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The Burdens of Persuasion and Production

By John P. McCahey

A concept central to all trials is that of the burden of proof. The allocation of that burden between the litigants has been described as an "important procedural right that may have substantive consequences."¹ Notwithstanding such importance, the burden of proof has also been described as being, at times, a confusing concept.² That confusion can be traced to several factors. The burden reflects social policy more than law,³ and it is intended to allocate among the litigants the risk of error

in deciding the issues in dispute.⁴ It does not necessarily follow the burden of pleading a claim or defense,⁵ and the reasons when it does not can sometimes be obscure.⁶ The Federal Rules of Evidence did not codify the burden of proof, and often there is no statutory or other codified rule providing guidance as to its allocation in particular cases.⁷ It has therefore been left for the most part to the courts to develop and apply those rules. In diversity cases deciding state law claims, state law controls the burden of proof.⁸

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The Burdens of Persuasion and Production

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Perhaps the most significant cause of confusion that surrounds the burden of proof and its application is the meaning that the courts ascribe to the term itself. The U.S. Supreme Court has defined the burden of proof as the "burden of persuasion."⁹ In so doing, the Court has distinguished it from the closely related but separate burden of production, sometimes referred to as the "burden of going forward."¹⁰ Some courts nonetheless use the term *burden of proof* without further description when referring to either the burden of persuasion or that of production, which they consider separate "elements" of the burden of proof.¹¹ Yet still other courts distinguish between the two by referring to the burden of persuasion as the "ultimate burden of proof" and that of production as the "initial burden of proof."¹²

Related to the burdens of persuasion and production is the standard of proof necessary to prove the facts of the claim or affirmative defense at issue in a particular case. For most civil claims and the affirmative defenses thereto, those facts need to be shown to exist by the preponderance of the evidence, a standard that requires the fact finder to conclude from the evidence before it that a fact at issue is more probably true than not true.¹³ The other standard that sometimes is applied in civil cases, such as with allegations of fraud or other quasi-criminal wrongdoing, is that of clear and convincing evidence.¹⁴ That standard, not as easily summarized as the standard of preponderance of evidence, has been described as requiring the fact finder to conclude from the evidence the existence of necessary facts with convincing clarity.¹⁵

This article summarizes the burdens of persuasion and production in a civil action as explained by federal courts.

Burden of Persuasion

The burden of persuasion has been defined in several ways, such as the "obligation to convince the fact finder at trial that a litigant's necessary propositions of fact are indeed true,"¹⁶ or the "burden to persuade the trier of fact that the existence of the proposition to be proved is more probably true than not true."¹⁷ It also has been described as a "tie-breaker," dictating that the party who bears that burden must lose where the fact finder concludes that the evidence before it as to one or more essential facts of a claim or defense is evenly balanced.¹⁸ Where, however, the fact finder comes to a definite conclusion as to those facts after hearing all the evidence, there is no occasion to invoke the burden of persuasion.¹⁹ That burden is not affected by whether the fact finder is a judge or a jury.²⁰

There is no principle that can be applied in all

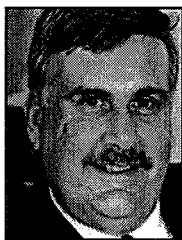
cases to determine which party bears the burden of persuasion as to a claim or defense at issue.²¹ In most cases, however, that burden is placed on the party that asserts a contention and seeks to benefit from it.²² The plaintiff as a general rule will thus bear the burden of persuasion as to the claims alleged by it.²³ To the extent that a defendant raises affirmative defenses, the burden of persuasion as to those defenses usually will rest with the defendant.²⁴ The statute creating or addressing a claim or defense, however, may otherwise fix the burden of persuasion,²⁵ and its allocation in a civil action ordinarily will not raise constitutional concerns.²⁶ Although it is said that a court on its own initiative and in rare circumstances may alter the general rule that the party asserting the claim or defense bear the burden of persuasion thereto, the precise circumstances when this may occur is not readily apparent.²⁷ Some courts, for example, express the notion that the burden of proof as to one or more issues in the case may be placed on one party for reasons of fairness, but they do not delineate whether the burden referred to is that of persuasion or production, or both.²⁸

The burden of persuasion is not a shifting burden and remains with the party bearing it at the trial's outset.²⁹

Burden of Production

The burden of production, also called the burden of going forward, is the obligation to come forward with evidence of the facts necessary to support a finding in support of a claim or defense.³⁰ To carry the burden of production, a party must introduce sufficient evidence to make out a prima facie case for a claim or defense³¹ or to raise a genuine issue of fact thereto.³² Unlike the burden of persuasion, it is for the trial judge and not the fact finder to determine whether the burden of production has been met. The burden is partially a procedural rule and partially a substantive one.³³ If met, the burden is procedural and drops from consideration; if not met, the burden is substantive, and the party bearing it must lose, notwithstanding that it may not bear the burden of persuasion.³⁴ It has been said that the burden of production matters most before trial because the party bearing it as to a claim or defense cannot withstand summary judgment against it without meeting that burden.³⁵

Like the burden of persuasion, there is no principle applicable to determine in all cases the party that initially bears the burden of production. In most cases, however, the burden of production in support of a claim or defense is initially placed on the same party bearing the burden of persuasion as to such claim or defense.³⁶ A statute or the court, however, can separate the burdens of



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production and persuasion at the outset of trial.³⁷ For example, under the Federal Rules of Evidence, a presumption by itself in a civil case imposes the burden of production on the party against which the presumption is invoked, but such presumption does not shift the burden of persuasion.³⁸ The burden of production can also initially be placed on a party as to all or some of the elements of a claim or defense for reasons of public policy or fairness, such as where one party as compared to the other would be expected to have sole or superior access to information.³⁹ That evidence, however, is difficult to obtain, and witnesses unavailable ordinarily will not relieve a party from either meeting its burden of production or from the consequences of such failure.⁴⁰

Unlike the burden of persuasion, which remains fixed throughout trial, the burden of production is a shifting burden.⁴¹ If the party initially bearing the burden of production as to evidence of the facts of a claim or defense carries its burden, the burden then shifts to the opposing party to submit sufficient evidence to rebut those facts or to create a material issue for the fact finder to decide.⁴² If, however, the party bearing the initial burden of production fails to sustain its burden, the claim or defense as to which the burden is born must be decided against it, notwithstanding that the burden of persuasion may lie with the other party.⁴³

Application of Burdens

At the outset in a civil trial, the plaintiff will normally bear both the burdens of persuasion and production as to the claims it alleges against the defendant.⁴⁴ The initial focus will be on the burden of the production and require the plaintiff to come forward with sufficient evidence of facts to support a finding in its favor by the fact finder (i.e., a prima facie case).⁴⁵ If the plaintiff fails to meet its burden as to all or some of its claims, those claims must be decided against it.⁴⁶


Where the plaintiff does meet its burden, the burden of production (but not persuasion) will then shift to the defendant. To the extent that the defendant has denied or disputed facts introduced by the plaintiff in support of its claim, the defendant will have the burden to introduce evidence to rebut or at least create a material issue as to the existence of such facts.⁴⁷ In addition, the defendant will need to meet its burden of production as to any affirmative defenses raised by the introduction of evidence in support of such defenses.⁴⁸ The defendant's failure to meet its burden will normally entitle the plaintiff that met its burden to a directed verdict. If the defendant does meet its burden, the burden as to rebuttal evidence will then shift back to the plaintiff.

It is only where the trial judge has determined

that both parties have met their respective burdens of production that the fact finder will then have to weigh the evidence and decide on the entirety of the record and under the applicable standard of proof (i.e., preponderance of the evidence or clear and convincing evidence) whether the burden of persuasion has been met as to the claims and defenses.⁴⁹ If the fact finder determines that the evidence in support of a particular claim or defense falls short of the required standard of proof or is evenly balanced, the party bearing the burden of persuasion as to such claim or defense must lose.⁵⁰

In the context of a summary judgment motion, the moving party always bears the burden of demonstrating the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law.⁵¹ This burden encompasses both that of production and persuasion.⁵² The burden of production requires the moving party to make a prima facie showing of its entitlement to summary judgment. The manner of this showing depends on whether the moving party will bear the burden of persuasion at trial. If it will, the moving party must support its motion with evidence that, if not controverted, would entitle it to a directed verdict. The burden of production in opposing the motion will then shift to the nonmoving party to produce evidence raising a genuine issue to be tried. If the moving party will not bear the burden of persuasion at trial, the movant may satisfy its burden of production either by submitting evidence that negates an essential element of the nonmovant's claim or defense or by demonstrating that the nonmovant's evidence as to such claim or defense is insufficient to establish an essential element thereof. The burden of production will then shift to the nonmovant. The burden of persuasion in all cases, however, will never shift from the moving party.⁵³

Conclusion

The burdens of persuasion and production are separate concepts, as shown by the fact that it is for the trial judge to determine whether the burden of production has been met and for the fact finder to determine whether the burden of persuasion has been carried. They are also related concepts, as illustrated by the fact that the issue of whether the burden of persuasion has been met need be decided only if both parties have met the burden of production. Viewing these burdens as separate but related concepts dispels much of the confusion that sometimes surrounds the concept of the burden of proof. 

Endnotes

1. See *Bruner v. Office of Pers. Mgmt.*, 996 F.2d, 290, 293

The burden of production is a shifting burden.

(Fed. Cir. 1993).

2. See *Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *Simpson v. Home Petroleum Corp.*, 770 F.2d 499, 502 (5th Cir. 1985).

3. See *Bruner*, 996 F.2d at 292.

4. See *Matter of Palmisano*, 70 F.3d 483, 485 (7th Cir. 1995), *cert. denied*, 517 U.S. 1223 (1996).

5. See *Alaska Dept. of Env't Conservation v. Env't Prot. Agency*, 540 U.S. 461, 470 n.17 (2004).

6. See *Nat'l Commc'ns Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2nd Cir. 2001).

7. See *Schaffer*, 546 U.S. at 56–57.

8. See *O'Rourke v. Jason, Inc.*, 978 F. Supp. 41, 46–47 (D. Mass. 1997).

9. See *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

10. See *Greenwich Collieries*, 512 U.S. at 272.

11. See *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287 (3d Cir. 2006); *In re Britt*, 199 B.R. 1000, 1008 (Bank. N.D. Ala. 1996).

12. See *Samuel v. Ford Motor Co.*, 112 F. Supp. 2d 460, 467 (D. Md. 2000), *aff'd*, 95 F. App'x 520 (4th Cir. 2004); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *In re Anthem Cmty's./RBG, LLC*, 267 B.R. 867, 872 (Bank. D. Colo. 2001).

13. See *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993).

14. See *Addington v. Texas*, 441 U.S. 418, 424 (1979).

15. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986).

16. See *El v. SEPTA*, 479 F.3d 232, 237 n.6 (3rd Cir. 2007).

17. See *Keller Brass Co. v. Cont'l Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988).

18. See *Schaffer*, 546 U.S. at 56; *Bristow v. Drake St. Inc.*, 41 F.3d 345, 353 (7th Cir. 1994), *reh'g denied*, 1995 U.S. App. LEXIS 2063 (7th Cir. 1995), *Lisbon Contractors*, 828 F.2d at 765.

19. See *Bristow*, 41 F.3d at 353.

20. See *Prickett v. United States*, 111 F. Supp. 2d 1191, 1192 (M.D. Ala. 2000), *aff'd*, 268 F.3d 1066 (5th Cir. 2001).

21. See *Alaska Dept. of Env't Conservation*, 540 U.S. at 494 n.17.

22. See *Schaffer*, 546 U.S. at 58; *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 428 (2nd Cir. 1999).

23. See *Schaffer*, 546 U.S. at 56; *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 566 (3rd Cir. 2003).

24. See *Schaffer*, 546 U.S. at 56; *F.T.C. v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004), *cert.*

denied sub nom, 544 U.S. 904 (2005).

25. See *Schaffer*, 546 U.S. at 56.

26. See *Concrete Pipe and Prods.*, 508 U.S. at 630; *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989).

27. See *Schaffer*, 546 U.S. at 56; *Alaska Dept. of Env't Conservation*, 540 U.S. at 494 n.17.

28. See *Martinelli*, 196 F.3d at 428; *United States v. 194 Quaker Farms Road*, 85 F.3d 985, 990 (2nd Cir. 1996), *cert. denied sub nom*, 519 U.S. 932 (1996).

29. See *Moore*, 318 F.3d at 566; *Samuel*, 112 F. Supp. 2d at 467.

30. See *El*, 479 F.3d at 237 n.6; *Bruner*, 996 F.2d at 293.

31. See *In re North St. Assocs. Ltd. P'ship*, 184 B.R. 1, 7 (Bank. D. Mass. 1995).

32. See *Johnson v. Mortham*, 915 F. Supp. 1574, 1575 (N.D. Fla. 1996).

33. See *In re Kim*, 71 B.R. 1011, 1015–16 (Bank. C.D. Cal. 1987).

34. See *In re Kim*, 71 B.R. at 1015–16; *In re Anthem Cmty's.*, 267 B.R. at 871.

35. See *El*, 479 F.3d at 237 n.6.

36. See *Moore*, 318 F.3d at 566; *Simpson*, 770 F.2d at 503; *Auburndale State Bank v. Dairy Farm Leasing Corp.*, 890 F.2d 888, 893 (7th Cir. 1989).

37. See *In re Britt*, 1999 B.R. at 1088; *Nat'l Commc'ns*, 283 F.3d at 130.

38. See *FED. R. EVID.* 301; *McCann*, 458 F.3d at 287.

39. See *Nat'l Commc'ns*, 283 F.3d at 130–31.

40. See *United States v. 15 Bosworth St.*, 236 F.3d 50, 55 (1st Cir. 2001); *In re Malget*, 163 B.R. 933, 936 (Bank. S.D. Cal. 1994).

41. See *Bruner*, 996 F.2d at 293; *Samuels*, 112 F. Supp. 2d at 467.

42. See *Bruner*, 996 F.2d at 293.

43. See *15 Bosworth St.*, 236 F.3d at 55; *In re Anthem Cmty's.*, 267 B.R. at 871.

44. See *Moore*, 318 F.3d at 566.

45. See *Samuel*, 112 F. Supp. 2d at 467.

46. See *15 Bosworth St.*, 236 F.3d at 55; *In re Anthem Cmty's.*, 267 B.R. at 871.

47. See *15 Bosworth St.*, 236 F.3d at 55.

48. See *Nat'l Bus. Consultants*, 376 F.3d at 322.

49. See *Lisbon Contractors*, 828 F.2d at 765; *Samuel*, 112 F. Supp. 2d at 467.

50. See *Schaffer*, 546 U.S. at 56; *Bristow*, 41 F.3d at 353.

51. See *FED. R. CIV. P.* 56(c).

52. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 330–31 (1986) (dissenting op.).

53. See *Celotex Corp.*, 477 U.S. at 330–31 (dissenting op.).