

Bond Case Briefs

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INSURANCE - WISCONSIN

Steadfast Insurance Company v. Greenwich Insurance Company

Supreme Court of Wisconsin - January 25, 2019 - N.W.2d - 2019 WL 323702 - 2019 WI 6

Liability insurer for municipal sewer system operator brought equitable subrogation action against prior operator's insurer to recover cost to defend sewerage district in lawsuits arising out of rain event during subsequent operator's contract with district.

The Circuit Court entered summary judgment in favor of plaintiff. Defendant appealed. The Court of Appeals affirmed. Review was granted.

The Supreme Court of Wisconsin held that:

- Each insurer's coverage for district, as additional insured, was primary;
- Prior operator's insurer breached duty to defend district;
- Defending insurer's claim was for breach of express contractual subrogation right and was governed by six-year statute of limitations;
- As a matter of first impression, pro-rata allocation of defense costs based on policy limits of \$30 million and \$20 million was required; and
- As a matter of first impression, defending insurer was entitled to recover attorney fees.

Contractor's pollution liability policies that covered different operators of metropolitan sewer system and sewerage district, as additional insured, during successive periods were primary with regard to each operator's respective insurance and provided successive primary coverage for district, and, thus, "other insurance" clauses did not apply to claims for sewer backups as result of heavy rains.

Contractor's pollution liability insurer for sewer system operator breached duty to defend metropolitan sewerage district, as additional insured, by relying on erroneous unilateral determination that its coverage was excess to coverage under another operator's policy in effect at time of sewer backups, and insurer was thus responsible for all damages that naturally flowed from the breach; insurer did not seek judicial determination of coverage obligations or pay any amount toward district's defense costs.

Liability insurer's claim to recover defense costs from another insurer for breaching duty defend sewerage district, as additional insured, against claims for sewer backup was claim for breach of express contractual subrogation right, rather than contribution, and, therefore, was governed by six-year statute of limitations for breach of contract; policy subrogated insurer to insured's rights of recovery against any person or organization.

Liability insurer's breach of duty to defend metropolitan sewerage district, as additional insured, against claims of sewer backup did not abrogate defending insurer's duty to defend district, and, thus, pro-rata allocation of defense costs based on policy limits of \$30 million and \$20 million was required making insurers liable for 60 percent and 40 percent; both insurers owed duty to defend, and financial sanction of insurer for breaching duty to defend did not include judicial forgiveness of

another insurer's financial obligation for defense costs.

Insured's right of recovery to which liability insurer was contractually subrogated for defending sewerage district, as additional insured, included attorney fees incurred in successfully establishing another insurer's duty to defend district, and, thus, defending insurer was entitled to recover attorney fees incurred in suit against other insurer under principles of contractual subrogation.