

Carrier

Wisconsin Supreme

In *Steadfast Insurance Co. v. Greenwich Insurance Co.*, the Wisconsin Supreme Court examined a typical situation where two carriers issued liability policies insuring the same insured, but for successive policy periods.

The Milwaukee Metropolitan Sewerage District (MMSD) was an additional insured under each policy. MMSD was sued for causing flooding, allegedly spanning both carriers' policy periods.

Steadfast foot the bill, but then what?

Steadfast accepted the insured's defense, hiring defense counsel for MMSD and ultimately incurring \$1.55 million in defense costs.

Greenwich denied coverage, ultimately relying on the "other insurance" clause in its policy. It did not seek a judicial determination of its coverage and defense obligations, instead electing to rely on its unilateral

coverage determination.

Steadfast objected to footing the entire bill for MMSD's defense, so after the suit against MMSD was settled it sued Greenwich seeking to recover all the defense costs incurred, along with the attorney fees incurred in establishing coverage.

Why the "other insurance" clause does not apply

The Wisconsin Supreme Court quickly resolved the coverage issue, holding that each policy covered the risk that MMSD would be liable for causing property damage in its policy period.

Since the allegations alleged just that, the court held that Greenwich had a duty to defend unless the "other insurance" clause applied to relieve it of potential coverage.

On that issue, the court correctly held that "other insurance" clauses only apply to resolve coverage

allocation disputes between concurrent policies, that is, policies that apply to cover the same risk, the same interest and the same insured.

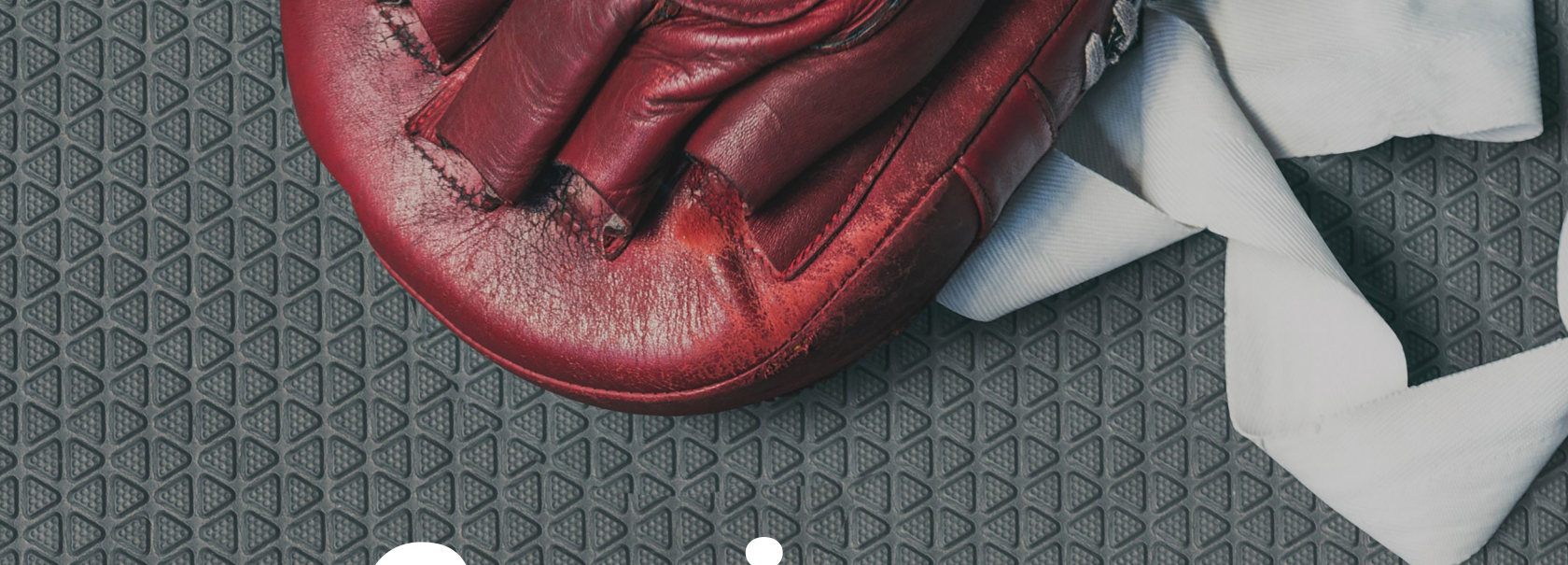
Here, the policies covered MMSD for successive periods, making them successive policies, rendering the "other insurance" clause inapplicable.

The court's opinion

Turning to Steadfast's claim for recovery of defense costs, the court analyzed the issue under a contractual subrogation theory, noting that its policy contained a subrogation clause that stated:

In the event of any payment under this policy, we shall be subrogated to all an "insured's" rights of recovery against any person or organization.

The court applied the provision in a straightforward way, holding that



vs. Carrier:

Court weighs in on duty to defend

upon payment of defense costs Steadfast became subrogated to MMSD's right of recovery for those costs against Greenwich.

The court held that this provision gave Steadfast the right to recover those defense costs that Greenwich was obligated to pay MMSD.

Importantly, however, the court denied Steadfast's claim for 100% of the defense costs it paid, stating that to relieve Steadfast of its share of those costs would amount to a windfall, constituting a "judicial forgiveness of Steadfast's duty to defend MMSD."

Sharing the duty to defend with a 2/5 compromise

Since both carriers had a duty to defend MMSD, an allocation of those costs was necessary.

Noting that Wisconsin had not yet addressed this issue, the court considered various approaches, ultimately determining that the

better approach was to allocate those costs according to the limits of the two policies.

Since Steadfast's policy had \$20 million in limits, and Greenwich's had limits of \$30 million, the court held that Greenwich's share was two-fifths of \$1.55, or \$620,000.

Who pays the legal fees?

The court also held that Steadfast was entitled to recover from Greenwich the attorney fees it incurred in establishing its right to recovery of defense costs.

Relying again on contractual subrogation principles, the court held that MMSD would have been entitled to recover its attorney fees had it sued Greenwich and that, since Steadfast was standing in MMSD's shoes as subrogee, it too was entitled to attorney fees.

A message to carriers: carefully review the duty to defend. Disputes between successive carriers covering the same insured

for the same loss are common. This case reminds carriers to carefully review the duty to defend without regard to the other carrier's potential coverage, and to seek a judicial determination of coverage obligations when there could be a reasonable dispute. The decision also addresses a few new issues of Wisconsin law, specifically the use of a contractual subrogation theory to recover defense costs from the breaching carrier and the proper allocation of costs under that theory.

If you have questions about insurance coverage or the duty to defend in Wisconsin, please feel free to contact Todd Smith.

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