

Standards of Proof and Civil Litigation: a Game-Theoretic Analysis

Alice Guerra, Barbara Luppi, Francesco Parisi

Abstract

In litigation models, the parties' probability to succeed in a lawsuit hinge upon two main factors: the merits of the parties' claims and their litigation efforts. In this paper we extend this framework to consider an important procedural aspect of the legal system: the standard of proof. We recast the conventional rent-seeking model to consider how alternative standards of proof affect litigation choices. We analyze the interrelation between different standards of proof, the effectiveness of the parties' efforts, and the merits of the case. We study how these factors jointly affect the parties' litigation expenditures, the selection of cases brought to the courts, pretrial bargain solutions and preemptive strategies. Our results show that standards of proof are not only instrumental to balance the competing goals of access to justice and judicial truth-finding, but they also play a critical role in affecting parties' litigation investments and settlement choices, as well as in sorting the mix of cases that will be filed and defended in courts. The understanding of the sorting effect of standards of proof sheds light on their role as a policy instrument in civil litigation.