A Perilous Decision: *Steadfast* Explains an Insurer's Duty to Defend in the Multi-Insurer Context (and the Damages Available against a Breaching Insurer)

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This article discusses the recent case of *Steadfast Ins. Co. v. Greenwich Ins. Co.*[1], which further clarified Wisconsin's legal landscape regarding an insurer's duty to defend in the context of multiple insurers defending the same mutual insured. First, the Wisconsin Supreme Court reaffirmed that "other insurance" clauses are only applicable to concurrent policies. Second, the court decided that defense costs among multiple insurers for the same insured are to be allocated on a pro rata basis based on the policy limits of the insurers. Finally, the court ruled that a carrier seeking reimbursement from another carrier that has been found to have breached its duty to defend can obtain the attorney's fees it incurred in establishing coverage under the breaching insurer's policy under a theory of subrogation even if the non-breaching carrier had its own independent duty to defend, arguably expanding the exception to the American Rule.

I. Background

Steadfast arose out of the "historic rains" of June 2008 in Milwaukee.[2] The rains overwhelmed the Milwaukee Metropolitan Sewerage District's ("MMSD") sewerage system and created widespread flooding of homes and businesses.[3] MMSD was sued in four separate lawsuits in Milwaukee County for the alleged damage caused by the flooding.[4] MMSD tendered the defense of these lawsuits to the two private companies that operated and maintained its sewerage system over different time periods, United Water Services Milwaukee, LLC ("United Water") and Veolia Water Milwaukee, LLC ("Veolia").[5] MMSD first contracted with United Water on March 1, 1998.[6] Its contracted with United Water expired on February 29, 2008. MMSD then contract with Veolia on March 1, 2008 to take over the operation and maintenance of its system from United Water.[7]

Pursuant to their respective contracts with MMSD, United Water and Veolia agreed to obtain liability coverage for losses that arose out of their respective operation and maintenance of MMSD's sewerage system.[8] In addition, the two contractors also both agreed to name MMSD as an additional insured under their respective policies.[9] United Water obtained a policy of liability insurance from Greenwich Insurance Company ("Greenwich"). Greenwich's policy incepted on July 24, 2007 and expired on July 24, 2008. Veolia obtained a policy of liability insurance from Steadfast Insurance Company ("Steadfast"). Steadfast's policy incepted on July 1, 2008 and expired on July 1, 2009. Both the Greenwich and the Steadfast policies named MMSD as an additional insured.[10]

After MMSD was sued, it retained its own counsel and then tendered its defense not only to United Water and Veolia, but also to their respective insurers, Greenwich and Steadfast.[11] Steadfast accepted the tender.[12] Greenwich did not accept MMSD's tender, explaining that it failed to see how its insured (United Water) could be liable for the sewerage backup that occurred in June of

2008 because its insured's contract to operate and maintain the sewerage system terminated months earlier.[13]

One year later, MMSD renewed its tender of defense to Greenwich, as unlike when MMSD first tendered the defense, Greenwich's insured, United Water, was now a party to the lawsuit.[14] As such, there were allegations in the amended complaint of United Water's fault in contributing to the sewage backups.

In response to the re-tender, Greenwich acknowledged that "there may be a potential for coverage" under its policy of insurance and requested additional information from MMSD so that it could determine its coverage obligations, including a copy of the Steadfast policy.[15] MMSD provided the requested information. After reviewing the "other insurance" clauses of the Greenwich and Steadfast policies, Greenwich asserted that its policy's "other insurance" clause made its policy excess over Steadfast's policy and since Steadfast was defending and its limits of liability were not exhausted, there was no obligation under its policy to defend MMSD.[16]

The lawsuits against MMSD were eventually settled. No indemnification was paid by Steadfast on behalf of MMSD for the settlements. However, Steadfast did pay $1.55 million to defend MMSD.[17] Steadfast commenced suit against Greenwich to recover defense costs it paid out on behalf of MMSD.[18] Steadfast filed a motion for summary judgment asserting that Greenwich had a duty to defend MMSD and since it did not, Greenwich breached its duty to defend. The trial court granted Steadfast's motion and awarded the $1.55 million in defense costs and also awarded attorney's fees in the amount of $325,000 to Steadfast in establishing coverage under Greenwich's policy.[19] Greenwich appealed.

II. Greenwich's Court of Appeals Argument

In its appeal, Greenwich first contended that its "other insurance" clause read in conjunction with Steadfast's "other insurance" clause made its policy excess over Steadfast's policy. As a result, it argued it did not have a duty to defend MMSD and thus, could not have breached its non-existent duty to defend.[20]

In the alternative, Greenwich argued that even if it had a duty to defend, that duty was contingent upon MMSD first satisfying the $250,000 self-insured retention under the Greenwich policy.[21] Greenwich argued that its policy required that MMSD itself pay the entire self-insured retention amount and prevented MMSD from relying upon Steadfast's payments of its defense costs to meet its own self-insured retention requirement.[22]

Greenwich also claimed that Steadfast's claim was not one of subrogation, but rather one of contribution because Steadfast had its own acknowledged duty to defend and thus, was seeking recovery of amounts in excess of its own fair share of defense costs. As such, Greenwich contended that Steadfast's claim was barred by the one-year statute of limitation applicable to contribution actions.[23] According to Greenwich, the statute of limitations began to run as Steadfast paid the defense costs. Greenwich argued that because Steadfast's lawsuit against Greenwich was filed well after a year following Steadfast's last payment of defense costs, Steadfast's lawsuit was untimely.[24]

Greenwich further argued in the alternative that even if it breached its duty to defend, it should only be responsible for a pro rata portion of the $1.55 million Steadfast paid in defense costs. It argued if its policy and Steadfast's policy were both primary, then both insurers had a duty to defend and the amount paid in defense costs should be allocated on a pro rata basis based on a comparison of limits ($30 million for Steadfast and $20 million for Greenwich).[25]

Finally, Greenwich argued that the award of attorney's fees was in error because Wisconsin law does not provide for an award of attorney's fees to an insurer pursuing coverage against another insurer and, in fact, in *Riccobono v. Seven Star, Inc.,*[26] the court of appeals had expressly rejected such a claim.[27]

III. The Court of Appeals' Decision

The court of appeals rejected all of Greenwich's arguments and affirmed the trial court's rulings.[28] First, the court of appeals rejected Greenwich's argument that its policy was excess to Steadfast's policy. The appellate court concluded that the "other insurance" clause can only be invoked when two policies are concurrent, that is, when two different policies insure the same risk, the same interest, for the benefit of the same person and during the same time.[29]

Here, according to the court of appeals, these elements were not met. First, the policies did not insure the same party. The Greenwich policy insured United Water and the Steadfast policy insured Veolia. Second, the court of appeals noted that while both policies did insure the same additional insured, MMSD, both policies insured MMSD for different risks. The Greenwich policy insured MMSD's vicarious liability for United Water's acts and omissions and the Steadfast policy insured MMSD's vicarious liability for Veolia's acts and omissions.[30]

Third, the court of appeals determined that the policies did not provide coverage for the same period of time. Greenwich insured MMSD as an additional insured only during the time of United Water's operation and maintenance of the MMSD's sewage system, while Steadfast insured MMSD as an additional insured only during the time of Veolia's operation and maintenance of the MMSD's sewage system.[31] Thus, the court of appeals determined that the policies were successive, not concurrent, policies, and thus the "other insurance" clauses were not applicable.[32] As a consequence, the court of appeals determined that both the Steadfast and Greenwich policies provided primary coverage for MMSD in relation to the underlying claims.

In reviewing the record, the court of appeals agreed with Steadfast that MMSD satisfied the $250,000 self-insured retention. The court noted that during the underlying lawsuit, MMSD had provided Greenwich with evidence that it paid its legal counsel $735,611.75 for services rendered in defending MMSD of which Steadfast had not reimbursed MMSD.[33] MMSD also supplied an affidavit from its counsel in which its counsel attested that MMSD had incurred "$594,302.23 in defense costs representing the difference between the rates that Steadfast applied and the amount MMSD paid to [its outside counsel]."[34] The court of appeals agreed with Steadfast that MMSD had met its self-insured retention amount.

The court of appeals also rejected Greenwich's argument that the one-year statute of limitations barred Steadfast's lawsuit.[35] Greenwich relied upon Wis. Stat. § 893.52, which applies to actions for contribution based on tort.[36] The court of appeals held that the statute was inapplicable because Steadfast's action was not one of contribution, that is, Steadfast was not a joint tortfeasor seeking contribution from another joint tortfeasor.[37] Rather, the court found that Steadfast was asserting a claim of subrogation.

The court of appeals noted that subrogation applies where "a person other than a mere volunteer pays a debt or demand which in equity and good conscience should be satisfied by another."[38] Here, Steadfast paid the entirety of the defense costs which Greenwich should have shared. The court of appeals reasoned that because Greenwich did not pay when it had a duty to do so and Steadfast was subrogated to its insured for all payments it made under its policy, Steadfast's claim was one of subrogation and governed by Wis. Stat. § 893.43, which is a six-year statute of limitations.[39]

The court of appeals also rejected Greenwich's claim for a pro rata allocation of the defense costs.[40] The court noted that when Greenwich made a unilateral decision not to defend, it made that decision at its own peril. The court held that because Greenwich was wrong about its defense obligation to MMSD when it failed to defend, it breached its duty to defend. Because MMSD could have recovered all of its defense costs from Greenwich directly, and because Steadfast was subrogated to MMSD's rights, the court held that Steadfast was entitled to

recover all of the damages that MMSD could have recovered from Greenwich. As a consequence, the court of appeals held that Steadfast was entitled to recover all of the defense costs incurred by MMSD for which Steadfast reimbursed MMSD, which totaled $1.55 million.

Finally, the court of appeals also affirmed the award of attorney's fees.[41] Steadfast sought attorney's fees as the subrogee for its insured, MMSD. The court reasoned that had MMSD sued Greenwich for a breach of its duty to defend and won, MMSD would have been entitled to reimbursement for those fees. Thus, the court reasoned that Steadfast, standing in the shoes of MMSD, was likewise entitled to recover attorney's fees for having established coverage under the Greenwich policy. The court also noted that subrogation rests upon equitable principles and under the facts of the case (namely that while both carriers had an independent duty to defend MMSD and only Steadfast defended), the equities favored Steadfast. Hence, the trial court's award of $325,000 was affirmed.

IV. The Wisconsin Supreme Court's Decision

Greenwich filed a petition for review with the Wisconsin Supreme Court, which was accepted. On January 24, 2019, the Wisconsin Supreme Court affirmed the court of appeals decision in part, and reversed in part, with Justices Ann Walsh Bradley and Rebecca Dallet concurring in part, and dissenting in part, and Justice Rebecca Bradley concurring in part, and dissenting in part.

The issues addressed by the Wisconsin Supreme Court were a bit more limited than those addressed by the court of appeals. The court first addressed whether the Steadfast and Greenwich policies were concurrent or successive. This issue was critical because Greenwich argued that its policy was excess over Steadfast's policy based on the two policies' "other insurance" clauses and since Steadfast was defending, there was no breach. However, if the court found that the two policies were successive, as opposed to concurrent, then Greenwich could not invoke the "other insurance" clause.

The court also addressed whether Steadfast's claim for reimbursement was one sounding in subrogation or contribution, and if the latter, whether the statute of limitations expired preventing any recovery by Steadfast. The court then provided clarity on the allocation of defense costs among two or more insurers when each insurer has a duty to defend, but only one defends — an issue it had not previously addressed. Finally, the court addressed the right to attorney's fees by one insurer against another.

a. The Majority Opinion

The supreme court concluded that Steadfast's and Greenwich's policies were successive, not concurrent.[42] As such, the court found that Greenwich could not rely upon its "other insurance" clause and thus, its policy was not excess but rather primary, and as a primary insurer, Greenwich had a duty to defend.[43] Because Greenwich did not defend, the court found that it breached its duty to defend.[44]

However, the court also noted that since both Steadfast and Greenwich had an independent duty to defend MMSD, Steadfast was not permitted to reallocate all of the defense costs to Greenwich.[45] Rather, the court held that the defense costs should be allocated on a pro rata basis based on the respective limits of liability of the two policies.

Finally, the court held that Steadfast's claim was one of contractual subrogation and not contribution.[46] Thus, the court held that not only was its lawsuit timely filed, but under the principles of contractual subrogation (that is, the right of subrogation set forth in a contract), Steadfast was entitled to its attorney's fees in proving coverage under the Greenwich policy as an element of damages that naturally flowed from Greenwich's breach of its contractual duty to defend.[47]

i. Concurrent v. Successive

Whether two or more policies are concurrent or successive determines whether a policy's "other insurance" clause will be enforced.[48] An

"other insurance" clause can determine whether a policy is primary or excess. For example, an "other insurance" clause can come into play in an automobile accident case where the negligent driver is operating another's car with that owner's permission. The driver's policy will often contain an "other insurance" clause that states that its policy will be excess where the insured (the driver in our example here) is operating a vehicle that he or she does not own. Thus, the owner's automobile liability policy will often provide primary (defense and indemnity) protection to the driver and only after the owner's policy is exhausted by payment of its limit of liability, will the driver's liability policy be triggered.[49]

Concurrent policies are those that "cover the same time period and risk"[50] whereas successive policies are those that cover different periods of time and different risks.[51] Greenwich argued that in order to determine if the same risk was being covered by the Steadfast and Greenwich policies, the focus must be on the "loss" sustained. Here, the loss was the defense costs incurred by Steadfast as Steadfast did not pay any indemnification on behalf of MMSD.[52]

Steadfast disagreed with Greenwich's position, arguing that the "risk" is not loss paid, but rather the risk being insured under the policies. The Supreme Court agreed with Steadfast. Here, Steadfast insured the risk that Veolia (its insured) would be negligent in its operation or maintenance of MMSD's sewage treatment system whereas Greenwich insured United Water's liability for United Water's operation and maintenance of MMSD's sewage treatment system. [53]

The court noted that while both Steadfast and Greenwich insured MMSD as an additional insured, the risk being insured was also different. The court stated that Steadfast only insured MMSD for MMSD's vicarious liability for Veolia's acts and omissions and in contrast, Greenwich only insured MMSD for MMSD's vicarious liability for United Water's acts and omissions.[54] Thus, the court determined that the risks insured by both policies were not the same. Hence, the court determined that the policies were not concurrent, but rather successive, and thus, the "other insurance" clause contained in Greenwich's policy was not applicable and Greenwich owed MMSD a primary duty to defend.

ii. Breach of the Duty to Defend

Having concluded that the policies were not concurrent and Greenwich could not rely on its "other insurance" clause, the court found that Greenwich breached its duty to defend.[55] The court recounted Wisconsin's long-standing preferred procedure for insurers who wish to contest their defense obligation without running the risk of breaching their duty to defend. Insurers should move to stay the merits of the case, bifurcate the coverage issue from the merits issues, and then resolve the coverage issue.[56] However, when an insurer makes a unilateral decision that its policy does not provide for a defense obligation — that is, a decision made without the assistance of a court — it does so at its own peril. This "peril" makes the defaulting insurer responsible "for all damages that naturally flow from the breach."[57]

Since the two policies were successive and not concurrent, Greenwich's "other insurance" clause was unavailable. As such, Greenwich was a primary insurer with a duty to defend MMSD — a duty that the Court found it breached. Having breached the duty, Greenwich was responsible for the damages that naturally flowed from that breach. However, this then begged the question, what were MMSD's damages that naturally flowed from Greenwich's breach — after all — MMSD was defended by attorneys of its own choosing and largely paid for by another insurer that also had an independent duty to defend this same insured, Steadfast.[58]

iii. Allocation of Defense Costs

Steadfast argued that all of the defense costs it paid should be passed onto Greenwich. In order to accomplish this end, Steadfast argued that it had a contractual subrogation claim against Greenwich. Steadfast's argument was predicated on five points: (1) it paid for MMSD's defense; (2) its policy

provided that Steadfast became subrogated for any payments that it made on behalf of its insured; (3) MMSD had a contractual claim against Greenwich for breaching the duty to defend; (4) MMSD was entitled to a complete defense from Greenwich; and (5) because Steadfast was subrogated to MMSD's rights, including the breach of contract claim, it was entitled to seek reimbursement of the entirety of the defense costs it paid. The court rejected Steadfast's position that Greenwich was responsible for all of the defense costs since it was found in breach.

The court concluded that the court of appeals decision to pass the entire cost of the defense from Steadfast to Greenwich, even though Greenwich was found to have breached its duty to defend, was in error. Requiring Greenwich to shoulder the entire cost of the defense of MMSD ignored the independent duty of Steadfast to defend MMSD as well.[59]

Not only did Greenwich have a duty to defend, but so did Steadfast. While Greenwich was found to have breached the duty, the breach did not justify a "judicial forgiveness" of another insurer's independent contractual obligation to defend its insured.[60] Rather, the court determined that it was appropriate to allocate the defense costs incurred based on the respective liability limits of the policies involved.

According to the court, the allocation of defense costs based on the limits of the various policies at issue "better reflects the insurance companies' respective bargains."[61] The court examined other allocation methods, such as time-on-the-risk apportionment, equal apportionment based on the number of insurers that are obligated to defend an insured and finally, a pro rata allocation based on a comparison of limits.[62]

The court concluded that an apportionment of the cost of defense on a pro-rated basis based on limits better reflects the bargain that each insurer entered into with its insured. That is, higher premiums are paid for higher limits and thus, that carrier should be responsible for a larger share of the defense costs. In contrast, a carrier with lower liability limits should expect to receive a lower premium. Because Greenwich's liability limit was $20,000,000 and Steadfast's liability limit was $30,000,000, Steadfast owed 3/5ths of the cost of the defense and Greenwich owed 2/5ths of the cost of the defense, which was $620,000.[63]

iv. Award of Attorney's Fees

Finally, the supreme court agreed that Steadfast was entitled to attorney's fees for having to establish coverage under the Greenwich policy. The court concluded that Steadfast had a contractual right of subrogation: its policy provided that if Steadfast made any payment on behalf of its insured, it was subrogated (stood in the shoes of its insured) to the extent of the payments it made.[64] The court reasoned that if MMSD had sued Greenwich to establish coverage, MMSD would be entitled to recover attorney's fees. Because Steadfast stood in the shoes of MMSD, Steadfast was able to recover its attorney's fees in establishing coverage under the Greenwich policy.

b. The Concurring and Dissenting Opinions

Justices Ann Walsh Bradley and Rebecca Dallet jointly concurred in part and dissented in part in the majority opinion. These justices concurred in the majority's opinion regarding whether the Steadfast and Greenwich policies were concurrent or successive; whether Greenwich breached its duty of defense owed to MMSD; and whether Steadfast's claim was one of subrogation or contribution.[65] Where these two justices diverged from the majority opinion was with regard to the allocation of the cost of the defense on a pro rata basis and on the award of attorney's fees. These justices opined that transferring the entire cost of the defense to Greenwich as a penalty for its breach of contract was appropriate but disagreed with the decision to award Steadfast its attorney's fees in establishing coverage under the Greenwich policy.[66]

This dissent opined that the majority erred by refusing to saddle the costs of the defense to Greenwich as a penalty for having been found to have breached its duty to defend. They noted that Wisconsin's long-standing law provided that an insurer that breaches its duty to defend does so at its own peril.[67] By not shifting the entire costs of the defense to Greenwich and instead allocating only a part of the costs (the portion that under this case Greenwich would be responsible for if it jointly defended MMSD with Steadfast) that "peril" was now eliminated. According to the dissenting justices, without the penalty portion, carriers could wrongfully refuse to defend, wait until another carrier defended and only be responsible for what it would have been responsible for had it honored its commitment to defend its insured.[68]

From the dissent's perspective, the majority's opinion rewarded Greenwich's decision to ignore "this court's established framework" for challenging coverage obligations by insurers and allowed "Greenwich to escape the consequences of its willful breach of the duty to defend."[69] According to the dissent, the majority's opinion created an incentive for carriers to avoid being proactive in determining their coverage obligations but instead, "rest comfortably in their decisions to deny a defense with the knowledge that if a breach is later found, no financial consequences will be forthcoming."[70]

The dissent also took issue with the award of attorney's fees to Steadfast in establishing coverage under the Greenwich policy. According to the dissent, the exceptions to the American Rule were to be limited and narrow; the exception created by the majority was unsupported by any case law and undermined the American Rule.[71]

Justice Rebecca Bradley also concurred in part and dissented in part. Justice Bradley disagreed with the majority's opinion that Greenwich breached its duty to defend. Rather, she opined that since the loss at issue in this particular case was defense costs (and not any indemnification), the analysis of whether the policies insured the same risk should have been on the defense costs. With that focus, the two policies were concurrent as they insured the same risk: MMSD's defense costs. As such, according to Justice Bradley, the policies were concurrent and Greenwich's "other insurance" clause permitted Greenwich to take an excess position and therefore it did not breach its duty to defend.

V. "Take-Aways" from the Case

There are several important take-aways from the case. One important take-away is that the court arguably further limited the peril to an insurer in a multi-insurer situation if it does not defend its insured. Prior to *Steadfast*, there was a bit of tension in Wisconsin law. When an insurer unilaterally determines its coverage obligations and refuses to defend, it has been said that it does so at its own peril. The peril imposed has been sometimes draconian, ranging from the payment of defense costs incurred, to settlements and judgments. The peril has also been a judicially imposed waiver of certain coverage defenses[72], as well as the loss of the right to control the defense of the insured.[73]

The nature of the peril imposed on the defaulting insurer stems from the nature of the relationship between the insured and insurer. The duty to defend is a contractual one.[74] It is based on the arrangement between the insured and the insurer that culminated in the issuance of the policy. The insured has paid a premium to the insurer for various protections set forth in the insurance policy. The insurer's duty of defense is thus a contractual one.[75]

The carrier reserves unto itself the right and duty to defend. When a carrier has that duty, but fails to honor it, the carrier has breached the contract.[76] Upon a finding of breach, the insured is entitled to be put in the same position it would have been had the defaulting carrier defended.[77] Typically, contract damages are available for the breach[78] and the carrier is thus responsible for the damages that "naturally flow from that breach."[79] Absent bad faith by the insurer, the damages for the failure to defend are limited to those damages that are a consequence of the breach.[80]

Often, the damages are readily identifiable. For example, if the insurer has wrongfully failed to defend and the insured must then hire its own counsel to represent and defend the insured, the cost of the defense in that scenario naturally flows from the breach. If the insured can prove that the failure to defend forces the insured to "throw in the towel" and settle, then the carrier's breach may have caused damages in the form of the settlement.[81] If the insured, because it was not defended, cannot defend the case and a judgment is entered against it or a default judgment is entered because the insurer did not defend, then, again, those damages more readily can be said to have naturally resulted from the breach.[82]

The corollary applies as well. If the insurer wrongfully fails to defend, but the failure to defend does not cause the claimed damages, then the carrier should not be responsible for those damages.[83] For example, if the insured hires its own counsel and defends the case, and is found liable because it was, in fact, factually liable to the plaintiff, the carrier should not be responsible for the settlement or judgment that follows.[84] The insured must prove that it sustained damages as a result of the insurer's failure to defend before any damages can be awarded.[85]

In *Steadfast*, the insured was defended. MMSD hired counsel of its own choosing and vigorously defended the lawsuit. The defense was successful; no indemnification was paid out on behalf of MMSD. While Greenwich was found to have breached its duty to defend, there was a question as to what damages were caused by that breach because MMSD was defended by another insurer who had its own independent duty to defend MMSD.

Certainly, an argument could be made that the costs and fees MMSD incurred that Steadfast did not pay because they were not compliant with its billing guidelines could be a cost that MMSD incurred that could be said to have naturally flowed from the breach. However, those were not the damages being sought by Steadfast in this case. Rather, as the court determined, the damages being sought were costs that Steadfast paid to discharge its own independent duty to defend its insured. That Greenwich also arguably had that same independent duty to MMSD but chose not to defend or share in the cost of defense based on its "other insurance" clause, does not change the fact that MMSD was still defended.

To make matters more complicated, Steadfast positioned its claim as one of subrogation, not contribution. The court found that Steadfast was subrogated to the rights of MMSD under its policy, Steadfast paid MMSD's debt to its counsel, and thus, Steadfast became subrogated to the defense costs it paid. Yet, the court determined that at least some of those costs were properly allocated to Steadfast's own defense obligation to MMSD. After all, MMSD was being sued, in part, for the alleged acts or omissions of Steadfast's insured, Veolia. Thus, the reallocation of the entirety of MMSD's defense costs from Steadfast to Greenwich posed a problem for the court. On the one hand, there was the "peril" that Wisconsin law imposes on breaching insurers and on the other hand, there was the limitation on the nature of the damages that, in absence of bad faith, are collectible for a breach of the duty to defend.

The court was faced with the unique question of how to determine what damages were caused by Greenwich's breach. After all, MMSD was defended and Steadfast had its own independent duty to defend MMSD. While Greenwich was found to have breached its duty to defend, the damages MMSD or Steadfast, as its subrogee, sustained that would not have been sustained had Greenwich not breached, were unclear. Had Steadfast been the only insurer for MMSD, it would have incurred the $1.55 million in defense costs alone.

Yet, had Greenwich defended, then Steadfast would have presumably paid less in defense costs as Greenwich would have shouldered some portion of those costs. Thus, the court's solution was to allocate between the insurers the entirety of the cost of defense. In this way, Greenwich was forced to pay for some portion of the damages that naturally flowed from its failure to defend (the costs of the

defense), but the allocation prevented Steadfast from reaping a windfall by transferring the entirety of the defense to Greenwich given its own independent duty to defend MMSD.

On one level, the solution makes sense. Both carriers were found to have had an independent duty to defend their mutual insured, MMSD. That duty is not divisible.[86] An allocation of the total amount of the defense costs between the two carriers arguably ensures that both carriers comply with their contractual duty to defend their mutual insured.

On another level, however, the result is at least arguably inconsistent with prior Wisconsin law and can create a disincentive for carriers to defend their insureds. In a multi-insurer situation, where two or more carriers have an obligation to defend the same insured, one could argue, as the dissent opined, that the *Steadfast* case now creates an incentive for the carriers to refuse to defend the insured and attempt to wait out the other carrier. The insured would be left to defend itself until one or the other carrier "blinks first" and defends. The carrier that won that game of litigation chicken would simply sit back and wait until the end of the case and presumably negotiate with the defending carrier to pay some proportion of the defense costs. At worst, the non-defending carrier would only have to pay a pro rata portion of the defense costs based on a comparison of limits. If the non-defending carrier has smaller policy limits, its exposure might be significantly less than what it would have paid had it defended from the beginning.

Further, the *Steadfast* result arguably removes a penalty often associated with the breach of the duty to defend. As noted above, "an insurer opens itself up to a myriad of adverse consequences if its unilateral duty to defend determination turns out to be wrong."[87] Yet, the only penalty imposed by the *Steadfast* court was that it required Greenwich to pay some portion of the costs to defend its insured.

This result can be explained, however, by recalling a few points. First, the only remedy being sought was repayment of defense costs. No settlement was paid on behalf of MMSD nor was a judgment entered against MMSD.

Second, the court did permit the award of attorney's fees against Greenwich. In a deviation from the American Rule, the court affirmed the lower court's award of $325,000 in attorneys against Greenwich. While the court did not do so as a penalty *per se*, it held that it was a natural consequence of Steadfast's subrogation rights through MMSD. The court noted that had MMSD chosen to pursue Greenwich for the breach, it would have been entitled to the attorney's fees that it incurred in establishing that coverage.

Here, Greenwich, while responsible for only $620,000 in repayment of the $1.55 million in defense costs, was required to pay an additional $325,000 in attorney's fees. Hence, some penalty, if not directly designated as one, was arguably imposed on Greenwich for having been determined to have breached its duty to defend. An award of attorney's fees could be seen as a penalty and therefore, consistent with Wisconsin's imposition of "peril" if a carrier wrongfully fails to defend.

From here, a few practice pointers are highlighted. First, if a carrier doubts its contractual duty to defend its insured, the most conservative approach is to follow the long-established procedure of filing a motion to bifurcate and stay and have the coverage issues resolved before the merits.[88] In *Steadfast*, Greenwich arguably could have agreed to defend under a reservation of rights, intervened in the underlying actions or filed a separate declaratory judgment action and filed a motion for summary and/or declaratory judgment to obtain a declaration on the priority of the "other insurance" clauses and its duty to defend.[89] If correct, Greenwich could have received a judicial declaration of its excess status and a declaration that it had no duty to defend.[90] If wrong, there would have been no adverse consequences imposed.

Second, if multiple carriers insure the same insured, but only one carrier defends, that defending carrier should promptly file a declaratory judgment

action to seek a judicial order compelling the non-defending insurer to contribute towards the defense. Rather than waiting until the end of the litigation, the defending carrier could obtain a ruling that the non-defending carrier has a duty to defend and the two carriers may then agree upon a cost sharing arrangement for the defense costs incurred in the litigation.

Had Steadfast or MMSD filed a declaratory judgment action to determine Greenwich's defense obligation in the underlying case, the issue of Greenwich's obligations would have been resolved early. If the trial court issued an order that Greenwich had a duty to defend MMSD, Greenwich would have been required to pay a share of the defense costs of MMSD during the underlying actions as those defense costs were incurred.

Third, if a non-defending carrier simply sits on the sidelines, it could contact the defending carrier, and offer to split the defense costs on a pro rata basis once the case is concluded or agree to pay a pro rata share of defense costs as they are incurred.[91] If the non-defending carrier waits until the end of the case to pay its share of the defense costs, then it could avoid litigation by promptly tendering a check for its portion of the defense costs, plus interest on the defense costs paid by the defending insurer. If it does that, it should be able to avoid any subsequent litigation and any award of attorney's fees since no fees would be incurred to establish coverage under the non-defending insurer's policy.

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References

1 *Steadfast Ins. Co. v. Greenwich Ins. Co*., 2019 WI 6, 385 Wis. 2d 213, 922 N.W.2d 71.
2 *Id.* ¶ 7.
3 *Id*.
4 *Id.* ¶ 7, n.4.
5 *Steadfast Ins. Co. v. Greenwich Ins. Co*., 2018 WI App 11, ¶ 9, 380 Wis. 2d 184, 908 N.W.2d 502.
6 *Steadfast*, 385 Wis. 2d 213, ¶ 8.
7 *Id.* ¶ 9.
8 *Id.* ¶¶ 8-9.
9 *Id*.
10 *Id.* ¶¶ 8, 11.
11 *Id.* ¶ 12.
12 *Id*.
13 *Id.* ¶ 13.
14 *Id.* ¶ 14.
15 *Id.* ¶ 14.
16 *Id.* ¶ 14.
17 *Id.* ¶ 12.
18 Steadfast also sued Travelers Property Casualty Company of America, one of United Water's other liability carriers. Travelers resolved all claims against it and did not participate in the appeal. *Steadfast*, 380 Wis. 2d 184, ¶ 1 n. 2.
19 *Steadfast*, 385 Wis. 2d 213, ¶ 15.
20 *Steadfast*, 380 Wis. 2d 184, ¶ 23.

21 A self-insured retention obligates the insured to pay the first level of loss before insurance pays for the claim. *Burgraff v. Menard, Inc.*, 2016 WI 11, ¶ 24, 367 Wis. 2d 50, 875 N.W.2d 596.
22 *Steadfast*, 380 Wis. 2d 184, ¶ 38.
23 *Id.* ¶ 16.
24 *Id.* ¶ 44.
25 *Steadfast*, 380 Wis. 2d 184, ¶ 58.
26 *Riccobono v. Seven Star, Inc.*, 2000 WI 74, ¶ 28, 234 Wis. 2d 374, 610 N.W.2d 501.
27 *Id.* ¶ 79.
28 *Id.* ¶ 4.
29 *Steadfast*, 380 Wis. 2d 184, ¶ 25 (*citing Plastics Eng'g. Co. v. Liberty Mut. Ins. Co.*, 2009 WI 13, ¶¶ 48-49, 315 Wis. 2d 556, 750 N.W.2d 613).
30 *Id.* ¶ 28.
31 *Id*.
32 *Id*.
33 *Id.* ¶ 38.
34 *Id.* ¶ 39.
35 *Id.* ¶ 46.
36 *Id.* ¶ 47.
37 *Id*.
38 *Id.* ¶ 56.
39 *Id.* ¶ 56-57.
40 *Id.* ¶ 73.
41 *Id.* ¶ 88.
42 *Steadfast*, 385 Wis. 2d 213, ¶ 27.
43 *Id*.
44 *Id.* ¶ 31.
45 *Id.* ¶ 41.
46 *Id.* ¶ 36.
47 *Id.* ¶ 46.
48 *Id.* ¶ 26.
49 *Lubow v. Morrissey*, 13 Wis. 2d 114, 108 N.W.2d 156 (1961).
50 *Steadfast*, 385 Wis. 2d 213, ¶ 25.
51 *Id.* ¶ 25.
52 *Id.* ¶¶ 23-24.
53 *Id.* ¶ 27.
54 *Id*.
55 *Id.* ¶ 31.
56 While not mentioned by the court, there are two other procedures that insurers can follow in order to challenge coverage without jeopardizing their insureds. Carriers can defend an insured subject to a reservation of rights or carriers can enter into non-waiver agreements with their insureds whereby preserving their coverage defenses. *Liebovich v. Minn. Ins. Co.*, 2008 WI 75, ¶ 55, 310 Wis. 2d 751, 751 N.W.2d 764.
57 *Steadfast*, 385 Wis. 2d 213, ¶ 31.
58 The duty to defend is usually not divisible. That is, the defense obligation contained in most policies is to provide a complete defense to all claims even if just one claim is covered. Absent language in the insurance policy providing for a pro-rated defense, each carrier that has a duty to defend has an independent duty to defend its insured in relation to the entire action, covered and non-covered claims. *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶ 21, 261 Wis. 2d 4, 660 N.W.2d 666; *see also*, *Burgraff*, 367 Wis. 2d 50, ¶ 52.
59 *Steadfast*, 385 Wis. 2d 213, ¶ 40.
60 *Id.* ¶ 41.
61 *Id.* ¶ 44.
62 *Id.* ¶¶ 42-44.
63 Mathematically, Greenwich's policy was 2/5ths of the total policy limits available ($20 million of $50 million). Steadfast's policy equaled 3/5ths of the total policy limits available. ($30 million of $50 million). 2/5ths of $1.55 million is $620,000.
64 *Steadfast*, 385 Wis. 2d 213, ¶ 11.
65 *Id.* ¶ 57 n.1.
66 *Id.* ¶ 57 n.2.
67 *Id.* ¶ 69.
68 *Id.* ¶ 70.
69 *Id.* ¶ 68.
70 *Id.* ¶ 72.
71 *Id.* ¶ 85.
72 *Prof. Office Bldgs. v. Royal Indem.*, 145 Wis. 2d 573, 585, 427 N.W.2d 427 (Ct. App. 1988); *but see Maxwell v. Hartford Union High Sch. Dist.,* 2012 WI 58, ¶ 58, 341 Wis. 2d 238, 814 N.W.2d 484.
73 *Patrick v. Head of Lakes Cooperative Elec.*, 98 Wis. 2d 66, 72, 295 N.W.2d 205 (Ct. App. 1980).
74 "Indemnification and defense for claims falling within the parameters of the insurance policy are the two primary benefits received by the insured from a contract of insurance." *Newhouse v. Citizens Security Mut. Ins. Co.*, 176 Wis. 2d 824, 835, 501 N.W.2d 1 (1993).
75 *Elliott v. Donahue*, 169 Wis.2d 310, 320, 485 N.W.2d 403 (1992) ("In return for the premiums paid by the insured, the insurance company assumes the contractual duties of indemnification and defense for claims described in the policy.").
76 As was explained earlier, "[t]he general rule is that where an insurer *wrongfully* refuses to defend on the grounds that the claim against the insured is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages that naturally flow from the breach." *Marks v. Hous. Cas. Co.*, 2016 WI 53, ¶ 41 n.21 (emphasis in original).
77 *Newhouse*, 176 Wis. 2d at 838 ("The insurance company must pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract.").
78 *Id*. ("Damages which naturally flow from an insurer's breach of its duty to defend include: (1) the amount of the judgment or settlement against the insured plus interest; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach.").
79 *Thorp Sales Corp. v. Gyuro Grading Co. Inc.*, 111 Wis. 2d 431, 438, 331 N.W.2d 342 (1983).
80 *Burgraff*, 367 Wis. 2d 50, ¶ 63.

81 *Hamlin, Inc. v. Hartford Accident Indem. Co.*, 86 F.3d 93 (7th Cir. 1996).

82 *See*, *e.g.*, *Horn v. American Country Ins. Co.*, 2007 WI App 1, 298 Wis. 2d 247, 726 N.W.2d 357 (Ct. App. 2006) (unpublished opinion).

83 *Hamlin*, 86 F.3d at 95 (The "insured must show that he was made worse off by the breach than he would have been had the breach not occurred.").

84 *See, e.g.*, *id*. at 95; *see also*, *Burgraff*, 367 Wis. 2d 50, ¶ 64.

85 *Klatt v. Penske Truck Leasing Co., LP.*, No. 2017AP2064, 2018 Wisc. App. LEXIS 447, at *23 (unpublished opinion).

86 *Burgraff*, 367 Wis. 2d 50, ¶ 52.

87 *Steadfast*, 385 Wis. 2d 213, ¶ 67 (*citing Water Well Solutions Serv. Group, Inc., v. Consolidated Ins. Co.*, 2016 WI 54, ¶ 28, 369 Wis. 2d 607, 881 N.W.2d 285).

88 *Elliott*, 169 Wis. 2d at 318.

89 *Fire Ins. Exch. v. Basten*, 202 Wis. 2d 74, 549 N.W.2d 690 (1996).

90 Greenwich would have been required to defend MMSD until it obtained a final determination of coverage, *i.e.*, all appellate rights had been exhausted. *Newhouse*, 176 Wis. 2d at 836.

91 Paying defense costs on an agreed upon pro rata basis as those costs are incurred would avoid any claim for interest under Wis. Stat. § 628.46.