

# Burgraff v. Menard, Inc., 2016 WI 11

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***Wisconsin Supreme Court reaffirms that an SIR constitutes "other applicable insurance," a breaching insurer is only obligated to pay damages caused by its breach, and a breaching insurer may not be entitled to equitable contribution under certain circumstances***

## ***Burgraff v. Menard, Inc., 2016 WI 11***

In *Burgraff v. Menard*, 2016 WI 11, plaintiff was injured when a Menard employee loaded materials onto plaintiff's truck. Plaintiff's auto insurer, Millers First Insurance Company, agreed to defend Menard as a permissive user of plaintiff's vehicle. The Millers First policy had liability limits of \$100,000. It also provided that if there is "other applicable liability insurance," Millers First's share would be "the proportion that our limit of liability bears to the total of all applicable limits." Menard had an excess liability policy issued by CNA with a self-insured retention ("SIR") in the amount of \$500,000.

The trial court granted a motion by Millers First that its share of any verdict or settlement would be one-sixth of \$600,000 (\$600,000 represents the total combined limits under the Millers First policy (\$100,000) and Menard's SIR (\$500,000)). Millers First then settled with plaintiff for \$40,000 and withdrew from Menard's defense. Menard funded the defense through trial, where plaintiff received a verdict in the approximate amount of \$345,000.

The Wisconsin Supreme Court considered three main issues: (1) whether Menard's SIR constitutes "other applicable insurance;" (2) whether Millers First breached its duty to defend by withdrawing the defense before exhausting its full policy limits; and (3) what damages are available as a result of Millers First's breach.

The Wisconsin Supreme Court affirmed the appellate court's decisions on all issues, and remanded to the circuit court for a determination of damages. Specifically, the Wisconsin Supreme Court held that:

- Menard's \$500,000 SIR constituted "other applicable insurance."
- Millers First breached its duty to defend by withdrawing the defense before paying its full policy limits. The court found that although Millers First may have paid its maximum *potential liability* for the claim, the policy language required Millers First to continue defending until it pays its full *policy limits*.
- Having concluded that Millers First was in breach of the duty to defend, the court next considered the available damages. The court reiterated that an insured is only entitled to be put in the same position he would have been in had the insurance company fulfilled the contract. The court went on to conclude that the verdict was not caused by Millers First's breach and, therefore, Millers First was not obligated to pay the full amount of the verdict as Menard had requested. In so ruling, the Wisconsin Supreme Court reiterated its holding in *Newhouse v. Citizens Security Mut. Ins. Co.*, 176 Wis. 2d 824, 501 N.W.2d 1 (1993), and adopted the Seventh Circuit's reasoning in *Hamlin Inc. v. Hartford Accident and Indem. Co.*, 86 F.3d 93 (7th Cir. 1996) that insureds may only recover damages that were incurred as a result of an insurer's breach.
- Unlike the verdict amount, which was not caused by Millers First's breach, Millers First was liable for defense costs incurred after Millers First withdrew its defense because such costs were caused by the breach.
- Finally, the court held that Millers First may not pursue a claim for equitable contribution against Menard for defense costs incurred after withdrawing the defense because Millers First failed to follow Wisconsin procedure for contesting insurance coverage.

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