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# Burdens of Proof in Coverage Litigation

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In coverage litigation, no issue is more overlooked — yet more critical — than the burden of proof. The casebooks are full of instances when an insured or an insurer lost its case solely because it failed to adequately address the burden of proof during case workup and trial preparation. Sadly, the insured or the insurer may have possessed the evidence to sustain its burden of proof but failed to come forward with it, merely out of unawareness that the law placed the burden upon it.

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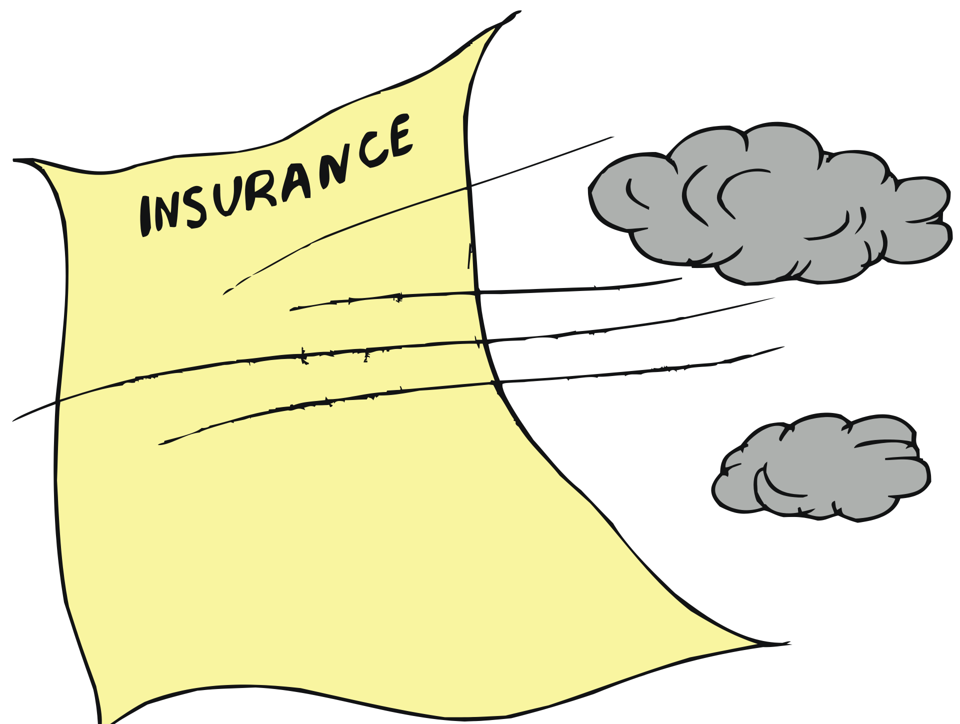


To avoid this trial misstep, attorneys must be cognizant of the various burdens courts and the Legislature place upon the parties, how those burdens shift during the course of litigation and what issues are still the subject of confusion.

For decades, under Texas Supreme Court cases such as *Royal Indemnity Co. v. Marshall* (1965) and *Employers Casualty Co. v. Block* (1988), the law in Texas has been that the insured bears the burden of showing that the loss falls within the scope of coverage. The rule is based on the traditional placement of the burden of proof in civil cases. As a general rule, a plaintiff bears the burden of proving his or her case.

In the context of a coverage case, this means the insured — usually the plaintiff — must show that the insurance policy's terms cover the claim. Thus, the insured must show that the claim falls within the policy's insuring agreement (the portion of the policy that states what is covered and what the insurer will do). This is true whether the policy is a third-party policy or a first-party policy.

• *Exclusions.* This burden has changed over time. For years under Texas common law, the insured bore the burden of proof of showing that an exception did not apply. Meanwhile, under Texas Rule of Civil Procedure 94, the insurer bore the burden of pleading the applicability of an exclusion. Once the insurer met its burden of pleading the exclusion, the burden shifted again to the insured to show that the exclusion did not apply, under Texas Supreme Court cases such as *Hardware Dealers Mutual Insurance Co. v. Berglund* (1965) and *Paulson v. Fire Insurance Exchange* (1965).

However, the Texas Legislature statutorily changed the common law to the benefit of the insured. In 1991, lawmakers enacted Article 21.58 of the Texas Insurance Code. In 2003, they recodified it as Texas Insurance Code §554.002, and in 2005 they amended it to include health-care maintenance organizations.

The rule now provides that "the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed

by the insurer or health maintenance organization constitutes an avoidance or an affirmative defense."

• *Exceptions to exclusions.* Many exclusions found in insurance policies have exceptions to how they operate. One example is Exclusion L of the standard commercial general liability policy. The standard CGL policy excludes from coverage "[p]roperty damage" to "your work" arising out of that work (or any part of it) and included in what's called the "products-completed operations hazard," which means work has been completed and put to its intended use. But this exclusion does not apply — this is the exception to the exclusion — if a subcontractor performed the damaged work or the work out of which the damages arises on behalf of the policyholder.

The question then becomes: Who bears the burden of proving an exception to the exclusion? Courts shaping Texas law — in cases such as *Telepak v. U.S. Auto Association*, decided by San Antonio's 4th Court of Appeals in 1994, and *Guaranty National Insurance Co. v. Vic Manufacturing Co.*, decided by the 5th U.S. Circuit Court of Appeals in 1998 — uniformly have held that the insured bears the burden of proving an exception to an exclusion.

The rationale is that the person who will benefit by showing the exception to the exclusion is the insured, and it only makes sense that the insured bear this burden since the insured would have the most to gain from successful litigation.

• *Allocation.* One area of some controversy is the burden of proof where allocation is required. Allocation is necessary when the insuring agreement covers part, but not all, of the damages. This happens when the damages either fall outside of the insuring agreement or the insuring agreement's terms exclude them.

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An example of the former situation — damages falling outside the insuring agreement — occurs when part of the property damage happens within the policy period but part of the property damage occurs outside the period.

An example of the latter — when the insuring agreement's terms exclude the damages — occurs when Exclusion L comes into play. If the insured's own work caused the property damage, that damage falls within the exclusion. But if a subcontractor's work caused the property damage, the policy covers it.

But who bears the burden of proof when the facts raise the issue of allocation? This is a critical question, because allocation may be not only difficult but impossible in some cases. Most often, proper allocation requires exacting expert testimony.

Most insureds will argue that the burden should fall on the insurer. However, Texas case law does not support this position. Attorneys for insurers cans turn to a number of decisions, including two cases decided by the 4th Court in 1999 — *Wallis v. United Services Automobile Association* and *State Farm v. Rodriguez* — and *Travelers Personal Security Insurance Co. v. McClelland*, decided by Houston's 1st Court of Appeals in 2006.

• *Conditions.* In many situations, the insured's compliance with a condition may be an issue. Examples of conditions include the requirement that the insured forward suit papers to the insurer in a timely manner and refrain from voluntarily incurring liability, in violation of the policy terms.

Who bears the burden with respect to conditions? Texas Insurance Code §554.002 places this burden on the insurer. It is to the insurer's benefit to show that the insured did not meet the policy's conditions. Under Texas Rule of Procedure 94, the insurer bears the burden of not only pleading failure to comply with a condition, but the burden of producing evidence showing noncompliance and proving such noncompliance to a jury.

Burdens of proof are not procedural technicalities attorneys can gloss over. They can make or break a case and are vital to a lawyer working on an insurance case. Diligent attorneys must remain apprised of who bears responsibility for burdens of production, proof and persuasion in any coverage case. TL

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