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Supreme Court guidance on burden of proof in insurance cases

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Introduction

Evidentiary issues are often central in civil cases, not least when it comes to insurance disputes. Indeed, parties to an insurance dispute often allege different fact patterns and, although the course of events sometimes may be investigated in retrospect, many times this is not the case. When the course of events cannot be sufficiently investigated and the parties' versions differ, a court must decide which party (the insurer or the insured) should bear the burden of proof for a particular question of fact (ie, bear the risk that a certain question of fact cannot be sufficiently established).

Under Swedish law, the common view has been that the insured bears the burden of proof that an event covered by the insurance policy has occurred, while the insurer bears the burden of proof that an exclusion from insurance coverage is applicable. Nevertheless, this generally accepted assumption has now been challenged in a recent decision by the Supreme Court.

In the case leading up to the Court's decision, dated 2 December 2021,[(1)] the insurer had denied compensation on the grounds that the insured had failed to meet its burden of proof – namely, proving that an event covered by the insurance policy had occurred. In its decision, the Court provided guidance on the principles for allocating the burden of proof in insurance compensation cases. This article outlines the Court's decision and discusses its possible implications.

Facts

In the case at hand, an insured submitted to its insurer a claim for insurance compensation for a vehicle that had been destroyed by a fire. The terms and conditions of the applicable motor vehicle insurance policy stated that damage to a motor vehicle caused by fire was covered by the policy only if the fire had been started by a third party (ie, only if the fire had been intentionally caused by someone other than the insured or someone acting with the insured's consent). Notably, this provision was principally designed as a coverage provision; however, the provision essentially operated more like an exclusion in the sense that it entailed a caveat from the general scope of coverage.

The insurer argued that the insured had the burden of proof for the fact that the fire had been started by a third party and, upon concluding that the insured had not satisfied its burden of proof, the insurer declined insurance coverage and denied insurance compensation. The insured then initiated legal proceedings against the insurer.

The case was first adjudicated by the District Court and then by the Court of Appeal. The insured was subsequently granted leave to appeal by the Supreme Court. The main issue that the Supreme Court assessed was which party should bear the burden of proof for the fact that the fire had been started by a third party or, conversely, caused intentionally by the insured or someone who had acted with the insured's consent.[(2)]

Decision

The Supreme Court began by referring to what has sometimes been considered to be the starting point for deciding the burden of proof in insurance compensation cases: the insured has the burden of proof for circumstances relating to the insurance coverage in the terms and conditions, while, on the other hand, the insurer bears the burden of proof for facts entailing that exclusions in the terms and conditions apply to the insurance coverage. According to the Court, a starting point to this effect will often align with how the burden of proof is generally decided in civil proceedings under Swedish civil procedural law, and will often lead to a satisfactory result. The Court also noted that this starting point has been assumed by some to derive from the Court's own previous case law.

However, according to the Court, no clear-cut rule to this effect may be deduced from the Court's previous case law. The Court instead stated that it had merely decided the burden of proof for certain types of cases, by way of applying general principles of evidentiary law and considering the circumstances in each case. The Court further stated that it would raise concerns if the burden of proof depended on whether a specific provision in the terms and conditions related to coverage or constituted an exclusion from the coverage. In addition to the difficulties in categorising a specific provision as a coverage provision or an exclusion, the Court stressed that an insurer, by formulating the terms and conditions, is often positioned to unilaterally decide whether a certain provision should be designed to relate to either the coverage or an exclusion.

The Court then provided guidance on how the burden of proof should be decided: the same considerations that apply in civil proceedings in general should apply also when deciding the burden of proof in insurance compensation cases; for example, the parties' respective abilities to secure evidence and the interest of the relevant substantive law being effective. As for the case at hand (ie, a consumer non-life insurance policy), the Court concluded that the insurer, typically, should bear the burden of proof for the fact that the insured has intentionally caused the damage to which the insurance claim related, regardless of the wording in the applicable terms and conditions.

In reaching this conclusion, the Court appears to have considered that an insurer will typically be in a much better position than the insured to investigate the damage caused to an insured vehicle. The Court also noted that its conclusion would be in line with the characteristics of the Swedish Insurance Contract Act, an important aim of which is to protect insureds in general and insured

consumers. Lastly, the Court noted that in a similar situation where the insurer seeks to prematurely terminate an insurance policy on the grounds that the insured has intentionally caused the insured event, existing case law provides that the insurer has the burden of proof for the fact that the insured has intentionally caused the insured event.

In the case at hand, the Supreme Court found that the insurer had to provide sufficient evidence to prove that the fire in question had been intentionally caused by the insured or anyone else who in a relevant way could be associated with the insured. Given that the appellate court had not tried the case from this starting point, the Court referred the case back to the Svea Court of Appeal, which quashed the district court's judgment.

Comment

This decision provides some clarification on how the burden of proof should be allocated in certain insurance cases; notably, cases that concern whether the insured has intentionally caused the damage to which the insurance claim relates. However, given that the question assessed by the Supreme Court was explicitly limited to a consumer insurance policy, other considerations may apply for commercial insurance policy cases. Some of the Court's remarks reflected above would also appear to be principally applicable in commercial insurance cases.

In most other cases, however, and despite any justified concerns associated with letting the burden of proof be governed by a schematic rule, the Court's decision likely leads to less certainty and may even advance parties' incentives to explicitly regulate the burden of proof in the terms and conditions.

Up until this decision, most parties have assumed that the burden of proof was split between the insured and the insurer depending on which type of provision in the terms and conditions relates to which question of fact. Therefore, this decision will likely change how both parties argue and position themselves in disputes over insurance compensation, perhaps already in the claims handling procedure.

In most insurance compensation cases, however, general principles of evidentiary law will likely lead to outcomes that are similar to the outcomes entailed by the schematic rule refuted by the Court. Against this backdrop, it seems unlikely that the Court's decision will radically change how the parties to an insurance contract and the lower courts in practice view the issue of the burden of proof.

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Endnotes

(1) T 3982-20.

(2) The Supreme Court also addressed what evidentiary requirements should apply in insurance cases, which is not within the scope of this article.