

2016 Texas Update: Hail and Windstorm First Party Property Claims

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Burden of Proof

In general, an insured bears the initial burden of showing coverage, and the insurer bears burden of proving applicability of any exclusion.

See, e.g., Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co., 107 S.W.3d 729, 733 (Tex.App.-Fort Worth 2003, pet. denied); TEX. INS. CODE ANN. § 554.002 (Vernon 2006).

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Burden of Proof: Concurrent Causes

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(s). *Travelers Indemn. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971).

The policyholder has the burden to provide evidence capable of enabling a trier of fact to segregate his covered damages from non-covered damages. See, e.g. *Nat'l Union Fire Ins. v. Puget Plastics Corp.*, 735 F. Supp. 2d 650, 669 (S.D. Tex. 2010)

Burden of Proof: Concurrent Causes

State Farm Lloyds v. Kaip, 05-99-01363-CV, 2001 WL 670497, at *1 (Tex. App.—Dallas June 15, 2001, pet. denied)

- Kaip's own expert testified that the damage was caused by hail (including prior hail storms) and premature deterioration, and therefore admitted that the condition of Kaip's roof was caused, at least in part, by excluded perils
- Kaip did not attempt to quantify the amount of loss caused by the hail and to secure a jury finding on the amount of damage attributable to hail

Burden of Proof: Concurrent Causes

All Saints Catholic Church v. United Nat'l Ins., 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, no pet.)

- A hailstorm caused damage to portions of All Saints' roof. Because of the prematurely-aged Hardi-Slate tiles, the hail damaged tiles could not be "spot" repaired; the non-hail damaged tiles could not withstand the repairs without breaking. Thus, the entire roof needed to be replaced to prevent it from leaking.
- United National paid the amount necessary to replace only those tiles damaged by hail. All Saints brought suit to recover the total cost for replacement of the Hardi-Slate roofing tiles.

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Burden of Proof: Concurrent Causes

All Saints Catholic Church v. United Nat'l Ins., 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, no pet.), Con't.

- All Saints argued that the doctrine of concurrent causation does not apply, and that the damage was not caused by the aged, defective Hardi-Slate tiles, but by the hailstorm alone.
- Court affirmed summary judgment in favor of United National, holding that it only owed for the cost of repairing, rebuilding, or replacing the tiles damaged by the hailstorm—and those tiles only. Any other tiles constituting "damaged property" under the policy were not reduced to that condition by the hailstorm, but by wear and tear and the nature of the Hardi-Slate tiles.

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