacity to be sued is admitted. Accordingly, the individual defendant may be held liable in either an individual or a corporate capacity if there is evidence to support such a judgment.136

Under the analysis made in these cases, a failure to deny that the plaintiff has sued in the right capacity or that the defendant has been sued in the right capacity obviates the need to prove the plaintiff's ownership of the claim or the basis, like alter ego, for the defendant's liability on the claim, but not the need to prove the elemental validity of the claim itself.

180 S.W.3d 593, 597–98 (Tex. App.—Eastland 2005, no pet.) (contention that breach of contract claim was owned by another corporation was waivable capacity issue); Prostok v. Browning, 112 S.W.3d 876, 921 (Tex. App.—Dallas 2003) ("A challenge to who owns the claim raises the issue of capacity, not standing, and requires compliance with Rule 93."); rev'd in part on other grounds, 165 S.W.3d 336 (Tex. 2005); Willis v. Donnelly, 118 S.W.3d 10, 49 (Tex. App.—Houston [14th Dist.] 2003) ("Whether a stockholder may recover damages personally for a wrong done to the corporation is an argument about capacity—that is, whether the stockholder has legal authority."); rev'd on other grounds, 199 S.W.3d 262 (Tex. 2006); see CHCA E. Houston, L.P. v. Henderson, 99 S.W.3d 630, 632–34 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that a complaint that plaintiff was not party to lease was waivable "capacity" or "defect of parties" issue); AU Pharm., Inc. v. Boston, 986 S.W.2d 331, 340 (Tex. App.—Texarkana 1999, no pet.) (holding that a challenge to ownership of claim is challenge to capacity, not standing); Van Voorhies v. Hudson, 683 S.W.2d 809, 810 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (holding that a verified plea is required to assert that suit brought by appellant individually should have been brought by corporation of which he was stockholder and president).

136. W.O.S. Constr. Co. v. Hanyard, 684 S.W.2d 675, 676 (Tex. 1985); see Light v. Wilson, 663 S.W.2d 813, 814 (Tex. 1983) ("Light's capacity to be sued is not in issue, but the merit of the Wilsons' suit was placed in issue by Light's general denial."); Beacon Nat'l Ins. Co. v. Reynolds, 799 S.W.2d 390, 395 (Tex. App.—Fort Worth 1990, writ denied) (citing Pledger, 762 S.W.2d 145, 145–46 (Tex. 1988)) (holding that verified capacity defense must be alleged where policy sued upon was issued by a different insurer); Butler v. Joseph's Wine Shop, Inc., 633 S.W.2d 926, 929–30 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (holding that individual liability may be found in absence of sworn denial without having to find corporation is alter ego of named defendant); see also Union Nat'l Bank of Little Rock v. Moriarty, 746 S.W.2d 249, 254–55 (Tex. App.—Texarkana 1987, writ denied) (holding that the contention that proper party is corporate party's subsidiary must be raised by verified plea under Texas Rule of Civil Procedure 93(7)).
Other cases hold, however, that a contention that the cause of action should have been brought by another person raises a question of standing, not merely an issue of capacity, or, perhaps, "something else." Thus, a contention that a claim should have been brought against a "separate and distinct corporate entity" has been held to be a claim of mistaken identity that involved the merits of the plaintiffs' tort claims, not a capacity defense. A defendant's contention that it is not liable because it is not a party to the contract that is the basis of the action involves the merits of the plaintiff's cause of action, not the mistaken legal capacity of the defendant.

These cases are difficult to reconcile with the Texas Supreme Court's opinions in Pledger v. Schoellkopf, Light v. Wilson, and W.O.S. Construction Co. v. Hanyard. In an attempt at clarification of the distinction between capacity and standing, in Nootsie the Texas Supreme Court subsequently explained that "[a] plaintiff has

137. Nauslar v. Coors Brewing Co., 170 S.W.3d 242, 249-52, 255-56 (Tex. App.—Dallas 2005, no pet.) (holding that former partner who sold interest in partnership to another party had no standing or capacity to prosecute partnership's claims); see also Gonzalez v. Greyhound Lines, Inc., 181 S.W.3d 386, 391-93 (Tex. App.—El Paso 2005, pet. denied) (holding that limited partners lack standing to sue for the partnership and a limited partnership not involved in the original transaction lacked standing, even though many of the same partners were involved in both partnerships); Pape Equip. Co. v. I.C.S., Inc., 737 S.W.2d 397, 404 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (holding that a challenge to plaintiff's right to bring claim not effectively assigned is treated as issue of standing, not capacity to sue); Cozad v. Roman, 570 S.W.2d 558, 562 (Tex. Civ. App.—Corpus Christi 1978, no writ) (holding that even though the defendant's pleas questioned the plaintiff's standing, defendant had not raised capacity and therefore the capacity pleading rules did not apply).


139. Trailways, Inc. v. Clark, 794 S.W.2d 479, 488-89 (Tex. App.—Corpus Christi 1990, writ denied) (holding that suit was mistakenly directed against parent corporation instead of its wholly-owned subsidiary).

140. C & C Partners v. Sun Exploration & Prod. Co., 783 S.W.2d 707, 721-22 (Tex. App.—Dallas 1989, writ denied) (holding that privity of contract is essential element of recovery that may be tried under general denial); John Chezik Buick Co. v. Friendly Chevrolet Co., 749 S.W.2d 591, 593 (Tex. App.—Dallas 1988, writ denied); see also TEX. R. CIV. P. 93(7) (requiring verification to deny plaintiff's allegations that defendant executed written instrument on which action is founded).

141. 762 S.W.2d 145 (Tex. 1988).

142. 663 S.W.2d 813 (Tex. 1983).

143. 684 S.W.2d 675 (Tex. 1985).
standing when the person is personally aggrieved" and therefore has a justiciability interest in the controversy, "regardless of whether the person is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciability interest in the controversy." 144 More recently, in Lovato the supreme court explained further that the issue of standing focuses on whether a party has a "justiciability interest" in the outcome of a case. 145 In contrast, capacity means a party's right to come into court to pursue the claim. 146 By themselves, these linguistic formulations are more mysterious than they are helpful, particularly because both Nootsie and Lovato involve Rule 93(1)'s first capacity defense ("legal capacity to sue") not Rule 93(2)'s second capacity defense ("plaintiff is not entitled to sue in the capacity in which he sues"). Neither case provides guidance on the proper interpretation of Rule 93(2)'s second capacity defense and its relationship to standing doctrine or other defenses.

The most sensible way to reconcile the Pledger v. Schoellkopf line of cases with cases treating the ownership of a claim as a question of standing would be to recognize that a person can have capacity to prosecute a claim if the person has the legal authority to do so under a contract or a statute or is so closely related to the legal owner of the claim that legal authority should be presumed and regarded as the legal equivalent of ownership, in the absence of a denial of capacity. Under this approach, if the claim actually belongs to one person, such as a corporation, but the action is filed by another person, such as a corporate shareholder or a related company, the issue should be whether the claimant is authorized to prosecute the claim on behalf of the actual owner. This is a waivable capacity problem, not a jurisdictional standing problem. 147 In such cases, the requirement of standing is satisfied by the interest of the person that actually does own the right sought to be enforced in the action; the capacity requirement is satisfied by the

144. Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996).
146. Id.
147. See Pledger, 762 S.W.2d at 145–46 (holding that plaintiff waived ability to contest capacity of a shareholder who brought action (when it actually belonged to company) by not complying with Texas Rule of Civil Procedure 93(2)).
presumed authority of the plaintiff to enforce the claim.\textsuperscript{148} But, if the action is filed by a person that is completely unrelated to the corporation at the time the action is commenced, there may be a standing problem as well as a capacity problem.\textsuperscript{149}

There are several good reasons for treating the presumed ownership of a claim as a waivable issue of capacity. First, in a large number of cases the "wrong plaintiff" problem probably could be obviated if the issue was raised during the pretrial phase of the litigation. In several reported cases, corporate claims have been filed and prosecuted to judgment by controlling shareholders whose right to sue was not challenged until trial by motions for instructed verdict or motions for judgment n.o.v. complaining that the evidence was legally insufficient to show that the shareholder was the rightful owner of the claim.\textsuperscript{150} Under these circumstances, the defect in parties could have been obviated by an assignment or by the joinder of the corporate claimant. Some of these courts have sensibly reasoned that in the absence of a sworn denial of capacity, "[j]ust how [the individual claimant] acquired the cause of action is not before [the] Court."\textsuperscript{151} Second, in dealing with the similar problem

\begin{itemize}
\item \textsuperscript{148} See Lovato, 171 S.W.3d at 848–54 (holding that estate had standing but no capacity to sue and that personal representative had capacity to represent estate).
\item \textsuperscript{149} See Nauslar v. Coors Brewing Co., 170 S.W.3d 242, 249–52 (Tex. App.—Dallas 2005, no pet.) (holding that plaintiffs who were not parties to a distribution agreement had no standing to sue based on harm allegedly suffered when a consolidation agreement fell through); cf. CHCA E. Houston, L.P. v. Henderson, 99 S.W.3d 630, 632–34 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("Successors-in-interest or affiliated corporations are different parties, not different 'capacities' of one another. And the only 'defect of parties' is an allegation that one of them should be dismissed. But the Texas Supreme Court has approved the application of Rule 93 to other situations involving confusion among parties that are separate entities.").
\item \textsuperscript{150} Van Voorhies v. Hudson, 683 S.W.2d 809, 810 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("Martin Van Voorhies testified he is one of two stockholders and the president of Martin Van Voorhies Inc."); Biggs v. Garrett, 651 S.W.2d 342, 343–44 (Tex. App.—El Paso 1983, no writ) ("[E]vidence reflects that Robert L. Garrett was the president and major stockholder of Garrett Building Center, Inc."); see also Sam Kane Beef Processors, Inc. v. Manning, 601 S.W.2d 93, 94 (Tex. Civ. App.—Corpus Christi 1980, no writ) ("Mr. Manning owns the business.").
\item \textsuperscript{151} Van Voorhies, 683 S.W.2d at 810–11; see also Biggs, 651 S.W.2d at 343 (noting that defendant had waived "any legitimate complaint" even though there was no showing of how the plaintiff acquired the cause of action).
\end{itemize}
of a party's failure to join a party needed for just adjudication, a defendant waives the absence of the joinder of a person needed for just adjudication by not raising the person's absence at, or preferably before, trial. Third, although the federal courts treat the wrong plaintiff problem a little differently, federal practice also requires a defendant to raise an objection to the plaintiff's right to make a claim before trial. Federal Rule 17(a) provides that an action must be prosecuted in the name of "the real party in interest." This requirement, which is not contained in the Texas Rules of Civil Procedure, serves the same function as Texas Rule 93(2), which itself has no exact counterpart in the Federal Rules of Civil Procedure. For example, in Ensley v. Cody Resources, Inc., Ensley and his wife incorporated Ensley Properties, Inc. (EPI) as a vehicle for the operation of a consulting firm for petroleum-related businesses. EPI/Ensley worked for Cody Resources on a deal to acquire Ultramar, but a dispute arose about compensation. Ultimately, Ensley sued Cody Resources for damages, alleging breach of contract, quantum meruit, and fraudulent inducement. At the close of Ensley's case in chief, Cody Resources moved for judgment as a matter of law on all three claims, claiming that Ensley had no standing to recover damages in his individual capacity for services rendered by EPI during the Ultramar transaction. The trial court deferred ruling on the motion, and the claims were tried to a jury, which found for Ensley on the quantum meruit claim awarding substantial damages. After the court rendered judgment on the verdict, Cody Resources renewed its Rule 50 motion for judgment as a matter of law, which the trial

152. TEX. R. CIV. P. 39.
153. See Brooks v. Northglen Ass'n, 141 S.W.3d 158, 162–63 (Tex. 2004) ("We appreciate the risk that, unless each homeowner is joined in one suit, Northglen may be subject to inconsistent judgments. Northglen's dilemma, however, is a product of its own inaction. Northglen could have sought relief at trial by urging the court, among other things, to abate the case, join absent homeowners, or grant special exceptions." (citations omitted)).
154. FED. R. CIV. P. 17(a).
155. See FED. R. CIV. P. 17(b) (discussing the requirements for capacity to sue or be sued).
156. 171 F.3d 315, 318 (5th Cir. 1999).
157. Ensley, 171 F.3d at 318; see also FED. R. CIV. P. 50(a) (providing the motion for judgment as a matter of law); Whelan v. Abell, 953 F.2d 663, 671–72 (D.C. Cir. 1992) (noting that queries concerning standing and real parties in interest overlap).
court initially granted. On reconsideration, the trial court held that the defendant’s objection was not about standing, at least not in a jurisdictional sense. Rather, the court found it was a real-party-in-interest objection that Cody Resources had waived by not raising it before trial. On appeal, the Fifth Circuit Court of Appeals affirmed the trial court’s judgment in favor of Ensley. The court of appeals assumed that the cause of action belonged to EPI, but held that notwithstanding the fact that Texas law provides that a shareholder may not sue for a corporation’s injury, the waivable real-party-in-interest objection governed the outcome. Because Cody Resources did not object until after Ensley’s case in chief, the objection came too late and was waived.

To recapitulate, if the issue is the authority of a claimant to prosecute a claim that arguably belongs to another person, the problem should be regarded as a waivable capacity problem, not an issue of jurisdictional standing that can be raised for the first time on appeal. Similarly, to preclude defendants from making dilatory ar-

158. Ensley, 171 F.3d at 318.
159. Id.
160. Id. at 318-19 (citing Wingate v. Hajdik, 795 S.W.2d 717, 719 (Tex. 1990)).
161. Id. at 320 (“The real issue is not whether there is jurisdiction, but the prudential limitation on our exercise of jurisdiction over a jus tertii/third party plaintiff. Although the cases Cody cites refer to a lack of standing as a shareholder, not one holds that the inquiry is jurisdictional or that the objection may not be waived.... Cody’s standing objection is a prudential limitation that constitutes an objection to the real party in interest under FED. R. CIV. P. 17(a).”). This approach is also followed in courts in the 2nd, 9th, 10th, D.C., and Federal Circuits. Stichting Ter Behartiging Van de Belangen Van Oudaaneelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber, 407 F.3d 34, 45 (2d Cir. 2005) (explaining that the district court did not abuse its broad discretion in holding that the real-party-in-interest defense had not been waived although the real-party-in-interest defense was not raised until ‘after more than three years of litigation’); Dunmore v. United States, 358 F.3d 1107, 1112 (9th Cir. 2004) (explaining that the real-party-in-interest requirement is a prudential limitation); Hefley v. Jones, 687 F.2d 1383, 1388 (10th Cir. 1982) (explaining that the trial court did not abuse its discretion in considering the real-party-in-interest defense waived when defendant tried to raise it sixteen days before trial); Richardson v. Edwards, 127 F.3d 97, 99 (D.C. Cir. 1997) (holding that the real-party-in-interest defense was waived when made on appeal because the defense was not raised “with reasonable promptness”); Aldridge v. United States, 59 Fed. Cl. 387, 389-90 (2004) (holding that the real-party-in-interest requirement is merely a prudential limitation, leaving it in the court’s discretion to determine whether the defense should be considered waived).
Arguments about whether the right plaintiff has prosecuted a claim, after the conclusion of the pretrial phase of the litigation (i.e. during trial or after receipt of the verdict), ownership of the claim itself, or at least the claimant’s authority to act for the true owner, should be established unless challenged by a timely denial of capacity under Rule 93(2) of the Texas Rules of Civil Procedure.

V. Conclusion

If federal standing doctrine is here to stay, several very muddled procedural and jurisdictional issues need to be resolved.

First, clear distinctions must be drawn between the types of cases in which a claimant’s standing, defined generally as the right to bring suit and prosecute a claim, is regarded as jurisdictional and the types of cases in which it is not. As explained in Part III of this Article, it is unnecessary and unhelpful to superimpose an external standing analysis on a claimant’s ability to bring suit in cases involving common law claims or statutory rights of action. In these cases, the issue of standing is either indistinguishable from the merits of the claims being asserted or superfluous. No additional evaluation and assessment of the claimant’s injury is needed because the elemental contours of the common law or statutory claims provide sufficient guidance about the nature of the legal interest and the legal injury that is being redressed. Regardless of whether damages or declaratory relief is sought, in such cases the claimant should be regarded as having a justiciable interest.

Second, it is a particularly bad idea for standing in common law and statutory actions to be regarded as jurisdictional, thereby allowing complaints about a claimant’s failure to prove the claim to be made for the first time on appeal. In contrast, in public rights cases, a more refined analysis is required. Unless a statute confers standing to bring the action, in public rights cases, some kind of “particularized injury” analysis is consistent with traditional Texas law and makes good sense. In public rights cases, there may also be good reason to regard the issue as jurisdictional, rather than prudential, to ensure that the courts do not usurp legislative or executive prerogatives. In such cases, it arguably also makes sense for Texas courts to wholeheartedly embrace federal standing doctrine.
Third, the nature of the interest or injury required for standing must be clearly distinguished from the issue of capacity, which has always been regarded as a waivable procedural matter. A person’s competence to prosecute a claim should be regarded as a waivable procedural defect primarily because the problem can be remedied by the selection of a suitable personal representative for the real party in interest. Similarly, a person’s authority to bring suit and prosecute a claim that may belong to another party should also be treated as a waivable procedural issue rather than an issue of standing. Under this analysis, the twin doctrines of standing and capacity can and should be sensibly harmonized.