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The Shifting Sands Regarding Burdens of Proof in Coverage Cases

It is important to understand the rules regarding burdens of proof on insurance coverage, regardless of whether you are a coverage geek or defense counsel. The Texas Supreme Court and the Texas Legislature have created a burden-shifting framework for insurance disputes. While the announced rules appear similar for both first party and third party coverage, there may be some slight differences in application. Understanding the burden-shifting framework in insurance coverage disputes is somewhat like trying to follow a fast-moving ping pong game. Just when you think you understand the rules and are finally following the game, things can change.

Let us begin with a simply stated rule. An insurer has no duty to indemnify its insured if the policy does not provide coverage for the loss.[1] Initially, the insured has the burden of establishing the existence of coverage under the terms of the policy at issue.[2] The initial serve sounds pretty straightforward, doesn't it? The insured simply finds some language in the policy that provides coverage for his or her loss. Of course, it can never be that easy. An insured cannot meet its initial burden of establishing coverage by relying on exemptions or exceptions to exclusions.[3] Exceptions to exclusions are not equated to an affirmation of coverage.[4] For example, many policies contain a self-defense exception to the intentional act/injury exclusion. That does not necessarily mean that the insured's invocation of defense of self will necessarily result in coverage. Assuming the insured shows a covered loss, the burden shifts to the carrier to plead and prove that the loss falls within an exclusion.[5]

The Texas Legislature has weighed in on this issue. Chapter 554 of the Texas Insurance Code addresses the issue of burden of proof and pleading. Specifically, section 554.002 provides:

> 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.

[1] *See Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App.—Dallas 2015, no pet.).
[2] *JAW the Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015) (first party coverage case); *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (third party coverage dispute).
[3] *Praetorian Ins. Co. v. Arabia Shrine Ctr. Houston*, 2016 WL 687564, at *6 (S.D. Tex. 2016).
[4] *Id.*
[5] *American Home Assurance Co. v. Cat Tech L.L.C.*, 660 F.3d 216, 220 (5th Cir. 2011); *Likens v. Hartford Life & Acc. Ins. Co.*, 794 F. Supp. 2d 720, 725 (S.D. Tex. 2011), *aff'd*, 688 F.3d 197 (5th Cir. 2012).

> Language of exclusion in a contract or an exception to coverage claimed by the insurer or health maintenance organizations constitutes an avoidance or an affirmative defense.

While the volley back seems relatively straightforward, it is important to note that the rules require the carrier to plead policy exclusions as an affirmative defense in any lawsuit that arises out of a coverage dispute.[6] Of course, everything that might sound like an exclusion, such as a claim that the loss did not occur during the policy period, is not. The Texas Supreme Court has determined that the timing of an event allegedly triggering coverage is a precondition to coverage and is not considered a defensive matter to be pleaded and proved.[7] Once the insurer proves an exclusion applies, the burden shifts back to the insured to show that an exception to the exclusion brings the claim back within coverage of the policy.[8]

So far, so good. The rules seem fairly simple, at least on paper. The insured initially proves the existence of a covered loss. The carrier then proves that an exclusion applies to preclude coverage for the otherwise covered loss. The insured must then come back with an exception to the exclusion so as to bring the claim back within coverage. So, you rightfully ask – if it is that easy, why the need for this article? The answer: nothing in the law is ever that simple.

We turn to the area of concurrent causation and separate and independent causation. While the courts use these concepts interchangeably in first party and third party coverage cases, it is not clear that the ideas necessarily mean the same thing depending upon whether you are looking at a first party or third party coverage issue. This may simply be an issue of language or it might reveal a deeper problem in application.

Under the concurrent causation doctrine, when excluded and covered events combine to cause a loss and the two causes cannot be separated, concurrent causation exists and the exclusion is triggered such that the insurer has no duty to provide the requested coverage.[9] However, when a covered event and an excluded event each independently cause a loss, separate and independent causation exists, and the insurer must provide coverage despite the exclusion.[10]

For example, in *Guaranty Nat'l Ins. Co. v. North River Ins. Co.*, a psychiatric patient died after jumping out of the window at a hospital.[11] The general liability policy provided that the carrier would pay all sums the insured became legally obligated to pay as damages because of bodily injury to which the insurance applied. The policy also contained a malpractice and professional services exclusion that excluded coverage for bodily injury that occurred due to the rendering of or failure to render any service of treatment conducive to health or of a professional nature.[12] The carrier claimed that the exclusion precluded coverage because the hospital's liability was founded, at least in part, on the hospital's failure to properly supervise a psychiatric patient. The excess carriers argued that the primary carrier could not escape liability because the hospital's liability was founded, in part, on the hospital's failure to safeguard the window.

Finding that the failure to secure the window did not arise out of the exercise of judgment in obedience to an established medical policy, the court turned to the issue of whether the carrier could be liable for a judgment that is

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[6] *See Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008) (must plead exclusion under Rule 94); *see also Standard Waste Sys. Ltd. v. Mid-Continent Cas. Co.*, 612 F.3d 394, 398 (5th Cir. 2010) (noting that under federal rules of pleading, a failure to affirmatively plead an exclusion or exception may lead to waiver on the part of the carrier).

[7] *Ulico Cas. Co.*, 262 S.W.3d at 778.

[8] *JAW the Pointe, L.L.C.*, 460 S.W.3d at 603.

[9] *JAW the Pointe, L.L.C.*, 460 S.W.3d at 608. This was a first party coverage case arising out of hurricane damage to an apartment complex. The Texas Supreme Court cited to its earlier opinion in *Utica Nat'l Ins. Co. v. American Indem. Co.*, 141 S.W.3d 198 (Tex. 2004), a case involving third party liability coverage, for these rules.

[10] *Id.*

[11] 909 F.2d 133 (5th Cir. 1990),

[12] *Id.* at 135.

founded in part on a covered action and in part on an excluded action.

> The answer clearly is yes. In Texas, an insurer is not liable only when a covered peril and an excluded peril concurrently cause a loss. Where a loss, however, is caused by a covered peril and an excluded peril that are independent causes of the loss, the insurer is liable. The failure to maintain the window and the failure to observe properly were independent causes, because the hospital's acts of negligence separately was a proximate cause of Wagner's death. We conclude, therefore, that North River is liable under its policy, notwithstanding that the loss was caused, in part, by an excluded loss.[13]

The Texas Supreme Court cited the foregoing case as an example of a case involving separate and independent causation.[14]

In *Burlington Ins. Co. v. Mexican Am. Unity Council, Inc.*, a resident of a youth home was physically and sexually assaulted by an unknown person while off the premises of the home.[15] She sued the youth home alleging it negligently allowed her to leave the premises. The liability policy for the home contained an endorsement excluding coverage for bodily injury or property damage arising out of assault and battery.[16] The insured sought to avoid application of the exclusion arguing there was concurrent causation: (1) the negligence of the home in allowing the resident to leave; and (2) the assault. The court rejected the insured's argument.

> The present case is similar to *Commercial Union* in that the allegations of negligence against [the insured] and the allegations of assault and battery against the unknown assailant are related and interdependent. The assault and battery was not "mere happenstance." Without the underlying assault and battery, there would have been no injury and no basis for suit against [the insured] for negligence.
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> Our review of the cases cited by both parties leads to but one conclusion: Assuming the truth of the factual allegations contained in [the plaintiff's] second amended original petition, the origin of her damages is the assault and battery, which is not separate and independent from the alleged negligence of [the insured]. Accordingly, the petition alleges a claim outside the scope of coverage of the insurance policy because of the assault and battery endorsement. Therefore, since the face of the petition establishes that there is no coverage, Burlington

[13] *Id.* at 137 (citations omitted).

[14] *Utica Nat'l Ins. Co.*, 141 S.W.3d at 204.

[15] 905 S.W.2d 359 (Tex. App.—San Antonio 1995, no writ),

[16] *Id.* at 360.

> has no duty to defend….[17]

The Texas Supreme Court cited the foregoing case as an example of a case involving concurrent causation.[18]

Up to this point, the doctrines of concurrent causation and separate and independent causation, while obviously difficult to apply in many cases, seem relatively straightforward in scope.[19] In first party coverage cases, courts use the concept of concurrent causation in a different manner. In first party cases, 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 damages caused solely by the covered peril.[20] Courts have noted that this doctrine embodies the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy.[21]

The burden is on the insured to allocate between covered and non-covered loss.[22] It is essential in seeking to allocate loss that the insured produce evidence which will afford a reasonable basis for estimating the amount of covered damage or the proportionate part of the damage caused by a risk covered by the insurance policy.[23] The insured is not required to establish the amount of its covered damages with mathematical precision, but there must be some reasonable basis upon which the fact finder's determination rests.[24] The burden of segregating the damages solely to the covered event is a coverage issue for which the insured bears the burden of proof.[25] Because allocation is central to the claim for coverage, an insured's failure to carry its burden of proof on allocation is fatal to his or her claim.[26]

It appears the courts have simply utilized terms across the spectrum of coverage in a way they may never have intended. Concurrent causation should not mean different things depending upon whether the concept is utilized in a first party or a third party coverage dispute.

Of course, we need to briefly discuss one more wrinkle. Many property policies contain an anti-concurrent cause provision – "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[27] When a policy contains this language, the court is going to evaluate coverage under this clause, not the common-law concurrent causation doctrine (whatever that might be).[28]

This has been a brief review of the rules regarding burdens of proof in insurance coverage disputes. The rules are fairly simple to recite, but can be problematic in application.

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[17] *Id.* at 363.
[18] *Utica Nat'l Ins. Co.*, 141 S.W.3d at 204.
[19] *See Utica Nat'l Ins. Co.*, 141 S.W.3d at 204-205 (noting that the court could not determine whether doctrine of concurrent causation applied because there had been no findings as to whether the infection at issue was caused by the breach of a professional standard of care which would be excluded or whether the doctor breached both professional and non-professional standards of care).
[20] *Farmers Group Ins., Inc. v. Poteet*, 434 S.W.3d 316, 325 (Tex. App.—Fort Worth 2014, pet. denied); *Wallis v. USAA*, 2 S.W.3d 300, 302-303 (Tex. App.—San Antonio 1999, pet. denied).
[21] *See All Saints Catholic Church v. United Nat'l Ins. Co.*, 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, no pet.).
[22] *Dallas Nat'l Ins. Co.*, 458 S.W.3d at 222.
[23] *Id.* at 223.
[24] *National Union Fire Ins. Co. v. Puget Plastics Corp.*, 640 F. Supp. 2d 613, 650 (S.D. Tex. 2009), *aff'd*, 454 Fed. Appx. 291 (5th Cir. 2011) (noting that under doctrine of concurrent causation, the insured bore the burden of presenting evidence by which the court could reasonably apportion the damages awarded). I know what you are thinking. Craig, you simply have confused the doctrines between first party and third party cases. Nice try. The *Puget Plastics Corp.* case involved indemnity coverage under a commercial general liability policy for a third party claim. *Dallas Nat'l Ins. Co. v. Calitex Corp., supra*, likewise involved indemnity coverage under a commercial general liability policy.
[25] *Poteet*, 434 S.W.3d at 326.
[26] *Dallas Nat'l Ins. Co.*, 458 S.W.3d at 223.
[27] *See JAW the Pointe, L.L.C.*, 460 S.W.3d at 604.
[28] *Id.* at 608.