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*137 HEIGHTENING THE BURDEN OF PROOF IN UTILITY SHUTOFF CASES INVOLVING ALLEGATIONS OF FRAUD

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The disconnection of home heating service to low-income customers continues to be one of the major problems facing the public utility industry. [FN1] Throughout the decade of the 80's, the disconnection of home heating posed significant problems to the poor. [FN2] Even today, increases in energy prices, as well as in the cost-of-living, continue to outstrip increases in income for the poor. [FN3] Recent decreases in federal fuel assistance funds have exacerbated the problem. [FN4]

Frequently, however, a utility disconnection involves more than a mere claim that a bill has gone unpaid. In addition, utilities may predicate their actions on allegations of fraud. [FN5] In these situations, the utility must meet a higher burden of proof than in the straight nonpayment case. The common law rules of evidence in most states provide that fraud may not be proved by a mere preponderance of the evidence; instead, the party alleging fraud must make a stronger clear ***138** and convincing showing. [FN6]

This article will look at that higher burden of proof. The article is divided into four parts. Part I reviews the common law "duty to serve" of a public utility as it affects a utility's right to disconnect service. Part II examines the sources of law to which an administrative agency should turn to determine the burden of proof in a utility shutoff proceeding. Part III reviews the two standards of proof for fraud: "preponderance of the evidence" and "clear and convincing evidence." Part IV proposes that a clear and convincing showing be required for utility shutoffs, even if not required for fraud.

I. THE DUTY OF A PUBLIC UTILITY TO CONNECT AND CONTINUE SERVICE

A public utility is under a common law duty to serve. [FN7] This duty incorporates an obligation to provide service [FN8] to all who pay for it and who comply with the reasonable regulations of the utility. [FN9] A utility can unquestionably terminate its provision of service for nonpayment of a bill. [FN10] It can also disconnect service for noncompliance with its "reasonable" regulations. [FN11] Within the context of these rights, however, ***139** the duty of a utility to provide service is absolute. It matters not, in other words, whether a utility reasonably believed that it had a reason to disconnect service; when a disconnection is made, the utility assumes the risk that it is making it lawfully. [FN12] If the disconnection is unjustified, the utility is liable for the damages arising as a result. [FN13] In this regard, the law does not distinguish between a disconnection of present service and a delay in connecting service to an applicant. [FN14] If a member of the public has applied for and made the necessary arrangements to receive service, and has paid for or offered to pay the price and abide by the reasonable rules of the company, it is the duty of a utility to provide the service. [FN15]

The imposition of these special duties must be viewed in light of the nature of a public utility. Three attributes are of particular relevance. First, an essential component of a company's public utility status is its agreement to serve all who come. [FN16] In consideration of this agreement is the grant of a number of public prerequisites not available to private non- utility firms. Included, for example, is the right to exercise eminent domain, [FN17] as well as the right to a guaranteed opportunity ***140** to earn a reasonable profit. [FN18] Second, a public utility is often a

monopoly provider of service. [FN19] Indeed, the exclusive service territory of a utility is often guaranteed by statute [FN20] and a firm found not to be a public utility is not entitled to such protected status. [FN21] As a result, if public utility service to any given individual is disconnected, no alternative supplier is available. The imposition of regulation in the first instance arose in part because of this monopoly status. [FN22] Finally, the service provided by a public utility is often considered a necessity. [FN23] When coupled with its monopoly status, therefore, in a contested shutoff situation, the utility not only has the superior resources, but it stands in the superior bargaining position as well. [FN24]

***141** The soundness of placing an obligation to serve on a public utility thus becomes apparent. The agreement to serve all was the basis of the grant of substantial public benefits to the utility. It was also the basis for officially banning the presence of alternative suppliers of essential public needs. A disconnection of service is a breach of the agreement by the utility that served as consideration for these benefits. While the breach may be justified, [FN25] the burden to justify the breach is on the utility.

Because of the unique status of public utilities, substantial attention has been addressed to the procedures necessary to protect consumers from unjustified shutoffs. For example, when service is provided by a municipal utility, due process requires that a customer be given notice and an opportunity to be heard prior to disconnection. [FN26] Even when such notice is not constitutionally required, [FN27] liability has been imposed for damages arising from a failure to provide notice of a pending disconnection. [FN28] The essential elements of a "fair" pre-termination procedure have been well chronicled.

This article, though, does not look at the substantive law of shutoffs [FN29] as much as it looks at the allocation of the burden of proof in justifying a utility shutoff when challenged. The Maryland state supreme court directly addressed the burden of proof issue in a 1986 case involving Baltimore Gas and Electric Company (BG&E). In Everett v. Baltimore Gas and Electric, [FN30] the Maryland court noted that a ***142** utility does not have an absolute right to terminate service. According to Everett:

> BG&E, as a regulated public utility, has an affirmative duty to provide service to the public. In order to discontinue service, it must have grounds for termination . . . . Where a bona fide controversy or dispute exists between the utility and the customer, the utility must show that the proposed termination is justified. [FN31]

The Maryland court concluded, "[w]e hold that where a customer demonstrates a bona fide controversy or dispute as to a proposed termination of service, the utility bears the burden of going forward and the burden of persuasion in establishing sufficient grounds for termination." [FN32]

This allocation of the burden of proof is nearly universal. The New York courts, for example, have long held that a utility has "a duty to supply service to a customer" and that "any lawful termination of such service, such as for non-payment of an amount owing, may be accomplished only . . . with the utility company having the burden to justify its shut-off." [FN33] According to the New York courts, "it is clear that when a utility corporation seeks to cutoff an existing energy supply to a residential consumer the burden of proof is upon the utility." [FN34]

The proper allocation of the burden of proof is illustrated in instances where telephone service is alleged to be used for criminal purposes. [FN35] In such cases, the telephone company has been held to have the burden to justify the termination of service. [FN36] According to the D.C. district court, this allocation is based in large part on the fact that " a public utility, such as a common carrier, a telegraph company, or a telephone company, must serve all members of the public ***143** without discrimination or distinction." [FN37] While the telephone company "may refuse to furnish or may discontinue service," the D.C. court said, " t he burden of proof . . . is on the public utility to establish the fact that the service is being used or is about to be used for a criminal purpose." [FN38] Indeed, according to the Illinois courts, a complaint which challenges the disconnection of service "need only set forth the threatened termination of facilities and assert its right to telephone service . . . . The customer is at no point required to come forward with evidence, much less testimony, until the utility has satisfied this burden of proof ." [FN39]

II. BURDEN OF PROOF IN AGENCY PROCEEDINGS

Before exploring the precise burden of proof standard to be imposed in a fraud case, it is important to understand

why a stricter burden is to be applied in an administrative proceeding. [FN40] Again, the Maryland court in Everett directly addressed the issue. In a shutoff proceeding in Maryland, the Everett court held, "the agency must look to the standard of proof applied in civil cases to determine the standard to be applied in similar administrative proceedings." [FN41] According to Everett, "the preponderance of the evidence standard is only the minimum degree of proof required in administrative proceedings." [FN42] Importantly, the court founded this holding in part on what the court termed "basic common-law principles." According to Everett, the common law states that: " g enerally, the party seeking to change the status quo bears the risk of failure of proof or persuasion . . . . We see no reason to deviate from this general rule under the ***144** present facts, where the utility seeks to terminate the customer's access to the vital services of gas and electricity." [FN43]

The holding in Everett states the general rule. While one legal encyclopedia asserts that administrative proceedings are governed by a "preponderance of the evidence" standard, more importantly, it states: "as a general rule, the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding . . . ." [FN44]

The various courts who have faced the question, while agreeing on the outcome, often differ as to the underlying rationale. Some courts base the allocation of the burden of proof in an administrative proceeding on express statutory language, while others hold that the conclusion is grounded in the common law. Still, other courts hold the standard to be derived from an application of the state rules of civil procedure to administrative cases, without generally explaining why those rules are transferable. Illinois is an example where the courts rely on express statutory language. The Illinois state Administrative Procedure Act "specifically states that the rules of evidence in civil cases 'shall be followed . . .' in administrative proceedings." [FN45] In contrast, many courts rely on the common law allocation of the burden of proof. " T he courts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof." [FN46] The D.C. appellate courts have held this allocation to be "a fundamental principle of administrative proceedings." [FN47] The Florida courts impute the standards used in the state courts to state administrative agencies. [FN48] According to the Florida courts, while ***145** the state Administrative Procedure Act "is silent on the subject, . . . its federal counterpart is essentially the same as Florida decisional law." [FN49] In Iowa, the state supreme court specifically cited the Rules of Civil Procedure in allocating the burden of proof in administrative proceedings before the Secretary of Agriculture. [FN50]

The significance of this discussion for purposes here, lies not so much in defining the precise law regarding who bears the burden of proof, as in determining the sources to which the courts turn to answer the burden of proof question. In the absence of statutes, the courts have turned to the common law, as well as to rules setting forth general civil procedure.

Clearly, in a contested utility shutoff case, the utility bears the burden of persuasion. It is thus next important to precisely determine the burden. One knows that the same burden exists in an administrative proceedings as would exist in a civil proceeding. Where the utility alleges "fraud" in a shutoff case, therefore, common law fraud cases govern the proper allocation of the burden of proof. It is this question--what is the burden in a civil common law fraud case--to which this inquiry now turns.

III. ALLEGATION OF FRAUD

In a shutoff situation where a utility company alleges fraud, it is the obligation of the utility to prove all of the facts necessary to justify its shutoff. [FN51] In the fraud situation, therefore, the utility must prove among other things that a false representation was made by the customer [FN52] and that the utility not only relied upon the misrepresentation, but had a right to rely upon it with a full belief in its truth. [FN53] It is not the duty of the utility merely to come forward with evidence; the utility also bears the burden of persuasion. [FN54]

***146** In proceedings involving allegations of fraud, the utility must meet its burden of proof by "clear and convincing evidence." This burden differs from most administrative proceedings, where parties may carry their burden of proof through a simple "preponderance of the evidence." [FN55] One of the seminal cases examining the stricter burden of proof is the 1986 Maryland supreme court decision in Everett v. Baltimore Gas and Electric Company. [FN56] According to Everett:

Where a utility alleges that a customer engaged in conduct amounting to fraud or to a crime and such conduct constitutes the sole basis of the customer's alleged responsibility for prior unpaid bills, the utility must prove its allegation by clear and convincing evidence to justify termination of service for non-payment. [FN57]

The two different issues contained within this holding--illegal conduct on the one hand and fraud on the other--will be separated. Allegations of fraud will be examined, while for purposes of this article, allegations of criminal conduct will be set aside. [FN58]

In most states, a stricter burden of proof is required in civil proceedings involving allegations of fraud. [FN59] The fundamental doctrine is set out in Wigmore on Evidence: [FN60] "In civil cases, . . . it is customary . . . to attempt to define the quality of persuasion necessary . . . . The phrase is that there must be a "preponderance of the evidence" in favor of the demandant's proposition." [FN61] Wigmore goes on to assert, however, that "a stricter standard, in some such phrase as 'clear and convincing proof,' is commonly applied to measure the necessary persuasion for a charge of fraud . . . ." [FN62] Only nine states appear to have rejected the stricter standard in their common law. [FN63]

***147** A. The Clear and Convincing Standard

"Clear and convincing" proof is an intermediate standard falling between a "preponderance of the evidence" and "beyond a reasonable doubt." [FN64] It is important to understand the reasons why such a standard is applied in proceedings involving allegations of fraud.

1. The Basis for the Higher Standard

Two primary reasons have been advanced for adhering to the "clear and convincing" standard of proof in cases involving fraud. Perhaps the most common is the fact that courts are to presume "honesty and fair dealing." [FN65] The requirement that evidence be clear and convincing is to overcome that presumption. [FN66] According to the Nebraska supreme court, for example, proof of fraud "must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives." [FN67] The second reason relies on the "aura of guilt" that attaches to a person found to have acted fraudulently. [FN68] As a result of the stigma of dishonesty and bad faith, courts have rejected the notion that evidence must reveal only that it is "more likely than not" that fraud has occurred. [FN69]

Given these reasons for requiring the higher standard of proof for fraud, it is not immediately apparent why a contrary rule is applied when there are allegations of criminal behavior. [FN70] A utility may allege behavior in a shutoff case that amounts to criminal conduct. Meter tampering, where a customer taps the power line (or gas or water main ***148** or the like) is one such example. [FN71] The English rule is that if proof of a crime is an element in a civil proceeding, the burden of proof on that element is the same as in the criminal case itself. [FN72] The American courts have not generally endorsed this British rule. [FN73]

Maryland is one of the few states to require a heightened burden, though not the "beyond a reasonable doubt." [FN74] The Maryland courts have held that, even in a civil proceeding, when conduct alleged amounts to a crime, "something more than a preponderance of the evidence may be required . . . ." [FN75] In defining "something more," the Maryland courts have held that "the proof must be 'clear and satisfactory' and be of such a character as to appeal strongly to the conscience of the court." [FN76] This article, however, deals only with the fraud situation. It will not look further at allegations of criminal behavior.

2. The Required Showing

Before looking at precisely what showing the clear and convincing standard requires, it is beneficial to first examine certain types of evidence; the use of which is either precluded under a clear and convincing standard or restricted. After examining those limits, the level of evidence sufficient to meet the standard will be examined.

a. No presumptions

The requirement of clear and convincing evidence to prove fraud places some limits on the type of evidence that might be adduced as proof. Each element of fraud must be proved, none can be supplied by presumption. Accordingly, for example, an intent to deceive cannot be presumed merely from the fact of nonperformance or misrepresentation. [FN77]***149** Indeed, as discussed above, the beginning presumption in any fraud case is the opposite, that the challenged transaction is based on honest and fair dealing. [FN78] Fraud may be inferred from circumstantial evidence. [FN79] Evidence may not, however, be simply "consistent" with a finding of fraud, [FN80] but must lead to the logical deduction that fraud has occurred. [FN81] If a transaction is fairly susceptible of two constructions, the one that will free it from the imputation of fraud must be adopted. [FN82] Particularly if circumstantial evidence is the only evidence relied upon, the circumstances must be "of such a nature and so related to each other that the conclusion reached is the only one that can be fairly and reasonably drawn therefrom." [FN83]

The limit on presumptions would be perhaps most significant in utility situations involving applications for service. Any evaluation of the denial of an application for service has two starting points: first, as discussed above, if a person has applied for and made the necessary arrangements to receive service, and has paid for or offered to pay the price and abide by the reasonable rules of the company, it is the duty of a utility to provide the service. [FN84] Second, there is an initial presumption that the application for service is made consistent with honest and fair dealing. Pulling these two doctrines together leads to the conclusion that the utility may not assert, without evidence of a clear and convincing nature, that an applicant will not pay the price for service, and abide by the reasonable rules of the utility in the future. For a utility to deny service in such a situation, it must prove each element of fraud with sufficient persuasiveness to overcome its common law duty to serve all who come and to overcome the initial presumption of fair and honest dealing. Suspicions, doubts or uncertainty, will not suffice to serve as the basis for a denial of a service application.

***150** b. Somewhere in between

A requirement that utilities provide "clear and convincing" evidence of fraud is without question a higher standard of proof to meet than a "preponderance of the evidence" requirement. According to Wigmore, courts have on occasion made attempts to give a "more expanded definition" of the phrase "clear and convincing evidence." [FN85] The Oregon supreme court's discussion of the clear and convincing standard in Riley Hill General Contractor v. Tandy Corp., [FN86] is perhaps the best.

> There are three standards of proof: "a preponderance," "clear and convincing" and "beyond a reasonable doubt." Proof by a "preponderance of the evidence" means that the jury must believe that the facts asserted are more probably true than false. To be "clear and convincing," evidence must establish that the truth of the facts asserted is "highly probable." "Beyond a reasonable doubt" means that the facts asserted are almost certainly true. [FN87]

Disagreement exists between courts as to the precise ramifications of requiring a clear and convincing showing. Two general approaches exist. On the one hand, some courts hold that "clear and convincing" refers to the quality of proof to be offered. On the other hand, some courts hold that "clear and convincing" defines the quantum of proof.

The first doctrine has been expounded by the Kansas state supreme court. According to Kansas, "clear and convincing evidence" is not a "quantum of proof" at all; rather the term refers to the "quality of proof" to be accepted by the court. [FN88] A Kansas litigant, in other words, must prove all of the elements of fraud by a "preponderance of clear and convincing evidence." [FN89] While not explicitly adopting this typology, the South Dakota court's description of clear and convincing evidence is consistent with this approach as well. [FN90] In Cromwell v. Hosbrook, [FN91] the court defined the "quality of proof" to be ***151** "clear and convincing," saying:

> the witnesses must be found to be credible, that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct and weighty and convincing as to enable either a judge or a jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [FN92]

The Kansas courts have added that to be "clear and convincing," the testimony must be presented by witnesses "lacking in confusion as to the facts at issue." [FN93]

The California courts sharply disagree with any qualitative analysis of the clear and convincing standard. Evidence, for it to be admissible, according to the California court in Liodas v. Sahadi, [FN94] must be both material and relevant. The Liodas court expressly rejected the notion that, once evidence meets this standard of admissibility, there can be a difference in its "quality." [FN95] According to the court:

> There are no degrees of "quality" of evidence in this state: no evidence is admissible except "relevant" evidence and except as provided by statute "all relevant evidence is admissible." The standard of proof by clear and convincing . . . remains an alternative to the standard of proof by a preponderance of the evidence . . . . [FN96]

The Oregon courts also rejected attempts to blend a clear and convincing test into the preponderance of the evidence standard. Unlike the theoretical and policy analysis [FN97] advanced by California, the Oregon courts were quite pragmatic. In discussing the analysis of two state justices seeking to articulate the blend, the Oregon court said: Both ***152** justices concluded that while proof of fraud must be clear and convincing, issues of fact in civil cases are nevertheless determined by a preponderance of the evidence. [FN98] The court continued: "Those most learned and highly respected justices may have been enamored with this distinction, but we doubt that any jury then or now could follow an instruction that encompasses such legal double talk." [FN99] The Oregon court then expressly overruled prior decisions that "imply that a clear and convincing proof standard can co-exist with a preponderance standard on the issue of burden of persuasion." [FN100] This California/Oregon approach is the predominant opinion. [FN101]

Ohio used reasoning similar to Oregon in refusing to distinguish, in actions at law, between the standard of proof necessary for compensatory and punitive damages. Unlike Kansas, which requires a "preponderance of clear and convincing evidence", [FN102] Ohio imposed the preponderance standard for compensatory damages while imposing the clear and convincing standard for punitive damages. The Ohio supreme court eventually rejected that dichotomy. [FN103] According to the court: "the multiplication of theories prerequisite to a sufficient explanation of 'clear and convincing' would operate to mislead and confuse rather than assist a jury." [FN104] The court noted that the jury would need to be instructed on the preponderance and beyond a reasonable doubt standards and told that "clear and convincing" is "somewhere in between." [FN105]

One commentator asserts that both of these approaches miss the point, arguing that "much of the trouble in this class of cases . . . is caused by the use of phrases which describe the quality of the evidence rather than the state of mind of the judge or the jury who must determine [***153** the facts]." [FN106] He states that the rule should be that "belief as to truth of the facts asserted should be strong . . . . The proponent should be compelled to bear the burden of inducing persuasion to a relatively high degree." [FN107] He concludes that:

> The burden then should be that the proponent of these issues must establish that the facts, which he asserts, are highly probably true. It is recognized that it is impossible to define with precision the word 'highly' . . . . The most that can be done, in these cases, which is the least that should be done, is to adopt a rule that the litigant who bears the burden must induce belief in the minds of the judge or the jury that the facts which he asserts are not merely probably true, but that they are highly probably true, yet not require him to discharge the greater burden of persuading them that they are almost certainly true, true beyond a reasonable doubt, or are certainly true. [FN108]

Given the function that the burden of proof serves in allocating the risk of obtaining a wrong decision, [FN109] this final approach is the most appropriate.

B. The Preponderance of the Evidence Standard

While clearly a minority, some courts expressly reject the clear and convincing standard for fraud proceedings altogether. Among those states are Indiana, [FN110] Montana, [FN111] Rhode Island, [FN112] Minnesota, [FN113] Tennessee, [FN114] South Dakota, [FN115] Texas [FN116] and Florida. [FN117] In ***154** Arkansas, the law appears to be unsettled, with recent cases going each way without readily apparent distinction. [FN118] At least two states, California [FN119] and Louisiana, [FN120] rely on specific statutory language imposing the preponderance of the evidence test. [FN121]

In contrast to the above, some states impose different requirements on different types of fraud proceedings. For example, in both Nebraska [FN122] and Ohio, [FN123] a preponderance standard is required in actions at law while a clear and convincing standard is required in actions in equity. It seems clear that a utility shutoff is more analogous to an action in equity than to an action in law.

Finally, in all states applying the clear and convincing standard, it is necessary to distinguish an action for "fraud" from an action for negligent misrepresentation. [FN124] A misrepresentation involves only a material "assertion not in accordance with the facts." [FN125] It is "material" if it is likely to affect the conduct of a reasonable person [FN126] and may be actionable if it in fact induces reliance. [FN127] In contrast, fraud ***155** incorporates an intent to deceive. [FN128] The situation alleged by a utility in a shutoff case will likely be fraud, and not misrepresentation. [FN129]

In summary, in most states, where a utility predicates a proposed termination of service on an allegation that the customer acted fraudulently, the utility bears a heavier burden of proof than the mere preponderance of the evidence required in a straight nonpayment situation. In such situations, the utility carries the burden of persuasion to prove all of the elements of fraud by "clear and convincing evidence." Such a standard requires more than a showing that it is "more likely than not." Clear and convincing evidence requires a showing that is greater than a preponderance of the evidence but less than a showing of "beyond a reasonable doubt."

C. Appellate Review

On one issue there is no disagreement. Even if a clear and convincing standard is required at the "trial" level, appellate review is limited to a "substantial evidence" test. While the appropriate burden of proof is a question of law for the courts to decide, [FN130] whether that burden has been met involves determinations of issues of fact. [FN131] Those determinations will be disturbed on appeal only if lacking substantial evidence as support. [FN132] According to the Arizona courts, for example, while it is "beyond question" that fraud must be established by clear and convincing evidence, "the purpose of the clear and convincing standard is to guide the trier of fact in the consideration of the evidence. It is not a test to be applied by an appellate court in passing on the sufficiency of the evidence." [FN133]

***156** IV. A CLEAR AND CONVINCING STANDARD FOR A PREPONDERANCE STATE

State public utility commissions should apply a clear and convincing burden of proof even in those states which have adopted a preponderance of the evidence standard for general fraud proceedings. Because of the severity of the consequences to the individual, [FN134] and the inherent risk of being wrong, a utility shutoff should be governed by the stricter standard. This argument is grounded in historic "clear and convincing" analysis. The clear and convincing standard, while "less commonly used," is nonetheless "no stranger to the civil law," according to the U.S. Supreme Court. [FN135] In Addington v. Texas, the Supreme Court has required the stricter burden when "interests at stake . . . are deemed more substantial than the mere loss of money." [FN136] Decisions declaring that clear and convincing evidence is required, appear where the proceedings threaten the individual, involving a significant deprivation of liberty. [FN137]

The burden of proof in any dispute allocates the risk of an erroneous decision. Addington v. Texas, outlined in detail this allocative function. The Court stated that the standard of proof instructs the fact finder concerning "the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication" . . . . [FN138] The standard serves to "allocate the risk of error between the litigants." [FN139] Since, for example, society has a "minimal concern" with the outcome of a private suit involving a monetary dispute between parties, a preponderance standard is used. This means that the litigants "share the risk of error in roughly equal fashion." [FN140]

The clear and convincing standard is used "to protect particularly ***157** important individual interests in various civil cases" [FN141] where there should be a reduced risk to the defendant of an erroneous decision. [FN142] In deciding the appropriate standard, [FN143] the courts should weigh the consequences to each litigant of an erroneous decision. [FN144] In any given proceeding, the minimum standard of proof "reflects not only the weight

of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." [FN145] To impose a higher burden of proof in a utility shut-off case, therefore, one should consider the risk of an erroneous deprivation of service and the likelihood that a higher evidentiary standard would reduce that risk. [FN146] A higher standard is preferable when "given the weight of the private interests at stake, the social cost of even occasional error is sizable." [FN147]

A similar analysis is used to support the requirement that clear and convincing evidence be offered to support the award of punitive damages in civil cases. [FN148] The Indiana court explained in Travelers Indemnity Company v. Armstrong, [FN149] that it all boils down to the allocation of the risk of a wrong decision. [FN150] According to the Indiana court:

***158** A rule that would permit an award of punitive damages upon inferences permissibly drawn from evidence of no greater persuasive value than that required to uphold a finding of the breach of contract . . . injects such risks into refusing and defending against questionable claims as to render them, in essence, nondisputable. The public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes. [FN151]

The Indiana court distinguished the situation where it would grant punitive damages from "the ordinary economic case where 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.'" [FN152]

The risk of error in a shutoff situation should not turn on a "more likely than not" determination. [FN153] Historically, there has been a high degree of concern expressed about the erroneous deprivation of a household's utility service. [FN154] The U.S. Supreme Court, has noted that "utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health or safety." [FN155] Similarly, an Ohio federal district court stated that "the lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal." [FN156]

In addition to this expressed concern is the higher protection judicially offered to protect against the erroneous deprivation of utility service in other circumstances. [FN157] Many courts have held public utilities***159** not to a simple duty of care in negligence actions, for example, but rather to the "highest" duty of care. [FN158] This duty flows from the special dependence that customers have on their local utility, their inability to mitigate the damages from an erroneous deprivation of service from a monopoly supplier, and the risk of serious loss should service be denied or interrupted. [FN159] The first line of inquiry--into the significance of the loss and whether there are grounds for determining that the risk of error should not be spread evenly as between customer and utility--works in favor of establishing the higher clear and convincing burden of proof for shutoff cases.

In addition to this risk allocation inquiry, the Supreme Court has found that a higher standard is appropriate where conditions exist that will likely lead to an erroneous decision. The Court articulated three factors in Santowsky that it found "create[d] a significant prospect of erroneous" judicial decisions. In that case, the Court considered the burden of proof for proceedings involving the termination of parental rights. The three factors included:

. First, because the litigants in such proceedings "are often poor, uneducated, or members of minority groups," the proceedings are "often vulnerable to judgments based on cultural or class bias." [FN160]

. Second, the state's "ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense . . . . The State's attorney usually will be expert on the issues contested . . . . The State may call on experts . . . ."

. Third, "the disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options." [FN161]

There can be little question but that these same three factors are as applicable in proceedings involving the termination of utility service as they are in the termination of parental rights.

***160** SUMMARY

In seeking to disconnect service to poor households, utility companies often combine their claim of nonpayment with a further allegation that the customer acted to fraudulently obtain service at their current or former address. In such instances, the claim of fraud must be proved by a clear and convincing degree of proof rather than a mere

preponderance of the evidence. At no time is there any question of who bears the burden of proof; that burden is always with the utility. The only issue is what showing will meet that burden.

The burden of proof to be observed in any administrative proceeding is the same as would be applicable in its civil analog. As a general rule, in other words, the civil "preponderance of the evidence" test is applicable. For fraud in particular, however, all but a few states require the stricter "clear and convincing" standard to be met. The clear and convincing standard is thus the appropriate standard to impose on utilities when they allege fraud as a basis for a service disconnection.

Even in those states which have imposed a preponderance of the evidence standard in their fraud proceedings, there is a strong basis to argue for a higher standard in shutoff fraud cases. The higher clear and convincing standard is imposed in situations where the risk of an erroneous decision should not be shared equally as between litigants, the risk of an erroneous decision is high, and the consequences of an erroneous decision are severe. A termination of utility service falls within the same genre of cases in which the higher standard has been required.

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[FN1]. J. Kirkwood, Cash Deposits--Burdens and Barriers in Access to Utility Services, 7 HARV. C.R.-C.L.L. REV. 630 (1972); Note, The Shutoff of Utility Services for Nonpayment: A Plight of the Poor, 46 WASH. L. REV. 745 (1971); Note, Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers, 78 YALE L. J. 448 (1969).

[FN2]. See, e.g., United States General Accounting Office, Disconnection of Natural Gas Service to Residential Customers, (Nov. 1983); see also, National Consumer Law Center, Cold--Not by Choice (Apr. 1984).

[FN3]. National Consumer Law Center, The Crisis Continues: Addressing the Energy Plight of Low-Income Pennsylvanians Through Percentage of Income Plans (1986); National Consumer Law Center, Losing the Fight in Utah: Low-income Households and Rising Energy Costs (1989).

[FN4]. Low-Income Home Energy Assistance Act, Pub. L. No. 97-35, 46 U.S.C. sec. 8621 (1981). See also, "Alternative Energy Assistance Strategies for Ohio," Cleveland State University (December 1987); "Energy and Montana's Poor: A Blueprint for Action," National Center for Appropriate Technology (February 1989); N. HEISER, The Energy Crisis in North Carolina, Institute of Politics, Sciences and Public Affairs, Duke University (Spring 1989).

[FN5]. Obtaining service in a fictitious name (or perhaps the name of a minor child) is one example of such an alleged wrong-doing.

[FN6]. The elements of common law fraud include that the party made a false representation; that its falsity was known to that party, or that the misrepresentation was made with such reckless indifference as to the truth or falsity as to impute knowledge; that the misrepresentation was made with the intent to defraud; that the person not only relied upon the misrepresentation, but had a right to rely upon it with full belief in its truth; that the person would not have done the action from which damage resulted but for the misrepresentation; and that damage directly resulted from the misrepresentation. Everett v. Baltimore Gas and Electric Co., 513 A.2d 882, 889 (Md. 1986); see also, Anderson v. Reynolds, 588 F. Supp. 814, 818 (D. Nev. 1984); Servicemaster Industries v. J.R.L. Enterprises, Inc., 223 Neb. 39, 388 N.W.2d 83, 86 (1986); Pacific Northwest Life Ins. Co. v. Turnbull, 51 Wash. App. 692, 754 P.2d 1262, 1268 (1988).

[FN7]. For excellent discussions of the scope and ramifications of this duty, see generally: Comment, Liability of Public Utility for Temporary Interruption of Service, 1974 WASH. U. L. Q. 344, 346, n.10; Robinson, The Public Utility Concept in American Law, 41 HARV. L. REV. 277 (1928); Arterburn, The Origin and First Test of Public Callings, 75 U. PA. L. REV. 411 (1927); Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 COLUM. L. REV. 514 (1911).

[FN8]. This includes all types of utility service: water, telephone, electric, gas.

[FN9]. 64 AM. JUR. 2D, Public Utilities, § 16 (1972).

[FN10]. See, e.g., Annotation, Right to Cut Off Water Supply Because of Nonpayment of Water Bill or Charges for Connection etc., 28 A.L.R. 472 (1924); Annotation, Right to Cut Off Supply of Electricity or Gas Because of Nonpayment of Service Bill or Charges, etc., 112 A.L.R. 237 (1938).

[FN11]. Among those regulations universally held not to be reasonable include disconnecting service for a collateral matter, see 55 A.L.R. 771 (1928); disconnecting service for nonpayment of a third party's debt, Annotation, Liability of Premises, or Their Owner or Occupant, for Electricity, Gas, or Water Charges, Irrespective of Who is the User, 19 A.L.R. 3d 1227 (1968); disconnecting service for nonpayment of an unrelated service, 60 A.L.R. 3d 714 (1974), but see, Annotation, Right to Cut Off Water Supply because of Failure to Pay Sewer Service Charge, 26 A.L.R. 2d 1359 (1952).

[FN12]. The general rule was stated early: "'the general rule is that a telegraph company is under no obligation to contract to communicate an illegal or immoral message.' This rule is not only correct as to telegraph companies, but it applies to all persons who undertake to carry for the public . . . . Of course, a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril. If it is mistaken or has misjudged the tenor or purpose of the message, it would be held responsible to the injured party for any damage sustained by reason of his refusal." Smith v. Western Union Telephone Co., 84 Ky. 664, 2 S.W. 483 (1886); see also, Pike v. Southern Bell Telephone & Telegraph Co., 263 Ala. 59, 81 So.2d 254, 255-57 (1955); Andrews v. Chesapeake & Potomac Telephone Co., 83 F. Supp. 966, 968 (D.D.C. 1949).

[FN13]. For a discussion of the tort ramifications of an unlawful disconnection of service, see generally, Colton, Unlawful Utility Disconnections as a Tort: Gaining Compensation for the Harms of Unlawful Shutoffs, 22 CLEARINGHOUSE REV. 609 (1988).

[FN14]. See, e.g., Josephson v. Mountain Bell, 576 P.2d 850, 852 (Utah 1978) "[U]tility must render service to all members of the public who so request and pay for it."); see generally Annotation Liability of Gas, Electric or Water Company for Delay in Commencing Service, 97 A.L.R. 838 (1935).

[FN15]. Id. at 839; see also 26 AM. JUR. 2D, Electricity, Gas and Steam, section 110 (1966) (delay in commencing electric service); 26 AM. JUR. 2D Electricity, Gas and Steam, section 216 (1966) (delay in commencing gas service).

[FN16]. See, e.g., Arizona Corp. Comm'n v. Nicholson, 497 P.2d 815, 817 (Ariz. 1972).

[FN17]. See, e.g., Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 212-15 (1907); Lowell v. Boston, 111

Mass. 454, 463 (1873); Messenger v. Pennsylvania Railroad Co., 37 N.J.L. 531, 536-37 (1874); see generally F.P. Hall, THE CONCEPT OF A BUSINESS AFFECTED WITH A PUBLIC INTEREST, at 96 (1940) (hereinafter, Hall).

[FN18]. See Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Virginia, 262 U.S. 679, 692-93 (1923); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

[FN19]. Note, however, that in some New England states in particular, home heating is a competitive service. In addition to the regulated utility, many homes use deliverable fuels such as propane and fuel oil.

[FN20]. "The certificate of public convenience and necessity is the implementing device by which designated service areas are protected from invasion." A.J. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, 377 (1969). For a general discussion of certificates of public convenience and necessity, see Priest, at 347-77.

[FN21]. For example, one interesting sidelight has developed in those states where Rural Electric Cooperatives (RECs) are found not to be public utilities because they do not hold themselves out to serve the general public. In such states, a public utility may encroach upon the service territory of the REC while the REC lacks standing to lodge complaint. If the REC seeks only to serve its members, and not the general public, it has no interest in preventing another company from entering the territory to serve the general public. See, e.g., Socorro Electric Cooperative, Inc. v. Public Service Co., 66 N.M. 343, 348 P.2d 88, 89-92 (1959); San Miguel Power Ass'n v. Public Service Comm'n, 4 Utah 2d 252, 292 P.2d 511, 512 (1956); Clearwater Power Co. v. Washington Water Power Co., 78 Idaho 150, 299 P.2d 484 (1956); Louisiana Power and Light Co. v. Louisiana Public Service Comm'n, 250 La. 596, 197 So. 2d 638, 643 (1967); Black River Electric Coop. Inc. v. Public Service Commission, 238 S.C. 282, 120 S.E.2d 6, 13 (1961).

[FN22]. See, Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 HARV. L. REV. 156, 161 (1904). So, too, does Hall find that the presence or not of monopoly is crucial to a determination of whether a business may be regulated as public. Hall, supra n.17, at 92-93. What these commentators do not explain, however, is the subsequent U.S. Supreme Court decision in Budd v. New York that expressly held: "[t]hat the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly . . . ." 143 U.S. 517, 532 (1982). In Brass v. Stoeser, 153 U.S. 391 (1894), the Supreme Court held: "in the face of able argument by counsel and a strong dissenting opinion based squarely on the theory that virtual monopoly is necessary to warrant governmental regulation, under the doctrine of the Munn case, that it is the public nature and not the monopolistic character which justifies control of a business as a public utility."

[FN23]. See infra nn.155-59, and accompanying text.

[FN24]. In the early case of Wood v. Auburn, 87 Me. 287, 32 A. 906 (1895), the Maine State Supreme Court noted:

> The parties are not upon equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer, at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer must pay it again and perhaps still again. He cannot resist lest he lose the water. Id. at 292-93.

[FN25]. See supra nn.10-11, and accompanying text.

[FN26]. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978); see also Davis v. Weir, 497 F.2d 139 (5th Cir. 1974).

[FN27]. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), but see, Comment, Constitutional Law--Notices of Utility Shutoffs Need Not Meet Due Process Standards Where Rules Promulgated by the Iowa State Commerce Commission Do Not Create a State Action by Utility Companies, 33 DRAKE L. REV. 459 (1983-84).

[FN28]. See, e.g., Washington Gas Light Co. v. Aetna Casualty & Sur. Co., 242 A.2d 802, 804 (Md. App. 1968).

[FN29]. For a discussion of the substantive law of utility shutoffs, see, e.g., National Consumer Law Center, Model Residential Utility Service Regulations (1984).

[FN30]. 307 Md. 286, 513 A.2d 882 (1986).

[FN31]. Id., at 888 (the customer must allege facts sufficient to show a bona fide dispute, but does not carry any burden of going forward).

[FN32]. Id., at 888-89 (emphasis added).

[FN33]. See, e.g., Brooklyn Union Gas Co. v. MacGregor's Custom Coach, Inc., 122 Misc. 2d 287, 471 N.Y.S.2d 470, 474 (N.Y. Civ. Ct. 1983).

[FN34]. Montalvo v. Consolidated Edison Co. of New York, Inc., 110 Misc. 2d 24, 441 N.Y.S.2d 768, 775 (N.Y. 1981).

[FN35]. See, e.g., Annotation, Right or Duty to Refuse Telephone, Telegraph, or Other Wire Service in Aid of Illegal Gambling Operations, 30 A.L.R.3d 1143, section 6(a) (1970).

[FN36]. See, e.g., Pennsylvania Publications v. Pennsylvania Public Utility Commission, 349 Pa. 184, 36 A.2d 777, 781 (1944).

[FN37]. Andrews v. Chesapeake & Potomac Telephone Co., 83 F. Supp. 966, 968 (D.D.C. 1949).

[FN38]. Id.

[FN39]. Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621, 628-29 (D. Ill. 1963). Note that this is a stricter rule than that announced by the Maryland court in Everett above. Everett required the customer to at least initially "[demonstrate] a bona fide controversy or dispute as to a proposed termination of service . . . ." Everett, supra, at 888-89. Even in Everett, however, the customer did not have the burden of coming forward with

evidence to prove its dispute; the customer need only allege facts sufficient to demonstrate the controversy.

[FN40]. For the analysis in this article to be applicable, there is an assumption that the utility disconnect controversy will be presented to the state public utility commission in a complaint proceeding. Most states today provide for such complaint proceedings. See generally, National Consumer Law Center, Compendium and Analysis of State Regulations and Law Regulating Utility Service Terminations and Disputes (1982).

[FN41]. 513 A.2d at 891.

[FN42]. Id. (emphasis in original).

[FN43]. 513 A.2d at 888, citing McCormick on Evidence, Section 337 (3d ed. 1984).

[FN44]. 2 AM. JUR. 2D, Administrative Law, section 392 (1962).

[FN45]. Scott v. Department of Commerce and Community Affairs, 416 N.E.2d 1082, 1088 (Ill. 1981). The Illinois statute, according to the court, is "virtually identical" to the Model State Administrative Procedure Act.

[FN46]. International Minerals and Chemical Corp. v. New Mexico Public Service Commission, 81 N.M. 280, 466 P.2d 557, 560 (1970); accord Kobilansky v. Liffrig, 358 N.W.2d 781 (N.D. 1984), citing McCormick on Evidence, Section 357 (3d ed. 1984).

[FN47]. See, e.g., Carbon v. Physical Therapists Examining Board, 242 A.2d 835, 836 (D.C. App. 1968), citing, Schramm v. Physical Therapists Examining Board, 219 A.2d 846, 847 (D.C. App. 1966), aff'd mem., 394 F.2d 972 (D.C. Cir. 1967), cert. denied, 390 U.S. 987 (1968).

[FN48]. "The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Balino v. Department of Health and Rehab. Services, 348 So. 2d 349, 350 (Fla. App. 1977) (emphasis added); accord Florida Department of Transportation v. J.W.C. Co. Inc., 396 So. 2d 778, 788 (Fla. App. 1981).

[FN49]. Balino, supra, 348 So. 2d at 350, citing 5 U.S.C. section 556(d).

[FN50]. Wonder Life Co. v. Liddy, 207 N.W.2d 27, 31 (Iowa 1973) (citing Rule 344(f)(5), Iowa Rules of Civil Procedure).

[FN51]. Viewed from the perspective of the customer, it is not the responsibility of the customer to disprove the elements of fraud. A utility customer, in other words, is not required to prove residence at one address in order to disprove allegations of fraudulently obtaining utility service at a different address.

[FN52]. One such example might be an allegation that the customer lived at a particular address under an assumed name or a relative's name.

[FN53]. For a full discussion of the elements of fraud, see supra n.6 and accompanying text.

[FN54]. See supra nn.31-39, and accompanying text.

[FN55]. See infra nn.110-129, and accompanying text.

[FN56]. 513 A.2d 882 (Md. 1986).

[FN57]. Everett, supra, at 891.

[FN58]. See infra nn. 70-76, and accompanying text.

[FN59]. The "fraud" discussed herein is common law fraud. If actions are brought under particular statutes, the statutory standard applies and, in the event it is not expressly stated, ascertaining the standard of proof is a matter of statutory construction. In such an instance, the common law standard may be evidence of what the legislature may have intended, but many other factors--the standard for similar statutes in other states is one such factor-- would exist as well.

[FN60]. Wigmore on Evidence, (3d ed. 1940) (hereinafter, Wigmore).

[FN61]. Id., at section 2498.

[FN62]. Id., at section 2498.2(3), page 329, n.13.

[FN63]. Two more have imposed a lesser standard by statute. See infra nn.61-76, and accompanying text. States that have adopted the "preponderance" standard are discussed in the text below.

[FN64]. See infra nn.85-109, and accompanying text.

[FN65]. See, e.g., Newell v. Krause, 239 Kan. 550, 722 P.2d 530, 536 (1986); see also, Credit Union of America v. Myers, 234 Kan. 773, 676 P.2d 99 (1984).

[FN66]. This reasoning is not universal, however. The Montana courts, for example, have stated that while "[g]ood faith will always be presumed," the preponderance of the evidence standard nevertheless still governs actions alleging fraud in that state. Cowan v. Westland Realty Co., 512 P.2d 714, 716 (Mont. 1973).

[FN67]. Peters v. Woodmen Accident and Life Company, 170 Neb. 861, 104 N.W.2d 490, 497 (1960); see also Omaha Bank for Cooperatives v. Siouxland Cattle Cooperative, 305 N.W.2d 458, 464 (Iowa 1981); Neuhaus v. Kain, 557 S.W.2d 125, 136 (Tex. Civ. App. 1977); Rhoads v. Harvey Publications, Inc., 145 Ariz. 142, 700 P.2d 840 (1984).

[FN68]. Riley Hill General Contractor, Inc. v. Tandy Corp., 303 Or. 390, 737 P.2d 595, 603 (1987).

[FN69]. See infra nn.134-52, and accompanying text.

[FN70]. If there is a presumption of honest dealing that can only be overcome by clear and convincing evidence, or if there is a "stigma" attached to a finding that a litigant has not dealt honestly and fairly, that presumption and that stigma would seem equally applicable (if not more so) to a proceeding involving allegations of criminal behavior as to a proceeding involving fraud.

[FN71]. See generally Friedman, Prosecution for Utility Meter Tampering: Constitutional Limitations on Statutory Presumptions, 18 Urban 297 (1980).

[FN72]. JONES ON EVIDENCE, CIVIL AND CRIMINAL, at sec. 227 (5th ed. 1958).

[FN73]. Id.; see also Wigmore, supra n.60 at section 2498.2(1), nn.2-3, p. 327.

[FN74]. See, e.g., First National Bank of South Maryland v. United States Fidelity & Guaranty Co., 275 Md. 400, 340 A.2d 275, 283 (1975); Peurifoy v. Congressional Motors, Inc., 254 Md. 501, 255 A.2d 332, 340 (1969); Bachrach v. Washington United Cooperative, Inc., 181 Md. 315, 29 A.2d 822, 825 (1943); Rent-A-Car Co. v. Fire Insurance Co., 161 Md. 249, 156 A. 847, 855 (1931).

[FN75]. 513 A.2d at 890.

[FN76]. U.S.F. & G., supra at 283; see also, Jonas v. Northeastern Mutual Fire Ins. Co., 44 Wis. 2d 347, 171 N.W.2d 185, 187, n.1 (1969).

[FN77]. See, e.g., Callicoat v. Acuff Homes, Inc., 723 S.W.2d 565,568- 69 (Mo. App. 1987); compare, Farr v. Hoesch, 745 S.W.2d 830, 832 (Mo. App. 1988).

[FN78]. See supra nn.65-67, and accompanying text.

[FN79]. Rogers v. Hickerson, 716 S.W.2d 439, 446 (Mo. App. 1986); Austin v. Wickerson, Inc., 519 P.2d 899, 904-05 (Ok. 1974).

[FN80]. Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 243 (D.D.C. 1986).

[FN81]. Rigby Corp. v. Boatmen's Bank & Trust Co., 713 S.W.2d 517, 540(Mo. App. 1986).

[FN82]. Funnell v. Jones, 737 P.2d 105, 108 (Ok. 1985); Madill Bank and Trust Co., v. Herrmann, 738 P.2d 567, 571 (Ok. App. 1987).

[FN83]. Servicemaster Industries v. J.R.L. Enterprises, 388 N.W.2d 83,86 (Neb. 1986).

[FN84]. See supra nn. 7-9, and accompanying text.

[FN85]. WIGMORE, supra n.60 at 111, n.12(a) (1979 Supp.).

[FN86]. 737 P.2d 595 (Or. 1987).

[FN87]. 737 P.2d at 602 (citations omitted).

[FN88]. Newell v. Krause, 722 P.2d 530 (Kan. 1986).

[FN89]. Id.

[FN90]. Remember, however, the South Dakota courts do not require litigants to meet a "clear and convincing" evidence standard in proving allegations of fraud. Spect v. Anderson, 349 N.W.2d 49 (S.D. 1984).

[FN91]. 134 N.W.2d 777 (S.D. 1965).

[FN92]. Id. at 780; Notwithstanding this apparent agreement with the Kansas approach, even the South Dakota court seems to view the clear and convincing standardfrom a somewhat quantitative point of view. The standard, according to Cromwell, is "somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt." Id. (emphasis added).

[FN93]. Nordstrom v. Miller, 227 Kan. 59, 66, 605 P.2d 545, 552 (1980); accord Modern Air Conditioning v. Cinderella Homes, 226 Kan. 70, 78, 596 P.2d 816, 824 (1979).

[FN94]. 137 Cal. Rptr. 635, 562 P.2d 316 (1977).

[FN95]. Id. at 642, 562 P.2d at 323.

[FN96]. Id. The California court noted that the state statute setting forth the rules of evidence provides that a party may be required to establish the existence or nonexistence of a fact "by a preponderance of the evidence, by clear and convincing proof or by proof beyond a reasonable doubt." Id. (emphasis in original).

[FN97]. In contrast, Iowa has blended the two tests. Cornell v. Wunschel, 408 N.W.2d 369, 374 (1987) ("recovery in fraud is premised on plaintiff's ability to show by a preponderance of clear, satisfactory and convincing evidence," of each element of fraud.); compare supra n.89, and accompanying text.

[FN98]. Riley Hill General Contractor v. Tandy Corp., 303 Or. 390, 400, 737 P.2d 595, 604 (1987).

[FN99]. Id.

[FN100]. Id.

[FN101]. Accord, Finch v. Hughes Aircraft, 469 A.2d 867, 887 (Md. App. 1984) ("the law of Maryland determines the quantum of proof required of Plaintiffs . . . ."); see also Tobin v. Flynn & Larsen Implement Co., 369 N.W.2d 96, 100 (Neb. 1985) (defining "clear and convincing" as being "the amount of evidence which produces in the trier of facta firm belief or conviction about the existence of a fact to be proved.") (emphasis added); Sievert v. LaMarca, 367 N.W.2d 580, 588 (Minn. Ct. App. 1985).

[FN102]. See supra n.89, and accompanying text.

[FN103]. But see infra nn.148-52, and accompanying text.

[FN104]. Household Finance Corp. v. Altenberg, 5 Ohio St. 2d 190, 214 N.E.2d 667, 670 (1966).

[FN105]. Id.; "Such needless confusion is not the law in Ohio." Id.

[FN106]. McBaine, Burden of Proof: Degrees of Belief, 32 CALIF. L. REV. 242, 253 (1944) (hereafter McBaine).

[FN107]. Id. at 253.

[FN108]. Id. at 254.

[FN109]. See infra nn.138-52, and accompanying text.

[FN110]. Miller v. Lay Trucking Co., 606 F. Supp. 1326, 1339 (D. Ind. 1985); DeVoe Chevrolet v. Cartwright, 526 N.E.2d 1237, 1240 (Ind. Ct. App. 1988). In Indiana, fraud must be proved by clear and convincing evidence only if the plaintiff is seeking punitive damages. Fowler v. Hilliard, 585 F. Supp. 1320, 1322 (D. Ind. 1984); accord Travelers Indemnity v. Armstrong, 442 N.E.2d 349, 363 (Ind. 1982).

[FN111]. Wright v. Blevins, 705 P.2d 113, 116 (Mont. 1985).

[FN112]. See, e.g., Ostalkiewicz v. Guardian Alarm, 520 A.2d 563 (R.I. 1987); Cambrola v. Kaiser Aluminum & Chemical Corp., 416 A.2d 694 (R.I. 1980).

[FN113]. Sievert v. LaMarca, 367 N.W.2d 580, (Minn. Ct. App. 1985); Martin v. Guarantee Reserve Life Ins. Co., 279 Minn. 129, 155 N.W.2d 744, (1968).

[FN114]. Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981) (citing James v. Joseph, 156 Tenn. 417, 1 S.W.2d 1017 (1928)).

[FN115]. Jennings v. Jennings, 309 N.W.2d 809, 810-12 (S.D. 1981), (citing Aschoff v. Mobil Oil Corp., 261 N.W.2d 120, 125 (S.D. 1977)).

[FN116]. Wise v. Thompson, 540 S.W.2d 837, 839 (Tex. Civ. App. 1976); Sanders v. Select Insurance Co., 406 S.W.2d 937, 939 (Tex. Civ. App. 1966).

[FN117]. Wieczoreck v. H & H Builders, 475 So.2d 227, 228 (Fla. 1985); Watson Realty Corp. v. Quinn, 452 So.2d 568, 569 (Fla. 1984).

[FN118]. See, e.g., Tipp v. United Bank of Durango, Colo., 745 S.W.2d 141, 143 (Ark. Ct. App. 1988) ("the party who alleges and relies upon fraud bears the burden of proving fraud by a preponderance of the evidence . . . ."), (citing Auchita Electric Cooperative Corp. v. Evans-St. Clair, 12 Ark. App. 171, 672 S.W.2d 660 (1984)); but see In Re Ozark Restaurant Equipment Co., 61 Bankr. 750, 754 (W.D. Ark. 1986) (citing Rice v. Rice, 125 F. Supp. 900 (W.D. Ark. 1955) ("In Arkansas, fraud must be proved clearly and convincingly, and is never presumed.").

[FN119]. Liodas v. Sahadi, 562 P.2d at 323.

[FN120]. Bank of Coushatta v. Patrick, 503 So.2d 1061, 1068 (La. Ct. App. 1987); accord Ordner v. Fire Insurance Co. of Quaker City, 467 So. 2d 619, 621 (La. Ct. App. 1985).

[FN121]. See, e.g., La. Civ. Code Ann. art. 1957 (West 1985). Comment (a) to that statute states that while "this article is new . . . it does not change the law . . . ." Before the statute was enacted, however, substantial authority existed in Louisiana to impose a "clear and convincing standard." Lynnhaven Dolphin Corp. v. E.L.O. Enterprises, 776 F.2d 538, 541 (5th Cir. 1985), (citing Hall v. Arkansas-Louisiana Gas Co., 368 So.2d 984, 993 (La. 1979)) ("proof of fraud requires clear and convincing evidence of intent to defraud and actual or probable damage."). Note that this case requires the heightened burden only on particular elements of the fraud claim.

[FN122]. Tobin v. Flynn & Larsen Implement Co., 369 N.W.2d 96, 99 (Neb. 1985) (citations omitted); see also Servicemaster Industries v. J.R.L. Enterprises, 388 N.W.2d 83, 86 (Neb. 1986).

[FN123]. Johnson v. Stackhouse Oldsmobile, 27 Ohio St. 2d 140, 143, 271 N.E.2d 782, 784 (1971); accord In Re Poole, 15 Bankr. 422, 431 (N.D. Ohio 1981).

[FN124]. See, e.g., DiPerri v. Tothill, 531 A.2d 342, 344 (N.H. 1987); Baldwin v. Vantage Corp., 676 P.2d 413, 417 (Utah 1984).

[FN125]. Dudzik v. Leesona Corp., 473 A.2d 762, 766 (R.I. 1984).

[FN126]. Id. at 766-67.

[FN127]. Id. at 766.

[FN128]. Compare Baldwin v. Vantage Corp., 676 P.2d 413, 417 (Utah 1984) with, Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985).

[FN129]. For a discussion of one perspective on nonpayment, see, e.g., Yanz and Heymes, A Joint Venture in Reducing Utility Bad Debt, PUB. UTIL. FORT. at 16 (March 17, 1988).

[FN130]. See, e.g., Tobin v. Flynn & Larsen Implement Co., 369 N.W.2d 96, 99 (Neb. 1985); Travelers Indemnity v. Armstrong, 442 N.E.2d 349, 361 (Ind. 1982).

[FN131]. Stauth v. Brown, 734 P.2d 1063, 1068 (Kan. 1987); see also Workman v. Workman, 174 Neb. 471, 486, 118 N.W.2d 764, 780 (1962).

[FN132]. See, e.g., Delahaney v. First Pennsylvania Bank, 464 A.2d 1243, 1255 (Pa. Super. Ct. 1983); Hopper v. Industrial Commission, 558 P.2d 927, 929 (Ariz. Ct. App. 1976); Sanguinetti v. Strecker, 577 P.2d 404, 408 (Nev. 1978).

[FN133]. Hopper v. Ind. Commission, 558 P.2d 927, 929 (Ariz. Ct. App. 1976), (citing Beeler v. Am. Trust Co., 124 Cal. 2d 1, 147 P.2d 583 (1944)).

[FN134]. See, e.g., Montalvo v. Consolidated Edison Co. of New York, 110 Misc. 2d 24, 30, 441 N.Y.S.2d 768, 775 (N.Y. 1981).

[FN135]. Woodby v. Immigration and Naturalization Service, 385 U.S. 277, 285 (1966).

[FN136]. Addington v. Texas, 441 U.S. 418, 424 (1979).

[FN137]. Id., at 425.

[FN138]. Id. at 423 (quoting In Re Winship, 397 U.S. 358, 370 (1970)).

[FN139]. Id. at 423.

[FN140]. Id.; "In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself." Id. at 423-24.

[FN141]. Addington v. Texas, 441 U.S. 418, 424 (1979).

[FN142]. Id. at 425; see also Santowsky v. Kramer, 455 U.S. 745, 755 (1982).

[FN143]. The standard of proof is generally to be determined by the courts. Santowsky, at 755-56 (citations omitted).

[FN144]. "Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest and the permanence of the threatened loss." Santowsky, 455 U.S. at 758; accord Chaunt v. United States, 364 U.S. 350, 353 (1960) ("in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside--the evidence must indeed be 'clear, unequivocal, and convincing' and not leave the 'issue in doubt.'").
This allocation of risk must be "shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Santowsky, 455 U.S. at 757.

[FN145]. Id. at 755.

[FN146]. Id. at 761.

[FN147]. Id. at 764.

[FN148]. But see Johnson v. Stackhouse Oldsmobile, 27 Ohio St. 2d 140, 143, 271 N.E.2d 782, 784 (1971).

[FN149]. 442 N.E.2d 349 (Ind. 1982); see also Fowler v. Hilliard, 585 F. Supp. 1320, 1322-30 (S.D. Ind. 1984).

[FN150]. "[J]ust as we agree that it is better to acquit a person guilty of crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error. The public interest cannot be served by a policy that favors the latter over the former. And, just as the requirement of proof beyond a reasonable doubt furthers the public interest with respect to criminal cases, a requirement of proof by clear and convincing evidence furthers the public interest when punitive damages are sought." 442 N.E.2d at 362-63.

[FN151]. Id. at 363.

[FN152]. Id. at 362, (quoting Tucker v. Marion County Department of Public Welfare, 408 N.E.2d 814 (Ind. Ct. App. 1980)).

[FN153]. "In ordinary civil actions, a fact issue is . . . sufficiently proved by a preponderance of evidence. However, clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for a greater certainty, and where this high standard is required to sustain claims which have serious social consequences or harsh or far reaching effects on individuality . . . ." Travelers Indemnity Co. v. Armstrong, 442 N.E.2d 349, 360 (Ind. 1982) (quoting 32 C.J.S. Evidence, sec. 1023).

[FN154]. In addition to this "risk" analysis, see infra nn.158-59, and accompanying text.

[FN155]. Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 18 (1978).

[FN156]. Palmer v. Columbia Gas Co. of Ohio, 342 F. Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); see also Stanford v. Gas Service Company, 346 F. Supp. 717, 721 (D. Kan. 1972). An excellent canvass of cases is found in Montalvo v. Consolidated Edison Company of New York, 110 Misc. 2d 24, 441 N.Y.S.2d 768, 776 (N.Y. 1981).

[FN157]. Josephson v. Mountain Bell Telephone Company, 576 P.2d 850, 852 (Utah 1978) (the company, as a public utility, has a higher obligation to render service to the public than does the ordinary business.).

[FN158]. See, e.g., Kohler v. Kansas Power and Light Co., 387 P.2d 149, 151 (Kan. 1963); accord Washington Gas Light Co. v. Aetna Casualty & Sur. Co., 242 A.2d 802, 804 (Md. Ct. App. 1968).

[FN159]. See, e.g., Consolidated Edison Co. v. Jones, 444 N.Y.S.2d 1018 (1981).

[FN160]. Santowsky v. Kramer, 455 U.S. 745, 763.

[FN161]. Id., at 763.