ANATOMY OF AN ENTRENCHED ERROR:

"Concurrent Causation" in Texas Coverage Litigation

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Presented at the 20th Annual Advanced Insurance Law Course, June 1-2, 2023, Hyatt Regency Hill Country Resort, San Antonio, Texas

"Substantial Gaps" and the Story of a Pervasive Legal Error . . .

The topic under consideration in this short paper is one that continues to challenge courts applying and interpreting Texas insurance law. What should be a fairly simple concept – concurrent causation – has been a source of conflicting and confusing jurisprudence both in Texas state courts and Federal courts applying Texas insurance law over the last three decades as courts have tried to come to grips with where Texas stands on the burden to prove (or disprove) what role an excluded peril under an insurance policy may have played in causing an otherwise covered loss.

The question continues to arise regularly, prompting the Federal Fifth Circuit to certify questions to the Supreme Court of Texas on this issue – not once, but twice – in the last two years.[1] Both times the Texas high court accepted the certification, and both times the parties reached a settlement on the eve of oral argument before the Supreme Court of Texas.

The purpose of this paper is to discuss the basic concepts and issues that underlie the "concurrent causation" doctrine and the history of the doctrine in Texas particularly as it relates to who has the burdens of proof with respect to policy exclusions. The doctrine and its treatment by courts following the passage of a 1991 statute specifically designed to abolish it provides an interesting example of how an obvious legal error can become entrenched in courts' writings on a subject through the act of repeatedly citing non-binding caselaw that contains the error until the error has been repeated enough that it appears it must be the law.

What Is Concurrent Causation?

The first problem with which many courts and practitioners struggle is understanding and defining what actually constitutes a concurrent cause of a loss. It is most often cited as a rule governing the insured's burden to allocate the amount of a loss between a covered cause of loss and an excluded peril. The burden question is actually a separate matter, however, from the concept of concurrent causation itself. As the name of the doctrine suggests, it is a rule about causation that concerns whether a covered cause of loss and an excluded peril combine to cause a particular loss that neither would have caused on its own. This doctrine was concisely explained by the Texas Supreme Court in *Utica Nat. Ins. Co. v. Am. Indem. Co.*[2]

There are essentially four possibilities for how an excluded and covered peril can be causally related to a loss: (1) the covered peril caused the loss independent of the excluded peril (the loss would be covered); (2) both the covered peril and the excluded peril were sufficient to cause the loss independent of the other (the loss would also be covered); (3) the excluded peril caused the loss independent of the covered peril (the loss would be excluded); and (4) the excluded peril and the covered peril were both necessary to cause the loss - i.e. the damage to the property would not have occurred if both the excluded peril and the covered event combined to affect the property. Only that last option concerns the actual "concurrent causation" doctrine.[3] The first two result in coverage for the insured while the

[1] *Overstreet v. Allstate Vehicle & Prop. Ins. Co.,* 34 F.4th 496, 499 (5th Cir. 2022) certified question accepted (May 27, 2022), certified question dismissed (Sept. 16, 2022); *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 471 (5th Cir. 2021), certified question accepted (Sept. 10, 2021), certified question dismissed (Dec. 3, 2021).

[2] *Utica Nat. Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004).

[3] *Id.*, 141 S.W.3d at 204.

second two do not. See id. As the *Utica* court explained in Utica: "In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion . . . In cases involving concurrent causation, the excluded and covered events combine to cause the plaintiff's injuries. Because the two causes cannot be separated, the exclusion is triggered." *Id.*

Understanding "concurrent causation" necessarily requires an understanding of the concept of "independent causation." The question is not one of allocation, but one of concurrence or independence as causes of a singular loss, as explained by the *Utica* court:

> Texas courts and the Fifth Circuit applying Texas law have recognized a distinction between cases involving "separate and independent" causation and "concurrent" causation when both covered and covered and excluded events cause a plaintiff's injuries. In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion.[4]

A separate and independent cause is one that caused the particular loss without the necessity of some other excluded cause. Thus, if both an excluded peril and a covered cause of loss independently caused the loss for which coverage is sought the loss is ordinarily covered.[5] It has long been Texas law that an insurer is liable when a loss "is caused by a covered peril and an excluded peril that are independent causes of the loss" and that "an insurer is not liable *only* when a covered peril and an excluded peril concurrently cause a loss."[6]

Thus, the question of allocating or segregating damages caused by a covered cause of loss from damages caused by an excluded peril *is not a concurrent causation problem at all*. The general rule has been that where the claim includes both covered and non-covered perils combine to cause a single loss, the insured satisfies its burden by showing the covered peril would have been a "separate and independent" cause of the loss.[7]

The first problem that arises in the misapplication and misunderstanding of the doctrine is whether the two purported causes pertain to the same singular loss? If two events cause different loss to the same property, those are not "concurrent causes." When they combine to cause the same loss to the same property, they are concurrent causes. And when either acting by itself would have caused the loss, they are independent causes.

In sum, for the concurrent causation doctrine to actually be in play, the two causes must concern the same event of loss. Some examples should clarify this important

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[4] *Id.* at 204.

[5] *Utica*, supra; *see also Burlington Ins. Co. v. Mexican Am. Unity Council*, 905 S.W.2d 359, 363 (Tex. App. 1995).

[6] *Burlington Ins.* at 363; *quoting and discussing Guar. Nat'l Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133, 137 (5th Cir. 1990).

[7] *See e.g. Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 215 (Tex. App. – Houston [1st Dist.] 2003, pet. denied)("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."))(*citing Centennial Ins. Co. v. Hartford Acc. & Indem. Co.*, 821 S.W.2d 192, 194 (Tex. App. – Houston [14th Dist.] 1991, no writ)); *Cagle v. Commercial Standard Ins. Co.*, 427 S.W.2d 939, 943-44 (Tex. Civ. App. – Austin 1968, no writ); *see also* Guaranty Nat'l v. N. River Ins., 909 at 137 ("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.").

distinction. For these examples, assume that "faulty workmanship" and "wear and tear" are excluded under the policy, but water damage caused by discharge of water from a fire sprinkler system is a covered cause of loss.

(1) While remodeling a commercial kitchen, workers negligently scratch up the surface of the kitchen countertops. Two months later, a small kitchen fire triggers the fire sprinklers soaking the countertops and causing them to swell and warp. These are not concurrent causes of the covered water loss, because they did not combine to cause the loss in question. They each caused a separate loss.

(2) The workers negligently spill some solvent on the kitchen countertop that dissolves a moisture resistant barrier. The evidence shows that *if* the moisture resistant barrier had not been damaged by the faulty workmanship, the water from the sprinklers would not have caused any damage to the countertops. These *are* concurrent causes of the water damage loss because both events were necessary for the loss to have occurred.

(3) The countertop has been in use for several years and has some fading and scratches in its surface from ordinary wear and tear. The evidence shows that the water from the sprinkler system would have damaged the countertops the same amount regardless of whether they had been brand new. These are not concurrent causes of the water loss. If a claim were made for the wear and tear by itself, it would not be covered. But a claim for the water damage ordinarily would be covered, and the fact that there was some ordinary wear would simply resolved based on how the insurer agreed to handle "depreciation" (i.e. was it an "actual cash value" – ACV – policy or a "replacement cost value" - RCV – policy?).

As these examples, and the discussion above demonstrate, the first question to address is whether the excluded peril and the covered cause of loss relate to the same event of loss for which the coverage is sought. That property was damaged by something else at a different time or in a different way does not preclude coverage for damage resulting independently from a covered peril. Though such other damage might factor into the calculation of ACV (calculated as RCV less depreciation) it does not implicate a problem of concurrent causes. Most wear and tear situations fall into this category – some ordinary use of the property has resulted in a general decline in the quality of the property at the time of the loss, but that decline is not the reason why a subsequent covered cause of loss caused a different loss to the property.

The bigger question, and the one that really underlies the confusion in Texas law over the past three decades is that of *burdens* – who has the burden of proof to demonstrate that an excluded peril was not a concurrent cause of an otherwise covered loss?

As the Fifth Circuit would explain in yet a third case where concurrent causation was potentially at issue: "This Court has recognized the substantial gaps in the concurrent causation doctrine and, as a result, twice certified questions to the Supreme Court of Texas . . . Because both *Overstreet* and *Frymire* settled after

certification, this Court's questions regarding when the doctrine applies and a plaintiff's burden of proof remain unanswered."[8]

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To understand how this issue has caused such confusion and where these "gaps" lie that the Fifth Circuit has found so troubling, a review of the history of Texas law as it relates to burdens of proof regarding policy exclusions is in order. There are essentially three key periods in that history: (1) the early origin of the rule placing the burden of proof on policyholders with regard to exclusions and the distinction between the burden of proof and the burden of pleading under Tex. R. Civ. P. 94; (2) the passage of a new statute in 1991 by the Texas legislature placing the burden of proof regarding exclusions in a policy onto the insurer rather than the insured; and (3) the confusion in Texas law as that statute is sometimes applied by courts, but frequently not even mentioned, particularly after the publication of the San Antonio Court of Appeals' opinion in *Wallis v. United Servs. Auto. Ass'n.*[9]

Paulson/Berglund/McKillip **and Rule 94.**

Hurricane Carla struck the Texas coast in the Autumn of 1961 as the equivalent to what today would be a Category 4 storm. From the devastation wrought on Texas property owners emerged two important cases addressing this notion of "concurrent causation" and more importantly, who has the burden of proving whether and how much of a loss was caused by an excluded peril: *Fire Ins. Exch. v. Paulson*, 381 S.W.2d 199 (Tex. Civ. App. – San Antonio 1964) ("*Paulson I*") *affirmed Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 318 (Tex. 1965)("*Paulson II*") and *Berglund v. Hardware Dealers Mut. Fire Ins. Co.*, 381 S.W.2d 631 (Tex. Civ. App. – Houston 1964)("*Berglund I*") *reversed Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965) ("*Berglund II*"). The court of appeals' opinions occur within a few pages of one another in the Southwestern Reporter because they were decided just one day apart by the San Antonio and Houston courts of appeals, respectively. And there was a split of authority between them.

In *Paulson I*, a home in Palacios was insured by both a flood policy and a windstorm policy and the issue arose in the form of which party has the burden of allocating the cost to repair the damage caused by each peril. In that case, Texas Fire Ins. Exchange had an exclusion in its policy for loss caused by tidal waves and high water whether driven by wind or not - essentially a flood exclusion.. In *Berglund I*, the policyholders' home in Hitchcock was completely swept away by Carla. The windstorm insurance company refused to pay, and the issue was framed as whether the homeowners' total loss was caused by flood or by windstorm - and how either proposition could be proven (and who had to prove it) when the whole home was washed out to sea in the dark of night.

The position of the plaintiffs in both cases was that each had an "all risk" policy, as most homeowners do in Texas, meaning that all the insured need do is prove that the loss comes within the purview of the policy in the sense

[8] *Advanced Indicator & Mfg. v. Acadia Ins. Co.*, 50 F.4th 469, 476 n.4 (5th Cir. 2022).

[9] *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300 (Tex. App. – San Antonio 1999, no pet.).

that a physical loss to covered property happened during the policy period. The plaintiffs claimed that if the insurance company wanted to come forward and plead in avoidance or defense some exclusion in the policy such as a flood exclusion, that would be an affirmative defense in avoidance of the coverage provided under the contract. As is generally still true today, when a defendant raises affirmative defenses, that defendant has the burden of pleading and proof on the issues thereby raised.

The *Berglund I* court accepted this argument and placed the burden of proof upon the insurer to allocate between the concurrent causes. The *Paulson I* court, however, held it to be solely the insured's burden. Because the courts split on this precise issue the two cases were heard by the Supreme Court of Texas, which decided them on the same day, with Justice Norvell writing the opinion in both. Justice Norvell based his opinions on the 1890 case of *Pelican Ins. Co. v. Troy Co-op*,[10] where he found the dictum that "a party suing upon an insurance policy has the burden of proving that the insurance policy covered the loss." From this he took the precarious leap of reasoning this must mean it is the insured's burden to disprove exclusions.

Thus, the Court held in 1965, as a result of Hurricane Carla, that Mr. Paulson and Mr. Berglund had the burden to prove a negative - that the loss was not caused by an excluded peril (or how much of the loss, in the *Paulson II* case, was not caused by the excluded peril). In *Berglund II*, where the home was completely destroyed, there was simply no way to prove it. The case was over. The Berglunds lost their home and their insurers paid nothing.

These two 1965 cases represent the initial adoption of a doctrine that is often referred to as "concurrent causation" by Texas courts epitomized by this flood/wind dichotomy. The initial iteration of that doctrine was that where two perils, one insured and one excluded, combined to cause a loss, it was the insured's burden to prove the extent to which the excluded peril caused damage and the extent to which the insured peril caused damage. To reach this result, Justice Norvell had to distinguish Rule of Civil Procedure 94, adopted in 1941. Rule 94 to this day requires that any matter of avoidance, such as an exclusion or exception to general coverage provisions, must be affirmatively pleaded as an affirmative defense - just as the plaintiffs in *Paulson* and *Berglund* had argued. See TEX. R. CIV. P. 94.

Justice Norvell did not mention Rule 94 in his opinion in *Paulson II*, but he did discuss it in *Berglund II*. The court navigated around Rule 94's express treatment of exclusions as affirmative defenses by concluding the rule only places the burden of *pleading* on the insurer - not the burden of proof. The court relied on the last clause of Rule 94 that it was not intended to "change the burden of proof on such issue as it now exists."[11] Looking back to two prior opinions that pre-dated the enactment of Rule 94, Justice Norvell found support for the burden to disprove exclusions being placed on policyholders. This despite the long-standing rule - then as now - that the defendant bore the burden of proof on any other affirmative defense.

Justice Norvell's holding that the insured must be the one who bears the burden of separating out what was caused by an exclusion and what was covered was reiterated by the court in 1971

[10] *Pelican Ins. Co. v. Troy Co-op.*, 77 Tex. 225, 13 S.W. 980 (1890).

[11] *Berglund II*, 393 S.W.2d at 311 (*quoting* TEX. R. CIV. P. 94).

in *Travelers Indemnity Co. v. McKillip*.[12] The court simply lifted the language about concurrent causation out of the *Berglund II* and *Paulson II* opinions, and repeated it in *McKillip* to once again deny the policyholder a recovery on the basis that there were two causes - one excluded and one covered - that combined to cause his loss. Thus, the homeowner was owed no benefits under the policy because he could not disprove that an excluded peril had contributed to cause the loss. *Id.*

With *Paulson*, *Berglund* and *McKillip*, the court had spoken - the burden of proof for policy exclusions was on the policyholder and not the insurer, and nothing in Rule 94 changed that burden of proof.

The 1991 Statute – Texas Legislature Attempts to Bring Texas Law Into Accord With Every Other State.

This is where matters rested until the early 1990s and the case of *Millers Cas. Ins. Co. v. Lyons*.[13] The court of appeals' 1990 opinion cited Berglund for the proposition that it is the insured's burden to separate out an excluded cause from an otherwise covered loss. The case reached the Supreme Court of Texas in 1993, and is most well-known for its holding regarding the proof required to establish a bad faith claim. The *Lyons* court once again applied the same rule as it had in *Berglund/Paulson/McKillip*: when an excluded peril is pled as a cause of an otherwise covered loss, it is the plaintiff's burden to separate them out.

However, something important had happened in between the court of appeals' opinion in *Lyons I* and the Texas Supreme Court's opinion in *Lyons II*. Though the burden rule in Texas law was well-established after *Berglund/Paulson/McKillip*, over the years it became clear that Texas was the only state in the U.S. that placed the burden on the insured to disprove exclusions in an insurance policy applied to their otherwise covered loss and that it was out of step with the basic rule that had been recognized in the major insurance law treatises for decades.[14]

The Texas Legislature had enacted Article 21.58 (now codified as Tex. Ins. Code §554.002), which explicitly placed the burden of pleading and proof on an insurer seeking to

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[12] *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971).

[13] *Millers Cas. Ins. Co. v. Lyons*, 798 S.W.2d 339, 340 (Tex. App. - Eastland 1990)("Lyons I") *affirmed Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993)("Lyons II").

[14] "That the insurer has the burden of proof to prove no coverage under an all-risks policy is the American rule in all states, *with the possible exception of Texas*." *Battishill v. Farmers All. Ins. Co.*, 2006-NMSC-004, ¶ 6, 139 N.M. 24, 26, 127 P.3d 1111, 1113 (N.M. 2006)(*quoting* 1 Eric Mills Holmes & Mark S. Rhodes, HOLMES'S APPLEMAN ON INSURANCE, § 1.10, at 45 (2d ed. 1996)(emphasis added). For decades, both Appleman and Couch have repeated the basic rule that the burden of proving that a loss falls within an exclusion is on *the insurer*. *See e.g. Id.*; 5 Jeffery E. Thomas & Susan Lyons, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION §41.02(1)(b)(i) (2017 ed.)("Once the insured makes a prima facie showing that the all-risks coverage exists and there is damage to or loss of the covered property, the burden shifts to the insurer to demonstrate that the damage or loss falls within one of the exclusions listed in the policy."); 7 COUCH ON INSURANCE § 101:7 (3d ed. 2015)("In an 'All-Risk' policy, the insured has the initial burden to prove that the loss occurred. The burden then shifts to the insurer to prove that the cause of the loss is excluded by the policy."); *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181 (3rd Cir. 1991)(*citing* 19 G. Couch, COUCH ON INSURANCE 2d § 79:315, at 256 (M. Rhodes rev. ed. 1983); Lee R. Russ & Thomas F. Segalla, 7 COUCH ON INSURANCE §101:7 (3d ed. 2007); *Children's Friend & Serv. v. St. Paul Fire & Marine Ins. Co.*, 893 A.2d 222, 230 (R.I. 2006) (*citing* 19 COUCH ON INSURANCE § 79:315 (Ronald A. Anderson, 2d ed. 1981)).

establish an exclusion or exception to coverage. The new section was rather obviously in response to the court of appeals's decision just six months earlier in *Lyons I*, bringing attention to the *Berglund/Paulson/McKillip* rule on burden of proof and the fact that Texas was the lone holdout in switching the burden on exclusions to policyholders. In fact, when the bill containing this new section was introduced in the Economic Development Committee, the stated reason for the change was specifically to match Texas insurance law with the rest of the country:

> Under the Rules of Civil Procedure, Rule 94, insurance carriers, unlike other defendants, do not have the burden of proof for affirmative defenses. This would require insurers who assert affirmative defenses to plead and prove those defenses as required by every other party in Texas. ***This brings Texas in line with the rest of the nation.***[15]

However, the passage of that statute, which overrules the *Berglund/Paulson/McKillip* rule by legislative mandate, was not relevant to this court's review in *Lyons II* simply because Article 21.58 had not been enacted until *Lyons* was already on appeal.

Confusion resulted from the timing of the opinion in *Lyons II* that post-dates and seemingly ignores a contrary rule in Article 21.58 of the Insurance Code. Because of this chronological anomaly, many practitioners and courts are still today simply unaware that the legislature had already attempted to abolish the very rule on concurrent causation announced and repeated in *Lyons II* - a year before that opinion was even handed down.

Wallis and post-*Wallis* Confusion; Burdens on Exceptions to Exclusions and Endorsements.

Two cases dealing with Article 21.58 from the San Antonio Court of Appeals demonstrate the confusion. The first is *Telepak v. United Services Auto. Assoc.*[16] *Telepak* presents a crucial difference from the prior concurrent cause cases like *Paulson* and *Berglund*. It did not involve one peril covered under the policy and one peril excluded, and the burden of allocating between them. *Telepak* is a case where the insured's damage was entirely excluded by a "settling and foundation movement" exclusion of the policy. However, there was an exception to that exclusion for any amount of the excluded damage that was also caused by plumbing leaks. The *Telepak* court acknowledged the legislature had recently passed Article 21.58, that the court was bound to follow it, and that it required USAA (the insurer, not the policyholder) to plead and prove how much of the damage claimed was caused by settling and cracking. The *Telepak* court explained the statute unambiguously placed the burden of proof for exclusions onto the insurer, overriding both *Berglund* and *McKillip*:

> Prior to September 1, 1991, an insurer claiming that the loss was excluded by the policy only needed to plead the applicability of the exclusion. Plaintiffs then had the burden to negate that exclusion. *Hardware Dealers Mutual Ins. Co. v. Berglund*, 393 S.W.2d 309, 311 (Tex.

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[15] 72nd Tex. Leg., Reg. Sess., Economic Devel. Comm., Subcommittee on Insurance, May 20, 1991, Tape 0588 Side 1 (emphasis added). Available for download from the Texas Digital Archive through the following URL: https://tsl.access.preservica.com/uncategorized/IO_5d29a6d9-b0b9-4d6b-a5a8-006afd45b13a

[16] *Telepak v. United Services Auto. Assoc.*, 887 S.W.2d 506, 507-08 (Tex. App. - San Antonio 1994, writ denied).

> 1965); *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971). However, as of September 1, 1991, insurers are now required to both plead and prove the applicability of an exclusion . . .
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> . . . Neither party contends that article 21.58(b) or the insurance policy is ambiguous. Nor do we find that the statute requires judicial construction. The statute must therefore be enforced according to its express language. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). The statute requires insurers to sustain the burden of proof as to "any language of exclusion in the policy" and "any exception to coverage."[17]

The court expressly gave effect to the clear intent of the statute and held that USAA had and met that burden of proof by showing all the damage claimed was caused by settling and cracking and thus fell within the exclusion. The real question in the case then was who has the burden to plead and prove an exception to the exclusion that would bring all or part of the loss back within coverage. Holding that an exception to an exclusion is neither "language of exclusion" or "any exception to coverage," the court placed the burden of proof back on the policyholder to prove the extent to which the exception to the exclusion applied.

The rationale was that 21.58 only required insurers to bear the burden of proving the application of their exclusions, not the burden of negating exceptions to those exclusions. This is the same rule applied with respect to other "affirmative defense/exceptions to such defenses situations." For example, the defendant must prove the facts surrounding the running of a statute of limitations because it is an affirmative defense to liability. However, if the defendant shoulders that burden and the plaintiff wants to claim an exception, such as equitable tolling, a tolling statute, fraudulent concealment, etc., the burden of proving that exception to the affirmative defense is the plaintiff's.

Nothing about *Telepak* is inconsistent with the plain and unambiguous language of Article 21.58. To the contrary *Telepak* confirmed the purpose of the statute was to override the rule in concurrent cause/burden cases like *Paulson*, *Berglund* and *McKillip*, and to place the burden of allocating loss caused by an excluded peril on the insurer.

But then came *Wallis v. United Servs. Auto. Ass'n*.[18] Seven years after *Telepak,* the same court of appeals completely reversed its position on the effect of Article 21.58 on the burden of proving exclusions in concurrent causation cases. And it is the *Wallis* case that is habitually cited by subsequent courts as the basis for continuing the same concurrent causation rule from *Paulson*, *Berglund*, *McKillip* and *Lyons* without any mention or analysis of the 1991 statute that voided and superseded this rule.

To avoid the effect and intent of the statute, which was obvious and unambiguous to the same court and required no judicial construction seven years earlier in *Telepak*, the *Wallis* court simply redefined the "concurrent causation" doctrine as though it did not involve the burden of proof on an exclusionary provision of an insurance policy - stating that when a covered and excluded peril combine to cause a loss the burden is on the insured to allocate the amount excluded quite regardless of what Article 21.58 plainly states, relying on

[17] *Telepak*, 887 S.W.2d at 507.

[18] *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300 (Tex. App. - San Antonio 1999, no pet.).

case authorities the statute was specifically enacted to override.[19]

To justify this distinction - and absent any language to support it in the statute - the *Wallis* court cited *Employers Casualty Co. v. Block*,[20] from which it pulled the very general notion that "insureds are not entitled to recover under an insurance policy unless they prove their damage is covered under the policy."[21] That justification should look very familiar - because it is the same justification originally used as the basis for Justice Norvell's opinions in *Paulson II* and *Berglund II*. But critically, Justice Norvell was dealing with Rule 94's pleading requirements instead the plain language and obvious purpose of a statute that shifted the burden of proof as well.

Therein lies the obvious error in the *Wallis* court's analysis. Wallis cited *Paulson* and *McKillip* as though they were still good law after the statute - overlooking that the statute specifically overrode these prior cases. The only reason Justice Norvell had disregarded the policyholder's arguments based on Rule 94 in Berglund is because he found the rule only applicable to the burden of pleading and not the burden of proof. In doing so, the *Berglund II* court relied on the last clause of Rule 94 stating it was not intended to change the burdens of proof that were already applicable when the rule was enacted. There is no logical way that distinction can be applied to a statute whose plain language expanded Rule 94 to expressly include the burden of proof as well as the burden of pleading. Tellingly, the *Telepak* court was aware of and cited this same general rule that an insured bears the initial burden of demonstrating a covered loss (also citing *Block* as the basis for it), but concluded Article 21.58 was obviously and unambiguously intended to legislatively override *Paulson*, *Berglund* and *McKillip*.[22]

The *Wallis* court's reliance on the 1965 opinions in *Berglund* and *Paulson*, and in disregard of the plain language of a 1991 statute that *does* shift the burden of proof onto an insurer introduced a manifest and pervasive error into Texas jurisprudence - an error that yielded the certified questions the Fifth Circuit keeps asking that should be easily addressed by reference to a statute that is still good law and was intended to resolve this specific issue legislatively.

It is the *Wallis* case, combined with the timing of the court's opinion in *Lyons II* that seems to have created much confusion and seemingly erased the statute from Texas law, perpetuating the very rule the statute was enacted to legislatively override. But it is really with *Wallis* that the trouble starts, as *Wallis* is the case that is regularly cited to keep the concurrent causation/burden rule alive in case after case without any mention or discussion of the statute that abolished it.[23]

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[19] Id. at 302-303.

[20] *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988) *overruled in part on other grounds*, 925 S.W.2d 696 (Tex. 1996).

[21] *Wallis*, 2 S.W.3d at 303.

[22] *Telepak*, 887 S.W.2d at 507.

[23] *See e.g. Dall. Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App. – Dallas 2015, no pet.)(citing *Wallis* for the "concurrent causation" burden shifting rule, but making no mention of Section 554.002); *USAA v. Mainwaring*, No. 05-03-01250-CV, 2005 Tex. App. LEXIS 2161, at *8 (Tex. App. – Dallas 2005, no pet.)(mem. op.)(same); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 318 (Tex. App. – San Antonio 2002, pet. denied)(same); *Seahawk Liquidating Tr. v. Certain Underwriters at Lloyds London*, 810 F.3d 986, 994-95 (5th Cir. 2016)(same); *Mt. Hawley Ins. Co. v. JBS Parkway Apartments, LLC*, No. MO:18-CV-00092-DC, 2020 U.S. Dist. LEXIS 252528, at *23 (W.D. Tex. Dec. 30, 2020)(same); *Allison v. Allstate Tex. Lloyd's*, Civil Action No. 4:16-cv-00979-O-BP, 2017 U.S. Dist.

Where the dispute concerns what role, if any, a risk described by "language of exclusion" - i.e. loss that would otherwise be covered but for the exclusion - then the statute unambiguously places the burden on the insurer and was designed to override the "concurrent causation" doctrine as it was applied in cases like *Paulson*, *Berglund*, *McKillip* and *Lyons*. Only when the coverage does not depend on "language of exclusion," but instead depends on an exception to an exclusion (as in *Telepak*) or an additional policy endorsement that reinserts coverage over an exclusion (as in *JAW The Pointe*[24]), does the burden shift back to the insured.

As outlined above, this distinction is often missed by courts addressing Texas law to this day. What keeps happening is that both trial courts and appellate courts are picking up the dicta that originated in 1890 and that has been made pointedly obsolete by the 1991 adoption of Article 21.58/Section 554.002, and courts have continued to hold, without reflection or commentary, that based on *Wallis* (and sometimes *Lyons*, *Paulson* or *Berglund*) the claimant has the burden to allocate the damage between covered and excluded causes - ignoring the statute entirely or giving it no effect.

In short, the original argument that was made by Mr. Berglund when Hurricane Carla washed away his entire house that dark and stormy night in 1961 was vindicated by legislative action with the passage of Article 21.58. But the statute was buried by a plainly erroneous decision from an intermediate court of appeals and the unfortunate timing of this Court's opinion in Lyons published the year after the statute became Texas law.

Allocation and Segregation of the Cause of a Loss Between Covered and Excluded Perils

What the *Wallis* court (and courts since) purported to do is separate the burden of proof into two facets: (1) proving an exclusion applies in general and (2) "segregating" or "allocating" the loss between the excluded peril and the covered cause – a burden these cases have placed on the insured. The concept is that an insurer needs only produce evidence that an excluded peril was involved, but the extent to which this excluded peril is involved is then the insured's burden.

The logic of that is suspect on its face. If the insurer cannot prove what portion of a loss was caused by an excluded peril it effectively has not proven that any amount of the loss was caused by the excluded peril and has simply not met its burden under the statute. *Quantifying* the role the excluded cause played in causing a loss is an essential aspect of the burden of proving the affirmative defense. This is apparent from how Texas law treats other affirmative defense that involve matters of quantifying causation.

Logistically and procedurally the concept of separating the burden to apportionment from the burden of proof and placing it on a claimant is also problematic. That would require the defendant to raise evidence of the existence of some role played by an excluded peril in their

LEXIS 180233, at *8 (N.D. Tex. Oct. 16, 2017)(citing *Wallis* and *Lyons* with no mention that Section 554.002 was enacted the year before *Lyons* was decided); *Underwood v. Allstate Fire & Cas. Ins. Co.*, Civil Action No. 4:16-cv-00962-O-BP, 2017 U.S. Dist. LEXIS 165380, at *7 (N.D. Tex. Sep. 19, 2017)(same); *Nasti v. State Farm Lloyds*, No. 4:13-CV-1413, 2015 U.S. Dist. LEXIS 3009, at *9 (S.D. Tex. Jan. 9, 2015)(citing *Wallis*, *Paulson* and *McKillip* without mentioning the statute); *U.E. Tex.-One Barrington, Ltd. v. Gen. Star Indem. Co.*, 243 F. Supp. 2d 652, 668 n.110 (W.D. Tex. 2001)(same).

[24] *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015)("Law & Ordinance" and "DICC" endorsements provided coverage over exclusion in main policy form, placing the burden to prove coverage on the policyholder).

experts' reports and case in chief, and the only opportunity to apportion the amounts by the claimant would be in rebuttal experts and rebuttal evidence at trial. To require the plaintiff to demonstrate an apportionment of causation as part of its principal case for something on which the claimant does not have the burden of proof effectively transfers the burden of proof entirely onto the claimant. In order to meet the burden of allocation, the insured would have to anticipate what excluded perils the insurer *might* be able to prove, which would effectively relieve the insurer of proving them as they would have to be addressed in the plaintiff's experts' reports or case-in-chief to meet the allocation burden.

There is no logical reason why an affirmative defense based on language of exclusion as a basis for avoidance should work any differently under Texas law than similar affirmative defenses such as "failure to mitigate"[25] or "comparative fault."[26] The actual use of the defense in avoidance in the case mitigation, or comparative causation or allocating causation to an exclusion is that it avoids a liability the defendant would otherwise have. Placing the burden on the claimant to *quantify* the insurer's exclusion defense in avoidance *still* places the burden of proof as to a key element of the defense on the claimant. And it does so in a way that is especially burdensome because such a rule will typically require extensive expert testimony from causation and loss valuation experts, and in some cases (such as the *Berglund* house that was swallowed whole by Hurricane Carla) is simply impossible for the insured to meet. Regardless, it places the burden incorrectly on the insured in direct contravention of Section 554.002.

Consequently, consistent with the basic logic of the American rule, courts across the county (with the possible exception of Texas) have accordingly also placed the burden of segregating the amount of the loss that is

[25] *See e.g. Stucki v. Noble*, 963 S.W.2d 776, 781 (Tex. App. – San Antonio 1998, no pet.)("the burden of proving failure to mitigate is on the defendant, who must also show the amount by which the plaintiff's damages were increased by the failure to mitigate."); *Rauscher Pierce Refsnes, Inc. v. Great S.W. Sav. F.A.*, 923 S.W.2d 112, 117 (Tex. App. – Houston [14th Dist.] 1996, no writ)("Appellant also had the burden of proving the amount the damages were increased by the failure to mitigate, which it failed to meet."); *BMB Dining Servs. (Willowbrook) v. Willowbrook I Shopping Ctr., L.L.C.*, No. 01-19-00306-CV, 2021 Tex. App. LEXIS 4320, at *19 (Tex. App. – Houston [1st Dist.] June 3, 2021, no pet.)(mem. op.)(*quoting Cole Chem. & Distrib., Inc. v. Gowing*, 228 S.W.3d 684, 688 (Tex. App. – Houston [14th Dist.] 2005, no pet.)("[W]here a defendant proves failure to mitigate but not the amount of damages that could have been avoided, it is not entitled to any reduction in damages."); *Z.M. Shay Jayadam3, LLC v. Omnova Sols., Inc.*, No. 14-19-00623-CV, 2020 Tex. App. LEXIS 8439, at *24 (Tex. App. – Houston [14th Dist.] 2020, no pet.)(mem. op.)("'The defendants bear the burden to prove failure to mitigate damages; they must prove lack of diligence as well as the amount by which the damages were increased as a result of the failure to mitigate.'")(*quoting Turner v. NJN Cotton Co.*, 485 S.W.3d 513, 523 (Tex. App. – Eastland 2015, pet. denied)).

[26] The burden of proof in comparative causation situations where a defendant alleges a claimant's acts or omissions were a proximate cause of the damages sought includes both proof of the claimant's fault *and* requires the defendant to produce evidence from which the jury can apportion an amount based on the claimant's alleged fault. *See e.g. Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 654 (Tex. 1996)(the defendant has the duty to apportion liability and if it cannot do so, it is liable for the whole damages); *PHI, Inc. v. LeBlanc*, No. 13-14-00097-CV, 2016 Tex. App. LEXIS 1899, 2016 WL 747930, at *6 (Tex. App. – Corpus Christi Feb. 25, 2016, pet. denied) (mem. op.) (*citing Amstadt* as "acknowledging that Texas courts usually apply comparative fault analysis unless the defendant who has the burden of apportioning its liability for the plaintiff's injuries cannot establish its percentage of liability, and thus remains liable for the whole"); *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190, at *30 (Tex. App. – Houston [1st Dist.] July 25, 2013, pet. denied)(mem. op.)("When injuries resulting from the conduct of multiple tortfeasors cannot be apportioned with reasonable certainty, the plaintiff's injuries are indivisible and the tortfeasors are jointly and severally liable for the whole."); *see also* RESTATEMENT (SECOND) OF TORTS § 433B(2) and cmt. d (1963)(explaining that a defendant that has caused harm to the plaintiff seeks to avoid some part of the damages by claiming it was caused by some other person's wrongful conduct, the burden of proving an amount of apportionment is on the defendant seeking to avoid liability).

excluded on the insurer and generally left the final apportionment between covered and excluded losses for the finder of fact. *See e.g. Preis v. Lexington Ins. Co.*, 279 F. App'x 940, 944 (11th Cir. 2008)(Louisiana law); *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 638 F. Supp. 2d 692, 695 (E.D. La. 2009)("The insurer therefore must show 'how much of the damage' was caused by an excluded peril.")(*quoting Dickerson v. Lexington Ins. Co.*, 556 F.3d 290 (5th Cir. 2009)(Lousiana law)); *Covington Lodging, Inc. v. W. World Ins. Grp. (In re Covington Lodging Inc.)*, Nos. 19-54789-WLH, 19-5348-WLH, 2021 Bankr. LEXIS 2519, at *43-44 (Bankr. N.D. Ga. Sep. 15, 2021)("Where at least some of the damage is covered, the insurer has to prove how much of the damage is excluded from coverage under the policy.")(*citing Dickerson*, supra); *Leonard v. Nationwide Mut. Ins. CV.*, 499 F. 3d 419 (5th Cir. 2007) (the insurer had the burden of proving what portion of the total loss was attributable to water damage and was thus within the water damage exclusion)(Mississippi law); *Hoover v. United Servs. Auto. Ass'n*, 125 So. 3d 636, 642 (Miss. 2013)("USAA bears the burden to prove, by a preponderance of the evidence, that the loss was caused by, *or concurrently contributed to*, by an excluded peril.")(emphasis in original)[27]; *Matthews v. Allstate Ins. Co.*, 731 F. Supp. 2d 552, 565 (E.D. La. 2010)(Louisiana law, noting cases placing burden to segregate on policyholder relying on *pre-Dickerson* authorities are mistaken); *Lightell v. State Farm Fire & Cas. Co.*, 703 F. Supp. 2d 600, 603 (E.D. La. 2009)(same).

When reviewing language from cases discussing this burden shifting issue, it is important to note whether the dispute in a particular case concerns an exclusion or an exception to an exclusion. This distinction is still very much relevant to who has the burden. Some version of the following rule will often be stated: once the insurer establishes an exclusion applies to the loss, the burden shifts back to the insured to segregate the loss between covered and non-covered causes. *See e.g. Fiess v. State Farm Lloyds*, 392 F.3d 802, 807 (5th Cir. 2004); *Kelly*, 2007 Tex. App. LEXIS 1320, at *22 (*citing Telepak*, supra). However, that rule comes from cases where the "covered" cause at issue is now in the form of an *exception* to an exclusion - as in *Telepak*.

Thus, looking at the two cases cited by the Fifth Circuit in *Fiess*, for instance, *both* specifically involved coverage disputes over exceptions to exclusions (as did *Fiess* itself), and not disputes about exclusions to otherwise covered perils. *Fiess* at n.13, (*citing Guar. Nat. Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998)("Once the insurer has proven that an exclusion applies, the burden shifts back to the insured to show that the claim falls within an exception to the exclusion"); *Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App. – Forth Worth 2003, pet. denied)(same)).

In short, whichever party has the burden of proof should also have the burden of quantifying that portion of the loss to correspond to the policy language on which they rely – as it logically should be as a matter of fundamental legal principle.[28] The *insured* has the initial burden

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[27] In *Hoover*, the Mississippi supreme court disagreed with Fifth Circuit's *Erie*-guess that Mississippi law switches the burden of segregating losses back onto the policyholder, expressly disapproving *Broussard v. State Farm Fire & Casualty Co.*, 523 F. 3d 618, 627 (5th Cir. 2008).

[28] *See e.g. Rodgers v. Roland*, 309 Ky. 824, 828, 219 S.W.2d 19, 20 (1949):

> "The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action. It lies upon the person who will be defeated as to either a particular issue or the entire case if no evidence relating thereto is given on either side. In other words, one alleging a fact which is denied has the burden of establishing it."

Id. (*quoting* 20 AM. JUR. Evidence, § 135 at pp. 138-139). This principle has been cited frequently over the years

to quantify a loss to covered property during the policy period caused by a covered peril (or any physical loss within the term and area of the policy if the policy is all-risks). The *insurer* would then have the burden to plead, prove and quantify how much, if any, of an otherwise covered loss falls within an exclusion to avoid its general coverage obligation. The burden shifts back to the insured to prove how much of a loss otherwise excluded falls within an exception to an exclusion or an endorsement that reinserts coverage over an exclusion. Each should carry the burden of proof in accordance with those provisions on which they have the burden of pleading – and that burden logically includes evidence from which a fact-finder could find the amounts on which each party bears the burden of proof.

Conclusion: An Uncertain Future for the "Concurrent Causation" Doctrine in Texas Coverage Litigation

As discussed at the opening of this paper, the Fifth Circuit has twice certified questions to the Supreme Court of Texas regarding these substantial gaps in the "concurrent causation" doctrine. Both times the defendant-insurer has settled shortly before oral arguments were scheduled to occur, effectively ending each case. It remains to be seen whether or when the Supreme Court of Texas will get an opportunity to address this issue directly. In the meantime, policyholders seeking to recover underpaid or unpaid insurance benefits where an insurer is claiming an exclusion is at issue, should be prepared to produce evidence quantifying the amount of the loss caused by an excluded peril, or evidence that *no* amount of the loss was caused by an excluded peril as the claimants did in *Advanced Indicator*.[29]

for placing the burden of proof on the party to whose benefit the matter to be proven would run. *Miller v. Westwood*, 238 Neb. 896, 908, 472 N.W.2d 903, 911 (1991)(same); *United States W. Communs., Inc. v. N.M. State Corp. Comm'n (United States W. Communs., Inc.)*, 1998-NMSC-032, ¶ 34, 125 N.M. 798, 808, 965 P.2d 917, 927 (N.M. 1998)(same); *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965)(same); *see also Lincoln Intermediate Unit #12 v. Bermudian Springs Sch. Dist.*, 65 Pa. Commw. 53, 56-57, 441 A.2d 813, 815 (Pa. 1982)("The general rule is that the burden of proof is upon the party who, in substance, alleges that a thing is so, or, as it is more commonly put, the burden of proof rests upon the party having the affirmative of the issue as determined by the pleadings."); *Cox v. Roberts*, 248 Ala. 372, 374, 27 So. 2d 617, 618 (Ala. 1946)("The burden of proof as to a fact or issue generally rests on the party asserting or pleading it or having the affirmative of the issue, and remains on that party throughout the trial."); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 485, 283 N.W.2d 25, 37 (1979)("The fundamental principle of the law of evidence is to the effect the burden of proof in any cause rests upon the party who asserts the matter.")(*citing* 29 AM. JUR. 2D, Evidence, § 134 at p. 167).

[29] *Advanced Indicator & Mfg. v. Acadia Ins. Co.*, 50 F.4th 469, 476 n.4 (5th Cir. 2022).