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§3.8 Hard Cases Where Counterproof Is Sufficient But Not Conclusive

Christopher B. Mueller
University of Colorado Law School

Laird Kirkpatrick
George Washington University Law School, lkirkpatrick@law.gwu.edu

Liesa Richter
University of Oklahoma College of Law

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If the basic facts are established, the hard case is the one where counter-proof is offered, and it is sufficient to support a finding against the presumed fact but not so cogent and compelling that such a finding is required. In this in-between case, a presumption does not control in the sense of requiring a finding of the presumed fact. Thus sufficient evidence that goods were carefully handled or stored means the bailed goods presumption no longer requires a finding that bailee's negligence caused the damage.

The in-between case raises three questions: Does the presumption disappear completely? Can the factfinder still find the presumed fact? Does the presumption protect this possibility? On these points, practice varies widely among states, and because of the difficulties presented by the in-between cases, states adopting their own versions of the Rules did not as faithfully follow the federal model as they did in other areas.[1] The two main lines of doctrine and some intermediate lines are explored below.

Approach of FRE 301

Rule 301 adopts the common law approach under which presumptions in civil cases affect the burden of persuasion, and not the burden of persuasion. One version of this approach is encapsulated in the expression "bursting bubble," for it is said that presumptions in civil cases burst like a bubble and disappear from the case when the other side offers counterproof that would support a reasonable jury finding against the presumed fact, regardless whether the jury actually believes or accepts the counterproof as persuasive. Many courts take the view that FRE 301 embodies this version of the common law approach.[2]

As if to drive home the evanescent nature of presumptions under this approach, some courts say

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§3.8 1. Among the 45 states that have adopted the Rules, 17 states have provisions that give at least some presumptions more effect than the "bursting bubble" approach. Among these, 12 states provide that civil presumptions shift the burden of persuasion (Arkansas, Delaware, Louisiana, Maine, Montana, Nebraska, Nevada, North Dakota, Oregon, Utah, Wisconsin, and Wyoming). At the opposite end of the spectrum, 18 states adopted provisions similar to FRE 301, under which presumptions affect only the burden of production (Alaska, Colorado, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, South Dakota, Vermont, and West Virginia). Ten other states do not prescribe by rule the effect of presumptions in civil cases (Arizona, Connecticut, Georgia, Iowa, Louisiana, Pennsylvania, Tennessee, Texas, Virginia, and Washington). The other five provide that some presumptions shift the burden of persuasion, while others shift only the burden of production (Alabama, Florida, Hawaii, Oklahoma, and Rhode Island).

2. In re Wettach, 811 F.3d 99, 108 (3d Cir. 2016); City of Arlington, Tex. v. FCC, 668 F.3d 229, 258-259 (5th Cir. 2012); Cappuccio v. Prime Capital Funding LLC, 649 F.3d 180, 189 (3d Cir. 2011); McCann v. Newman Irrevocable Trust, 458 F.3d 281, 287-288 (3d Cir. 2006) (all holding that FRE 301 adopts bursting bubble approach). *See also* Lansing, Enough Is Enough: A Critique of the Morgan View of Rebuttable Presumptions in Civil Cases, 62 Or. L. Rev. 485 (1983).

that only "minimal" evidence is required to destroy the presumption entirely. To put the point another way, it is said that the party opposing the presumption need only produce enough evidence against the presumed fact "to withstand a motion for summary judgment or judgment as a matter of law on the issue."[3] In other colorful expressions that mix the various metaphors, it is said that a presumption "smokes out" the opponent, and the presumption is then "put to flight" when the opponent produces enough counterproof against the presumed fact.[4]

Fortunately, the bursting bubble approach does not always mean a claim or defense that depends on the presumed fact must fail. The natural probative force of the basic facts may suffice to support a finding of the presumed fact (or the evidence as a whole suffices),[5] and sometimes the trial judge gives an inference instruction that allows or invites the jury to make such a finding. But sometimes the natural probative force of the basic facts is *not* a sufficient basis upon which to rest a finding of the presumed fact.[6] Absent other evidence, the bursting bubble approach means that the party who must prove the fact loses the case in this situation.

Consider the case where a claimant shows that 400 factory-packaged computers were turned over to a trucking company for shipment but 140 of them were broken on arrival. The proof supports an inference of negligence by the trucking company even if the handling and transportation of the computers went smoothly. The initial proof does more than establish the basic facts. It shows that the goods were properly packaged for transit and that damage to 140 of the computers would not likely happen without the bailee's negligence. Even without the presumption, the trier could decide in favor of the claimant, and a jury should get the case.

But suppose the initial proof shows a shipment of 48 china plates was packed in boxes with thin pads between them and that 20 plates were broken on arrival. The counterproof might indicate that the trucking company carefully handled the boxes and nothing untoward happened in transit. The initial proof brought the presumption into play. Under the bursting bubble theory, it disappeared

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3. Cappuccio v. Prime Capital Funding LLC, 649 F.3d 180, 189 (3d Cir. 2011) (only "minimal" evidence needed to rebut presumed fact and burst presumption bubble; testimony based on personal knowledge refuting the presumed fact suffices to rebut the presumption).

4. E.L. Cheeney Co. v. Gates, 346 F.2d 197, 202 (5th Cir. 1965) ("smoke out"); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5, 16-17 (1959) ("bursting bubble"). Hence presumptions are like "bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts," *see* Mackowik v. Kansas City, St. J. & C.B. R.R., 94 S.W. 256, 262 (Mo. 1906). They are also like "Maeterlinck's male bee" ("having functioned they disappear"), *see* Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. Pa. L. Rev. 307, 314 (1920). *And see* accounts of the bursting bubble theory in Thayer, A Preliminary Treatise on Evidence at the Common Law, ch. 8 (1898); 9 Wigmore, Evidence §§2491(2) and 2498a (21) (3d ed. 1940).

5. *See* America Online, Inc. v. AT&T Corp., 243 F.3d 812, 818 (4th Cir. 2000) (evidence rebutting presumed fact may "neutralize" presumption, but "does not eliminate" evidence that "gave rise to the presumption"); Sorrentino v. United States, 198 F. Supp. 2d 1068, 1076 n.4 (D. Colo. 2002) (even after bubble has burst, factual question of receipt of letter in due course remains open; factfinder may find receipt by drawing inference from proof of mailing).

6. *See* Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); A. C. Aukerman Co. v. R. L. Chaides Constr. Co., 960 F.2d 1020, 1038 (Fed. Cir. 1992).

in the face of the counterproof. Here the natural probative force of the initial proof does not support finding negligence by the bailee. One can expect substantial breakage of hand-packed china plates, regardless of the care exercised by the mover. If the presumption is gone, the case is gone too, unless there is other proof of negligence.

Reformist approach

There are other approaches to presumptions in civil cases, and the clearest of these is the approach urged by the drafters of the Rules and now adopted in a dozen states. Under this reformist approach, presumptions affect not only the burden of production but also the burden of persuasion.[7] Long ago, evidence scholars led by Edmund Morgan concluded that allowing a presumption to disappear (burst like a bubble) when the other side offered proof against the presumed fact that a jury could reject (in other words, counterproof that left room for other conclusions) underserved the purpose of presumptions. These scholars argued for the reformist approach, under which a presumption does *not* disappear, even if the opponent offers counterproof that a jury *could* accept in rejecting the presumed fact. Instead, this approach holds that a presumption shifts to the opponent the burden of persuasion, and the case goes to the jury with an instruction telling the jury that the opponent bears the burden of persuasion on the matter of the presumed fact (an instruction that need not use the term "presumption" at all).

Critique of traditional approach

There are two reasons for rejecting the bursting bubble approach. First, a presumption often embodies policy preferences that are underserved if the presumption disappears in the face of counterproof that the trier of fact might reject—counterproof that is perhaps *sufficient* to support a finding against the presumed fact, but not so cogent and compelling that the counterproof would *require* such a finding. Second, as a matter of doctrinal coherence, it is simply impossible to explain why a presumption *requires* a finding of the presumed fact in the absence of counterproof, but disappears altogether (bursts like a bubble) in the face of counterproof that the jury can reject (counterproof that is *less than* cogent and compelling).

Two modern examples help elucidate these criticisms:

First, consider the employment discrimination presumption construed in the *Burdine* case. If plaintiff shows that she applied for an open job for which she was qualified and that she was not hired, it is presumed that the reason was discrimination. In *Burdine*, the Supreme Court said this presumption requires a finding for plaintiff if defendant offers no counterproof, but it ceases to operate in that way if the defendant offers proof of nondiscriminatory reasons. Still, as the Supreme Court said clearly in its followup decision in *St. Mary's Honor Center*, the trier may infer discrimination from proof of the basic facts and the defendant's counterproof if the jury concludes that the reasons given by the defendant are "pretextual."[8] Under a bursting bubble theory, the

7. Counterparts to FRE 301 in the following states provide that presumptions put on the opposing party the burden of persuasion: Arkansas, Delaware, Louisiana, Maine, Montana, Nebraska, Nevada, North Dakota, Oregon, Utah, Wisconsin, and Wyoming. In some other states, at least some presumptions have this effect, while others have the lesser effect prescribed by FRE 301. *See* note 1, *supra*.

8. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S.

plaintiff in *Burdine* would lose because the probative force of the basic facts does not suffice to prove discrimination, and the counterproof, whether believed or not, would destroy the presumption.[9] Clearly the policy basis for the presumption recognized in *Burdine* and *St. Mary's Honor Center* would not be well served if such cases were taken from the jury, and those decisions mean that the presumption continues to play a role in the case. The policy underlying the presumption expresses a preference for allowing the jury to decide close cases, and recognizes that what the employer offers by way of reasons for not hiring or promoting the plaintiff (or giving her a raise) may well be false and pretextual. Hence the Court chose an approach that ensured the survival of the presumption in a lesser role of protecting the possibility of an inference favoring the plaintiff.

Second, consider the black lung presumption construed in the *American Coal* case, which involved a claim for permanent disability under the Black Lung Benefits Act. The coal miner invoked a presumption established by regulation, arising on proof of being in the mines for ten years plus certain medical test results, that he was permanently disabled from the disease. The mining company offered counterproof in the form of medical testimony based on other tests indicating the claimant had heart problems, not black lung disease. The company claimed that the bursting bubble standard of FRE 301 applied and that the presumption was therefore rebutted. The Tenth Circuit disagreed, concluding that under the Black Lung Benefits Act the presumption shifted the burden of persuasion to the defendant.[10] The claimant would have lost if the court had applied the bursting bubble theory because the presumption would have disappeared, regardless whether the trier of fact was persuaded by the counterproof. Again, this approach would have badly served the policy basis of the underlying presumption, which is that miners suffering from the disease that is so commonplace in that occupation should be compensated unless it is very clear that their ailment has other sources.

Intermediate approaches

Given the criticisms of the bursting bubble theory, it is not surprising that courts have resorted to other approaches to presumptions that reject the bursting bubble theory. There are three other approaches that can be described as "intermediate" in nature because they give presumptions more lasting effect than the bursting bubble theory, while stopping short of shifting to the other side the burden of persuasion. These approaches are "reformist" also, but they are not as clear or easy to apply as the simplest reformist approach under which presumptions shift the burden of persuasion. These three other approaches, however, can be understood as permitted by FRE 301, at least until

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502 (1993) (both citing FRE 301 without actually saying that it applies in the case; both saying the presumption protects possibility of pro-plaintiff finding).

9. *See* Reeves v. General Foods Corp., 682 F.2d 515, 520-526 & nn.9-10 (5th Cir. 1982) (proof of basic facts of discrimination presumption may not support finding of discrimination if presumption drops away).

10. American Coal Co. v. Benefits Review Bd., 738 F.2d 387, 390 (10th Cir. 1984) (FRE 301 does not apply; Congress has "otherwise provided" by delegating authority to Labor Secretary who promulgated presumption). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (construing other black lung presumptions and citing FRE 301).

it is decided definitively that FRE 301 embodies the bursting bubble approach.

Substantial and uncontradicted

One intermediate theory holds that a presumption has continuing effect unless the counterproof is "substantial and uncontradicted."[11] By this approach, the bailed goods presumption takes the case to the trier of fact despite counterproof of careful handling and uneventful trip. The case goes to the jury not only in the first situation sketched above (factory-packaged computers are broken on arrival) but in the second (breakage of china packed with thin pads), and the presumption ensures this possibility unless and until the court decides the counterproof is substantial and uncontradicted. An instruction conveys the message that a jury may still find the presumed fact.[12] A problem with this approach is that it requires courts to draw yet another distinction relating to the probative force of evidence. To the three recognized categories (insufficient, sufficient, cogent and compelling) we add a fourth (substantial and uncontradicted), making something that is already complicated even more so.

Believe the counterproof

Another intermediate approach that presumptions remain alive unless the factfinder believes the counterproof.[13] The bailed goods presumption would take the broken china case to the trier of fact, and an instruction would let a jury find for the claimant unless it "believes" the proof of careful handling and uneventful journey.[14] This approach comes perilously close to shifting the burden of persuasion because it seems to say the factfinder should decide for the claimant unless it thinks the counterproof preponderates.[15]

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11. *See* United States v. Jessup, 757 F.2d 378, 380-384 (1st Cir. 1985); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978); E. L. Cheeney v. Gates, 346 F.2d 197, 201, 204 (5th Cir. 1965).

12. Here is one way to put it: "There is evidence that the china was turned over to the bailee in good condition but many plates arrived in broken condition, and there is evidence that the china was carefully handled and the trip was uneventful. Based on this evidence, you may find that there was or was not negligence by the bailee and, if there was, that it was or was not the cause of the damage."

13. Progressive Northern Ins. Co. v. Flores, 2004 WL 944904 (Conn. Super. Ct. Apr. 16, 2004), following Sutphen v. Hagelin, 344 A.2d 270 (Conn. 1975) (should tell jury presumption applies if it disbelieves counterproof).

14. Here is one way to put it: "There is evidence that the china was turned over to the bailee in good condition but many plates arrived in broken condition, and there is evidence that the bailee carefully handled the china and that the trip was uneventful. If you believe the evidence that the bailee carefully handled the china and that the trip was uneventful, you should find that there was no negligence. Otherwise, you should find that there was negligence and that the bailee was the cause of the damage."

15. If "believe the counterproof" does not shift the burden of persuasion, then it is hard to interpret. Perhaps proof of careful handling and uneventful journey is only circumstantial evidence of due care, so it could be believed and yet the trier might think due care was not shown.

Equipoise

The "equipoise" alternative offers a third intermediate approach. Here the presumption requires a finding of the presumed fact unless the factfinder thinks the counterproof makes nonexistence of that fact at least as likely as its existence.[16] The bailed goods presumption would take the broken china case to the trier of fact, and it would find for the claimant unless the counterproof makes due care or external cause at least as likely as negligence by the bailee causing the damage. This approach gives a presumption the greatest possible effect short of shifting the burden of persuasion. The drawback is that it has a self-defeating quality: An instruction would tell a jury to find the presumed fact unless the evidence makes it seem as likely to be untrue as true, which seems to convey what McCormick aptly called an "impression of futility" that could "mystify rather than help."[17]

16. *See* Hinds v. John Hancock Mut. Life Ins. Co., 155 A.2d 721 (Me. 1959) (leading case adopting equipoise approach) (later Maine adopted rule in which presumption shifts burden of persuasion); Speck v. Sarver, 128 P.2d 16, 20 (Cal. 1942) (presumption should persist until there is evidence that "persuades the jury that the non-existence of the facts presumed is as probable as their existence") (Traynor dissent).

17. "You should find for the claimant on the issues of negligence and causation," the instruction could say, "unless you find that proof of due care or other cause makes it at least equally likely that the bailee was not negligent or did not cause the breakage." The critical comments quoted above are in 2 McCormick on Evidence §344 (6th ed. 2006).