The Burden Of Proof For Property Damage Policies

At the commencement of a coverage dispute, both the insurer and the insured should be clear as to who bears the burden of proving coverage under the policy.

In general, when an insured commences an action for recovery of property damage based upon the terms and conditions of their insurance policy, because the insured is the plaintiff they have the burden of proving both their loss and coverage for that loss. That burden of proof, however, is not a heavy one where an insured has an all risk policy. On the other hand, if the insured has a named peril policy then the insured’s burden of proving coverage can be more difficult.

For example, in Manopla v. Travelers Insurance Company, 139 Misc.2d 30, 525 N.Y.S.2d 997 (Civ. Ct. New York Cty. 1988) the insured sought recovery under his named peril policy for an alleged theft of his luggage while in the custody of an airline. The insured demonstrated only that the luggage was lost or somehow disappeared while in the custody of the airline. That quantum of evidence was not sufficient to sustain the insured's burden of proof under the policy to demonstrate that the loss was caused by theft. The court required the insured to produce some evidence that the property was stolen rather than simply lost. That evidence could have been circumstantial rather than direct evidence; but there had to be some evidence from which a jury could reasonably infer that the loss was caused by theft.

Similarly in this regard, in Spenge Inc. v. Aetna Insurance Company, 58 A.D.2d 1026, 396 N.Y.S.2d 957 (4th Dept. 1977) the insured sued to recover upon a named peril policy for inventory losses allegedly due to a burglary. The Appellate Division, Fourth Department dismissed the insured’s action because the insured failed to submit sufficient proof that a burglary was the cause of its inventory loss. The only proof suggesting that a burglary caused the inventory loss was a single instance where one of the insured's supplier's employees entered the insured premises with a key he had been given, loosened a bolt to enter into a storage area, and stole some cartons of cigarettes. The court ruled that this incident involving the supplier's employee was not sufficiently connected to the inventory loss estimated by the insured to be approximately twenty thousand dollars. The court indicated that the mere occurrence of the supplier's employee attempting to steal some cigarette cartons did not supply a sufficient causal connection to attribute the twenty thousand dollar inventory loss to burglary. The insured’s action was dismissed.

For many property damage claims, however, the issue of coverage involves the application of an exclusion contained within an all risk policy. In that instance, the New York State Court of Appeals has placed the burden of proof to demonstrate that the loss is not covered squarely upon the insurer, Maurice Goldman & Sons, Inc. v. Hanover Insurance Company et al., 80 N.Y.2d 986, 592 N.Y.S.2d 645 (1992). In an earlier Court of Appeals opinion, Facet Industries, Inc. v. Wright, 62 N.Y.2d 769, 477 N.Y.S.2d 316
(1984), the Court of Appeals reiterated the long standing proposition that, "[T]he burden of proving that the loss is within the exclusion of the policy is upon the insurer..."

The imposition upon the insurer of the legal burden to demonstrate that a loss falls within an exclusion often has the effect of additionally imposing upon the insurer the expense involved in demonstrating the cause of the loss. During the investigative stage of a claim, sometimes an insurer will inquire as to whether or not they should bear the expense of engineering and/or construction expert examination fees often required to determine the cause of a property damage loss. The insurer should first look to the terms and conditions of the insurance policy to determine whether or not it is an all risk policy or a named peril policy. If the insured is basing coverage upon an all risk policy and the insurer believes that coverage does not exist because of an exclusion, then the cost of an inspection to demonstrate that the cause of loss falls within the exclusion must be borne by the insurer. Naturally, the decision to incur the cost of an engineering and/or construction analysis and testing procedure is made on a case by case basis, influenced in part by the information concerning the cause of the loss and extent of the damages already ascertained before any formal inspection and testing is undertaken by an expert, and by the terms and conditions of the policy.

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