

February 7, 2019

Supreme Court of Wisconsin Applies Pro Rata Allocation Based on Policy Limits to Co-Insurance Dispute

BY: Brian Margolies

In its recent decision in *Steadfast Insurance Company v. Greenwich Insurance Company*, 2019 WL 323702 (Wis. Jan. 25, 2019), the Supreme Court of Wisconsin addressed the issue of contribution rights as among co-insurers.

Steadfast and Greenwich issued pollution liability policies to different entities that performed sewer-related services for the Milwaukee Metropolitan Sewerage District (MMSD) at different times. MMSD sought coverage under both policies in connection with underlying claims involving pollution-related loss. Both insurers agreed that MMSD qualified as an additional insured under their respective policies, but Greenwich took the position that its coverage was excess over the coverage afforded under the Steadfast policy, at least for defense purposes, and that as such, it had no defense obligation.

Both the trial court and the intermediate appellate court held that because the Steadfast and Greenwich policies insured different insureds, during different time periods, the policies were not concurrent and that Greenwich, therefore, could rely on its other insurance clause. The appellate court further concluded that Greenwich breached its defense obligation and that Steadfast, being equitably subrogated to MMSD's rights under the Greenwich policy, was entitled to recover 100% of defense costs it had spent in connection with the underlying claim.

On appeal, the Supreme Court of Wisconsin, in a majority decision, affirmed the lower courts' rulings concerning the other insurance issue, concluding that insurers can rely on other insurance clauses only in the situation of concurrent policies. The Court agreed that the Steadfast and Greenwich policies were not concurrent, but instead successive, because they insured different insureds for different periods of time. The Court concluded, therefore, that both insurers had a primary defense obligation to MMSD and that Greenwich breached this duty.

The Court went on to disagree with the lower courts' rulings concerning the remedy available to Steadfast. In particular, the Court reasoned that the appellate court erred in awarding Steadfast recovery of 100% of defense costs based on an equitable subrogation theory as this resulted in a windfall to the company that plainly had a defense obligation. It reasoned that the appropriate remedy to Steadfast was based on equitable contribution, whereby it would be entitled to recover a share of defense costs from Greenwich. The Court ruled, as a matter of first impression, that the contribution for defense costs should be pro rated based on policy limits. Since the Greenwich policy had a \$20 million limit of liability and the Steadfast policy had a \$30 million limit of liability, the Court concluded that Steadfast was entitled to recover three-fifths of the defense costs it had paid.