

Breaching Insurer Required to Reimburse Defending Insurer its Pro Rata Share of Defense Costs and Attorney Fees Related to the Coverage Action

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Steadfast Ins. Co. v. Greenwich Ins. Co., 2019 WI 6, 922 N.W.2d 71

Steadfast involved a June 2008 rain event that caused sewer backup in more than eight thousand homes in Milwaukee. The Milwaukee Metropolitan Sewerage District ("MMSD") is responsible for the Milwaukee sewer system. MMSD enters into operating agreements with private companies to operate and maintain its sewage system. United Water Services Milwaukee, LLC ("United Water") was responsible for operating and maintaining the sewage system until February 29, 2008. As part of the contract, it named MMSD as an additional insured under a CGL policy issued by Greenwich. Veolia Water Milwaukee, LLC ("Veolia") began operating and maintaining the sewage system under contract with MMSD commencing on February 29, 2008. MMSD was an additional insured under Veolia's CGL policy issued by Steadfast.

After the rain event, various homeowners sued MMSD, United Water and Veolia. MMSD tendered its defense to Steadfast and Greenwich. Steadfast accepted the tender while Greenwich denied the tender on the grounds that its "other insurance" provision made the Greenwich policy excess to Steadfast's policy.

Steadfast sued Greenwich seeking to recover all of the defense costs it reimbursed MMSD as well as its own attorney fees in the coverage case. The circuit court found that Greenwich breached its duty to defend and required Greenwich to reimburse Steadfast the entire \$1.55 million in defense costs. In addition, it awarded Steadfast \$325,000 in attorney fees incurred in the coverage action. The court of appeals affirmed.

The Wisconsin Supreme Court rejected Greenwich's argument that it did not have a duty to defend. However, it recognized that Steadfast also had a primary and independent duty to defend MMSD and rejected the lower courts' reasoning that Greenwich was required to pay the entire amount as a penalty for breaching its duty to defend.

Since there were two insurers with a primary and independent duty to defend, the court next addressed allocation. The court decided to apply the pro rata based on limits methodology under the circumstances of the case.

Finally, the court found Steadfast "stood in the shoes" of MMSD and was entitled to recover attorney fees from Greenwich through contractual subrogation.

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