LITIGATING THE DUTY TO INDEMNIFY

STEVEN R. SHATTUCK
JANA S. REIST
COOPER & SCULLY, P.C.
900 JACKSON STREET, SUITE 100
DALLAS, TEXAS 75202

TELEPHONE: 214/712-9500
FACSIMILE: 214/712-9540
steve.shattuck@cooperscully.com
jana.reist@cooperscully.com

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There is a special difficulty in analyzing issues involving the duty to indemnify an insured in a liability lawsuit. That difficulty is the result of a lack of cases in Texas that address those issues unique to the duty to indemnify under a liability policy. On the other hand, there are numerous cases addressing a carrier's duty to defend its insured. Because of this reality, the duty to defend is typically resolved much quicker and is easier to litigate than the duty to indemnify. As a result, the rules governing litigating the duty to indemnify are not nearly as well developed as the rules governing resolution of the duty to defend. However, the cases that have been decided are slowly shaping the parameters of Texas' law on the duty to indemnify.

A. DIFFERENCES IN DUTY TO DEFEND AND DUTY TO INDEMNIFY

The duty to defend and duty to indemnify are separate and distinct. *D.R. Horton Texas, Ltd. v. Markel International Ins. Co.*, 300 S.W.3d 740 (Tex. 2009). The duty to defend is much broader than the duty to indemnify. *Farmers Texas County Mutual Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997); *Pine Oak Builders, Inc. v. Great American Lloyds Ins.* Co., 279 S.W.3d 650 (Tex. 2009). While the duty to indemnify is determined by the actual facts, the duty to defend is governed by the "eight corners" rule, also known as the complaint allegation rule. *GuideOne Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co*., 279 S.W.3d 650, 654 (Tex. 2008). The duty to defend is determined by two documents and two documents alone – the pleadings and the policy. *Id.* "Whether the insurer must defend the insured is determined as a matter of law because the Court need only examine the policy language and the allegations in the underlying petition to make the decision." *Westport Ins. Co. v. Atchley, Russell, Waldrop & Hlavinka, LLP*., 267 F.Supp.2d 601 (E.D. Tex. 2003). *See also Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex.1997).

The duty to defend is determined by the facts alleged, not the legal theories pleaded. *McCarthy Bros. Co. v. Continental Lloyds Ins. Co*., 7 S.W.3d 725, 728 (Tex. App. – Austin 1999, no pet.); *Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyd's Ins. Co*., 852 S.W.2d 252, 255 (Tex. App. – Dallas 1993, writ denied). If a single allegation, taken as true potentially states a cause of action within the terms of the policy, the insurer must defend the entire suit. *National Fire In. Co. of Hartford, v. Radiology Associates, LLP*, 2010 U.S.Dist. LEXIS 19989 (S.D. Tex. March 3, 2010). In determining this duty, the pleadings are to liberally construed in favor of coverage. *Heyden Newport Chemical Corp. v. Southern General Ins. Co.* 387 S.W.2d 22, 26 (Tex. 1965). Use of evidence outside the four corners of the pleadings and the policy to prove or disprove the duty to defend is generally prohibited, or at least strongly restricted. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church,* 197 S.W.3d 305, 307 (Tex.2006); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex. 2008).

When reviewing the facts in the petition to determine the duty to defend, they are viewed favorably from the standpoint of the insured. *Heyden Newport Chem. Corp. v. Southern General Ins. Co*., 387 S.W.2d 22, 26 (Tex. 1965). The rule is very favorable to insureds because doubts are resolved in the insured's favor:

> Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. Stated differently, in case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured's favor.

Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997).

This is not the case in the duty to indemnify. There is not a favorable "standard of review" that applies. The parties start out on equal standing. In determining the duty to defend, the parties generally are limited to the petition and the pleadings. The "scope of review" for the duty to indemnify is much broader, depending upon if the underlying litigation was resolved by settlement or by actual trial. *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1493 (5th Cir. 1992). The "burden of proof" differs materially as well. Under the duty to defend, the insured must only show that there is a potentially covered claim. *Northfield Ins. Co. v Loving Home Care, Inc.*, 363 F.3d 523, 528 (2004). Under the duty to indemnify, the party with the burden of proof must establish their position by a preponderance of the evidence. *Guaranty Nat'l Ins. Co. v. Vic Mfg. Co.,* 143 F.3d 192, 193 (5th Cir. 1998). Claims are not

"potentially covered", they are either covered or not covered.

We will attempt to analyze the cases on the duty to indemnify that do exist to demonstrate the evolving state of Texas law ion this subject.

B. TIMELINESS OF DETERMINING DUTY TO INDEMNIFY

Of course, timing is a significant first issue that must be addressed in all litigation of the duty to indemnify. Generally, the duty to indemnify will be seen as premature until an underlying case has been settled or tried. Another issue that arises is when factual issues regarding coverage may be litigated and when the findings in the underlying case are binding so that no litigation is allowed. First, if there has been no trial of the underlying case, the factual issues regarding coverage may always be litigated. In fact, because there has been no underlying trial or factual determination, the fact issues must be litigated in order to obtain some resolution short of settlement.

The first prominent case on this subject is *Employers Casualty Co. v. Block.* 744 S.W.2d 940 (Tex. 1988). In that case, Coating Specialists Inc. (CSI) installed a monoflex roof on a house in San Antonio, Texas. George and Margie Block purchased the home in February 1978. In August of 1979, the Blocks discovered that the roof was leaking. CSI repaired the roof and resprayed it with plastic coating between September and November of 1979. No further leaking problems occurred until August 1980 when hurricane Allen caused heavy rainfall in the San Antonio area. Although the Blocks subsequently had their roof inspected and tried to have the leaking stopped, they were unsuccessful. In August of 1981, an inspector informed them that the roof needed to be repaired due to leaks which had allowed water to collect in the insulation and exterior walls of their house.

In June of 1982, the Blocks brought an action against CSI under the Deceptive Trade Practices Act and for breach of express and implied warranties. CSI had a Texas liability policy of insurance issued by Employers Casualty Company (Employers Casualty). The policy insured CSI for property damage occurring between August 1, 1980 and August 1, 1981. CSI notified Employers Casualty of the suit, but Employers Casualty refused to defend on the ground that the damaging event had not occurred during the policy period.

The Blocks and CSI subsequently entered into a settlement agreement whereby an agreed judgment for $47,500 plus interest and attorneys' fees was rendered in favor of the Blocks. The agreed judgment also recited that the Blocks' house was damaged as a result of an occurrence on August 6, 1980, and that the damages were sustained as a result of the breach of warranties by CSI. The issue in later coverage litigation was whether the finding of the date of loss in the agreed judgment would be binding on Employers under the principle of collateral estoppel. The supreme court found that the elements of collateral estoppel were not present and held that:

> Since the agreed judgment between the Blocks and CSI does not establish coverage, Employers Casualty is free to contest coverage in the present suit since this does not constitute a collateral attack on the liability judgment. Whether the doctrine of collateral estoppel applies to a specific issue depends upon whether the fact determined in the prior suit was essential to the judgment in the prior suit, and whether the necessary requirement of privity exists between the parties. *Wilhite v. Adams*, 640 S.W.2d 875, 876 (Tex. 1982). In the instant case, the recitation in the agreed judgment that the "Blocks sustained property damage to their residence as a result of an occurrence on August 6, 1980" was not essential in determining CSI's liability, and therefore was not a material issue in the agreed judgment. Likewise, in light of the fact that the respective positions of CSI and Employers Casualty regarding coverage were in conflict, no privity existed between the parties, thus precluding the application of the collateral estoppel doctrine. *See* Restatement (Second) of Judgments § 58(a) (1982). Therefore, we conclude that Employers Casualty should not be precluded from litigating the issue of coverage in the present case.

Under the *Block* decision, in order for collateral estoppels to apply, two elements must be present. First, the factual determination must be necessary to the underlying case. It must be essential to the judgment. For example, a finding that the insured was negligent may be necessary to the judgment. However, it is not binding on the insurer as to whether the conduct was also intentional unless that issue was also litigated in the underlying case. Otherwise, it is not binding because the insurer has not had the opportunity to litigate the issue of intentional conduct.

Second, there must also be privity between the insurer and the insured in the litigation of the underlying case. In other words, the insurer must have had the same interest in defending the underlying case as the insured. In other words, there must be no conflict in the interests of the two parties The Restatement of Judgments (2d) defines a conflict of interest in this situation:

> § 58 Effect of Judgment Against Indemnitee on Indemnitor Who Has Independent Duty to Defend Indemnitee
>
> (1) When an indemnitor has an obligation to indemnify an indemnitee (such as an insured) against liability to third persons and also to provide the indemnitee with a defense of actions involving claims that might be within the scope of the indemnity obligation, and an action is brought against the indemnitee involving such a claim and the indemnitor is given reasonable notice of the action and an opportunity to assume its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:
>
> > (a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and
> >
> > (b) The indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.
>
> (2) A "conflict of interest" for purposes of this Section exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not.

The Block court ruled that the insurer could not attack the judgment itself. However, that holding was reversed eight years later in *State Farm Fire & Cas. Co. v. Gandy,* 925 S.W.2d 696 (Tex.1996). There the court held that:

> In no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee. We disapprove the contrary suggestion in dicta in *Employers Casualty Company v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), and *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 954 (5th Cir. 1990).

Id. at 714.

C. EVIDENCE ALLOWED IN LITIGATING DUTY TO INDEMNIFY

If the parties are not barred by collateral estoppel from litigating the duty to indemnify, the next issue presented is what evidence may be used in determining the duty to indemnify. There is an issue as to whether the case is limited to evidence adduced in the underlying litigation or whether extrinsic evidence may be introduced. The answer to this issue is not straight-forward and can depend on how the underlying case was resolved.

1. Cases Resolved By Settlement

Where the underlying case is resolved by settlement, the evidence that may be utilized in resolving coverage determinations is fairly broad. One of the first cases to address this issue was *Enserch Corp. v. Shand Morahan & Co., Inc*., 952 F.2d 1485 (5th Cir. 1992). In *Enserch* the Fifth Circuit first analyzed whether two insurers breached the duty to defend their insured in underlying multidistrict ("MDL") litigation. Because the panel held that they did breach the duty, the question became whether the insurers were liable for the entire settlement negotiated by the insured. *Id.* at 1493. The Fifth Circuit held that the apportionment had not properly

been made in the coverage trial. *Id.* at 1494. In remanding the case, the panel held:

> There are several possible sources for help in allocating the claimant's damages. There are the allegations contained in the bondholders' complaint; there is the settlement between Ebasco and the bondholders; and there are the facts that would have been the subject of the MDL lawsuit, had it been tried.
>
> We can imagine cases where the allegations alone could sufficiently justify an allocation of damages. In such a case the judge could compare the insurance contract with the complaint and determine as a matter of law what portion of the damages were covered. This is not such a case. The MDL allegations are so insufficient to decide the allocation issue, in fact, that both parties before us have argued that the bondholders' complaint justifies an allocation entirely to their benefit as a matter of law. Neither is right. On remand the trial court will have to look further. *Id.*

Accordingly, although *Enserch* involved an underlying case that was settled, it supports the principle that new evidence may be admitted in coverage trials that follow liability trials.

A more recent case appears to be consistent with the *Enserch* case. The case of *D.R. Horton-Texas, Ltd. v. Markel International Insurance Company, Ltd.,* 300 S.W.3d 740 (Tex. 2009) is perhaps most significant for its holding, for the first time by the Texas supreme court, that a carrier may have a duty to provide indemnity for its insured in a situation in which no duty to defend existed under the "eight corners" rule. However, it also addressed the issue of what evidence may be used in the coverage case following the settlement of the underlying liability claim. The supreme court stated:

> The insurer's duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. This is especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case. *Id.* at 744.

The supreme court held that extrinsic evidence was fully available, stating that the "insurer and the putative insured may introduce evidence in coverage litigation to establish or refute the insurer's duty to indemnify." *Id.* at 745.

2. Cases Resolved By Trial Or Quasi-Judicial Proceedings

When the underlying case has been resolved by trial or quasi-judicial proceedings, the question of "what" may be litigated is not as simple. The rules are not settled and issues remain. One of the better discussions of this issue is contained in *Swicegood ex rel. Estate of Swicegood v. Medical Protective Co.,* 2003 WL 22234844 (N.D. Tex.). In that case, a former patient brought suit in state court to recover from a physician and his professional association for medical malpractice that arose in the context of an illicit romantic/sexual relationship between the physician and patient. The medical malpractice insurer for the physician and professional association filed suit in this court to obtain a declaratory judgment regarding its obligations to defend and indemnify them, relying on sexual act and punitive damages exclusions in their respective policies. The court issued an initial summary judgment ruling in 1996, holding that the insurer had no duty to defend or indemnify with respect to claims based on the physician's romantic/sexual relationship with the patient and no duty to indemnify against punitive damages. It abated the rest of the case until the state court case was tried and all appeals were exhausted.

The jury was required to determine what damages awarded in the underlying judgment were the result of sexual acts (and hence excluded) and what damages were the result of ordinary malpractice. The parties to the declaratory action had widely varying views on what evidence should be admissible:

> The court now examines Texas law to decide what evidence will be admissible. Dean at one point in her briefing thoughtfully analyzes how different factual scenarios in a third-party liability lawsuit affect (and vary) the evidence that is admissible in a subsequent first-party coverage suit, see P. July 21, 2003 Br. at 6-7, and she appeared to take a somewhat

> narrower approach at oral argument concerning what additional evidence is admissible. Nevertheless, she insists in her brief that she is entitled to call anew witnesses who testified in the Underlying Lawsuit (including herself), as if this coverage suit were in some sense a trial de novo. Medical Protective, on the other hand, appears to argue for an unduly restrictive per se ban on all additional evidence. The trial court rejected both positions. *Id.* at 13.

a. **Questions of Law**

First the court noted that there may be some situations where no new evidence is admissible:

> The court also holds that if the coverage question is one of law that can be decided on the record of the underlying suit, no new evidence is admissible. *See, e.g., Farmers*, 955 S.W.2d at 84 ("In some cases, coverage may turn on facts actually proven in the underlying lawsuit."). This principle is illustrated by *Hartrick. In Hartrick* the court was able to grant summary judgment in favor of the insurer in a coverage case because it was clear from the verdict and judgment in the underlying case that the judgment did not award damages caused by a covered "occurrence," within the meaning of a commercial general liability policy. *See Hartrick v. Great American Lloyds Insurance Co*, 62 S.W.3d at 278 (Tex.App.-Houston [1st Dist.] 2001, no writ). The premise is also supported by *Great American Lloyds Insurance Co. v. Mittlestadt*, 109 S.W.3d 784 (Tex.App.2003, not pet. h.), a decision on which Medical Protective heavily relies to support its contention that no new evidence may be admitted during the coverage trial.
>
> In *Great American* the Fort Worth Court of Appeals held that "because a duty to indemnify arises only if the underlying litigation establishes liability, we only look to the facts established in the underlying litigation to determine if a duty to indemnify exists." Id. at 787 (emphasis added). The record that it examined consisted of the pleadings, the trial transcript, the insurance policy, and the judgment. Id. at 787 n. 1 ("In doing so, we review the record from the underlying suit, which includes the pleadings, the trial transcript, the insurance policy, and the judgment, all of which were before the trial court in the indemnity suit."). In *Great American* no new evidence was necessary because the coverage questions were purely issues of law. *See Great Am.*, 109 S.W.3d at 786 ("We agree that the issue of whether Great American has a duty to indemnify is a legal issue to be reviewed de novo, and that the determination of whether 'property damage' occurred is also an issue of law." (citations omitted)). *Id.* at 15.

b. **Undecided Issues**

The court also analyzed indemnity issues in situations in which there was no reason to litigate in the underlying case. For example, if the insured was sued only for negligence and the insurer believed the conduct was intentional, it would not be litigated in the underlying case.

> The court predicts that the Texas Supreme Court will hold that new evidence can be introduced at a coverage trial when the proof is necessary to resolve a controlling coverage question that was not conclusively decided in the indemnity suit. By "not conclusively decided" the court means the issue was not determined in a way that binds all affected parties in the coverage case (e.g., via collateral estoppel). An undecided issue could include one that the parties in the indemnity case had no reason to litigate, e.g., an exclusion from coverage, where the burden of proof would be on a non-party insurer. Most of the cases falling under this rule will involve exclusions from coverage or breach of the conditions by the insured where the inquiry has no relevance to the underlying case. This rule may also apply to the issue of who is an

> insured. In the question, for example, of permissive use of a vehicle, this would not be an issue generally addressed in the underlying case and would be one where new and extrinsic evidence can and should be allowed. *Id.*

The Fifth Circuit recently confirmed the holding that a party in coverage suit may present evidence at trial regarding facts necessary to determine coverage that were not adjudicated in the underlying suit. *National Union Fire Insurance Company of Pittsburg, Pennsylvania v. Puget Plastics Corp.,* 532 F.3d 398 (5th Cir. 2008).

c. Allocation

Allocation cases present a unique problem. A second jury is being asked to allocate the damages that were awarded by the prior jury. In making an allocation, the only relevant evidence would appear to be the evidence heard by the prior jury. If new and additional evidence were admitted, the allocation would not be based upon what the first jury heard but on entirely new evidence. In the *Swicegood* case, the plaintiff argued in favor of retrying the issues of what damages she had sustained from the sexual acts and what damages she had sustained from medical malpractice. The court recognized the danger in allowing parties to maintain inconsistent positions:

> The court also rejects Dean's contention that she is allowed to offer in the instant trial some or perhaps all the evidence introduced in the trial of the Underlying Lawsuit. The court has located no case that suggests that a coverage suit should consist of a retrial of all or even substantial parts of an indemnity suit that has been fully tried. [FN21] Moreover, under Texas law, "[t]he duty to indemnify is *triggered by the actual facts establishing liability in the underlying suit.*" *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex.1997) (emphasis added). This well-settled principle would have little meaning if the trial of an indemnity suit served as nothing more than a warm-up match for the coverage trial. Under Dean's expansive view, "actual facts establishing liability" that were not proved in the indemnity trial could be demonstrated during the coverage trial. Having obtained substantial damages in the Underlying Lawsuit by relying heavily on her romantic/sexual relationship with Dr. Swicegood, she could retain the jury award and then shift gears in the coverage suit, focusing instead on the doctor-patient relationship in hopes of persuading the jury that all the damages awarded were for covered medical malpractice. Texas law discourages such an approach. *See, e.g., Gandy*, 925 S.W.2d at 712, 714 (holding in a case where the "parties took positions that appeared contrary to their natural interests for no other reason than to obtain a judgment against [the insurer]" that certain assignments by defendants of their claims against their insurer are invalid). *Id.*

In cases involving allocation, the court reached a unique solution:

> Applying the court's *Erie*-guess to the present case, it holds that the proof to be admitted at trial will consist of historical evidence from the Underlying Lawsuit and expert testimony to assist the jury in allocating or apportioning covered and non-covered damages. [FN22] In other words, the evidence to be admitted will be limited to historical documents such as the Swicegood and Clinic Policies, the court's opinion in *Swicegood I*, the pleadings, trial transcript, jury charge, verdict, and judgment in the Underlying Lawsuit, the briefs and opinion in *Swicegood II*, and expert testimony to help the jury understand this evidence and decide whether the damages in the Underlying Lawsuit should be allocated between covered and non-covered conduct and, if so, how. [FN23] For example, Dean may call expert witnesses to opine that no allocation is necessary because, based on their review of the proceedings in the Underlying Lawsuit, the damages awarded were necessarily limited to covered acts of medical malpractice. Medical Protective's experts may

> testify, for example, that some or all of the damages were necessarily awarded based on the romantic/sexual relationship between Dean and Dr. Swicegood and not covered. *Id.* at 17.

The court held that the evidence that could be considered was limited to that which was introduced in the underlying case. However, the court did allow experts to attempt to "explain" the evidence to the jury.

d. **Conclusion**

The issues addressed above certainly are not all that arise when litigating the duty to indemnify. Each case must be examined on its own merits to see what evidence should or should not be allowed. However, the principles underlying the three rules should be used when trying to determine what evidence may or may not be admitted in a duty to indemnify case.

D. BURDEN OF PROOF IN LITIGATING DUTY TO INDEMNIFY

The burden of proof is another significant issue in the coverage suit on duty to indemnify. A failure to sustain one's burden of proof in any case will spell defeat, and this is equally true in a coverage case. Many issues governing the burden of proof are well established under Texas law. They may be established by statute or by case law. However, there are still areas of dispute. We will examine a few areas of greater concern on the burden of proof.

1. Burden of Establishing Covered Claim

The law in Texas is well established that the insured has the initial burden of establishing that the claim is covered by the terms of the policy. *Guaranty Nat'l Ins. Co. v. Vic Mfg. Co*., 143 F.3d 192 (5th Cir. 1998). In the context of litigation of duties under liability policies, the insured has the burden of establishing among other things: 1) that the person making a claim falls within the definition of an "insured" under the policy; 2) that the claim falls within the insuring agreement of the policy; and 3) that the loss falls within the policy period of the policy. Should any of these elements be lacking, then the plaintiff will have failed to meet its burden.

2. Burden of Proof Regarding Exclusions or Breach of Conditions

The burden of establishing the existence of an exclusion or breach of a condition of the policy would fall upon the insurer. *Telepak v. United Services Auto. Ass'n,*, 887 SW 2d 506 (Tex.App.—San Antonio 1994). Section 554.002 of the Texas Insurance Code specifically provides:

> § 554.002. Burden of Proof and Pleading
>
> In a suit to recover under an insurance or health maintenance organization contract, 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.

Under TRCP 94, the insurer would have the burden to plead the applicability of any exclusion or breach of condition. Under 554.002 Tex. Ins. Code, the insurer would also have the burden of coming forward with evidence to support its defense. Should the insurer fail to meet the pleading or proof requirement, it would have failed to prevail on the exclusion or breach of condition.

3. Burden of Establishing Exception to Exclusion

Many liability exclusions have exceptions applicable to those exclusions. This would include, for example, exclusions (b), (e), (f) and (g) to the standard ISO general liability policy. Once the insurer establishes the applicability of an exclusion, the burden of establishing the exception to the exclusion falls upon the insured. *Guaranty Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192 (5th Cir. 1998).

4. Allocation

There is some dispute as to which party has the burden of proof on allocation of damages to covered and non-covered claims. In the *Swicegood* case, the trial judge held that the burden of proof on allocation was on the plaintiff/insured, stating:

> Because she will have the burden of proof on this cause of action at trial, to obtain summary judgment she "must establish 'beyond peradventure all of the essential elements of the claim'[.]" *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F.Supp. 943, 962 (N.D.Tex.1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)). Medical Protective opposes Dean's motion on several grounds, but the dispositive question is whether she has failed to meet her burden of conclusively proving how the Clinic was harmed. *Swicegood v. The Medical Protective Company*, 2003 WL 22234928 (N.D.Tex.) at 10-11.

Other courts have placed the burden of allocation on the insured. In *Allison v. Fire Ins. Exchange,* 98 SW 3d 227 (Tex.App.—Austin 2002) the Austin Court of Appeals held that:

> FIE asserted in its second amended answer that Ballard had the burden of segregating damages among covered and non-covered losses, under the doctrine of concurrent causation. Under this doctrine, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex.1971); *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 302-03 (Tex.App.-San Antonio 1999, pet. denied). The doctrine of concurrent causation is not an affirmative defense or an avoidance issue; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove that their damage is covered by the policy. *Wallis*, 2 S.W.3d at 303. Thus, an insured may only recover for the amount of damage caused solely by the covered peril. *Id*. The burden is on the insured to prove coverage. Id. The insured must therefore present some evidence upon which the jury can allocate the damages attributable to the covered peril. *Id.* Because allocation is central to the claim for coverage, an insured's failure to carry the burden of proof on allocation is fatal to the claim. *Id.* The insured must attempt to segregate the loss caused by the covered peril from the loss caused by the excluded peril. *Id.* at 258-59.

A similar issue is presented on the issue of allocation of settlements. If the insured has multiple losses and receives a settlement recovery, then there is an issue of which party has the burden of proof on allocation of damages. The Fifth Circuit addressed this issue in *RSR Corp. v International Ins. Co.* No. 09-10405, in the United States Court of Appeals for the Fifth Circuit (July 26, 2010). In that case, the insured had multiple sites creating pollution liability. The insured settled with all of its GL carriers and sought additional damages from its Environmental Impairment Liability (EIL) insurer. The court there held:

> If RSR's Harbor Island liabilities were only partially covered by its CGL settlements, Condition 8 would allow the Environmental policies to serve as excess insurance for the uncovered portion. Thus, the final issue we must confront in our analysis of the district court's dismissal under Condition 8 is whether or not the CGL settlements compensated RSR fully for its Harbor Island liabilities. RSR argues that it was not fully compensated for these liabilities by the CGL settlements. International responds that, even if this were true, it was RSR's burden under Texas law to allocate the settlement proceeds. Because RSR failed to do this, International argues that Texas law presumes that the full amount of the CGL settlements must be allocated to liabilities that would also be covered under the Environmental policies. International collected over $76 million from its settlements with the CGL insurers. It only seeks $13.1 million from International for its Harbor Island liabilities. Therefore, if International is correct about Texas's presumptive allocation, then there is no excess to be covered under Condition 8, and we

must affirm the district court's take-nothing judgment.

While the Supreme Court of Texas has not confronted the precise issue before us, we conclude that its opinion in *Mobil Oil Corp. v. Ellender,* 968 S.W.2d 917 (Tex. 1998), indicates how it would rule in this case. In *Ellender*, the family members of an independent contractor who died from exposure to benzene sued multiple parties whom they believed were responsible for his death. *Id*. at 920. All of the defendants except Mobil settled. *Id.* The jury returned a verdict for the plaintiffs. *Id.* At issue on appeal was the proper amount of the settlement credits that had to be subtracted from this verdict. *Id.* at 926. Specifically, the Supreme Court of Texas had to determine which side bore the burden of allocating the settlement amounts between actual and punitive damages. *Id.*

The court began its analysis of the issue by noting that "settling plaintiffs are in a better position than nonsettling defendants to insure that the settlement award is allocated between actual and punitive damages." *Id.* at 928. It expressed concern that "[w]ithout an allocation, Mobil, who was not a party to the settlement, had almost no ability to prove which part of the settlement amount represented actual damages. Nonsettling parties should not be penalized for events over which they have no control." *Id.* It then examined the hazards inherent in the opposite rule:

> "When the settlement agreement does not allocate between actual and punitive damages, requiring a nonsettling party to prove the agreement's allocation before receiving a settlement credit not only unfairly penalizes the nonsettling party but also allows settling parties to abrogate the one satisfaction rule…. Settling parties could prevent nonsettling parties from receiving settlement credit by refusing to allocate between actual and punitive damages in settlement agreements…. The better rule is to require a settling party to tender to the trial court, before judgment, a settlement agreement allocating between actual and punitive damages as a condition precedent to limiting dollar-for-dollar settlement credits to settlement amounts representing actual damages." *Id.* at 15-16.

The court concluded that, where a settling party failed to allocate its settlement, the nonsettling party was entitled to a credit equaling the entire settlement amount. *Id.*

> In our view, the situation in this case is analogous to the situation in *Ellender*. Just as Mobil was not a party to any of the plaintiffs' settlements in *Ellender*, here International was not a party to any of RSR's settlement agreements or negotiations with its CGL insurers. Just as the lack of an allocation could have led to a double recovery in *Ellender*, the lack of allocation could lead to a double recovery respecting the Harbor Island liabilities in this case. International was unable to request, let alone require, that the CGL settlement agreements allocate the proceeds amongst RSR's various liabilities. International should not be penalized for the fact that no allocations were made. Nor should

RSR be rewarded for failing to track each of its liabilities diligently through to the end of its negotiations. Therefore, just as the Supreme Court of Texas placed the burden of uncertainty on the party to the settlement agreements in *Ellender*, so will we place it on the party to the settlements in this case. *Id.* at 16-17.

Allocation cases present perhaps the greatest challenge for the insured. Under existing law, if the insurer demonstrates that part of the loss is not covered by the policy, the burden then shifts to the insured to demonstrate what portion of the damages were covered by the policy and what were not covered. One of the subjects with the greatest challenge concerns the trigger of property damage coverage, as seen in the case of *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.* 267 SW 3d 20 (Tex. 2008). If there is a continuous or progressive loss and the same insurer covered the risk the entire time period, there may still be an obligation to allocate on the part of the insured if there are coverage issues that might exist under one or more of the policies.

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