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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL REALTY INVESTMENT TRUST,)
)
 Plaintiff,)
)
 v.) Civil Action No. R-88-3658
)
 PACIFIC INSURANCE COMPANY,)
)
 Defendant.)
)

MEMORANDUM OF PLAINTIFF FEDERAL REALTY
INVESTMENT TRUST IN OPPOSITION TO MOTION
IN LIMINE OF DEFENDANT PACIFIC INSURANCE COMPANY
REGARDING THE APPLICABLE LEGAL STANDARD FOR ALLOCATION

INTRODUCTION

Pacific Insurance Company ("Pacific") states in its Motion In Limine that there is "little authority" concerning the appropriate legal standard to use to allocate defense costs in this case; on this basis, Pacific urges this Court to adopt a complicated and amorphous allocation standard never before used in any court. Pacific reaches this new standard by torturing the governing law beyond recognition. Contrary to Pacific's representation, Continental Cas. Co. v. Board of Educ. of Charles County, 302 Md. 516, 489 A.2d 536 (Md. 1985) ("Charles County"), authoritatively establishes the legal standard to use in allocating defense costs between Federal Realty Investment Trust ("Federal Realty" or the "Trust") and its trustees. The Charles County standard is nothing like the novel legal standard espoused by Pacific. Under the rationale of Charles County, when a particular item of legal services is "reasonably related" to the

defense of a party covered by insurance (here, the trustees) -- meaning that the service reasonably could have been provided in a suit against only the covered party -- the service is apportioned wholly to the covered party. This standard, notwithstanding Pacific's protestations to the contrary, treats fairly both the insured and its insurer. More to the point, the standard, whatever its pros and cons, prevails in the State of Maryland. Federal Realty therefore respectfully requests that this Court deny Pacific's Motion and apply at trial the Charles County standard, as explicated in this Memorandum.

ARGUMENT

I. CHARLES COUNTY ESTABLISHES THE LEGAL STANDARD FOR ALLOCATION OF DEFENSE COSTS TO BE USED IN THIS CASE

In Charles County, the Maryland Court of Appeals responded to a certified question from the United States Court of Appeals for the Fourth Circuit respecting the allocation of defense costs in a case in which some claims were covered by an insurance policy, whereas other claims were not. The Court held:

Counsel defending the . . . suit could properly have billed [the insurance company] for all services and expenses reasonably related to the defense of [covered claims]. Legal services and expenses are reasonably related to a covered count if they would have been rendered and incurred by reasonably competent counsel engaged to defend a suit against the [insureds] arising out of the same factual background as did the . . . suit but which alleged only the matters complained of in [the covered counts] of the . . . complaint.

489 A.2d at 544.

The Court in Charles County made clear that an insurance company is not entitled to any apportionment of fees

when a particular item of legal service benefited the defense of both covered and uncovered claims:

To phrase the meaning of "reasonably related" in another way, we do not believe that [the insurer] is entitled to an apportionment between [covered] and [uncovered] claims based simply on the fact that an item of legal service or expense would also be of use to counsel in defending a claim asserted under a[n] [uncovered] count . . . in addition to its use in defending a [covered] count. Having purchased this form of litigation insurance, the [insured] is entitled to the full benefit of its bargain. So long as an item of service or expense is reasonably related to defense of a covered claim, it may be apportioned wholly to the covered claim.

489 A.2d at 545 (emphasis supplied).^{1/} The Court thus made clear that when a legal service reasonably would have been provided in a hypothetical suit alleging only the covered counts, allocation of the cost of the service is improper -- notwithstanding that in the actual suit the service also aided the defense of the uncovered counts.

Charles County compels a directly analogous standard for the apportionment of costs between covered and uncovered

^{1/} In applying this standard, the Charles County Court considered whether any allocation was proper "for the time of counsel which has been devoted to moving the . . . case as a whole," including the time counsel spent preparing motions and appearing before the court. See 489 A.2d at 546. The Court concluded: "Because the facts underlying [one of the covered counts] also underlie the [uncovered] claims[,] it . . . seems likely that most if not all of the time of counsel devoted to motions practice will turn out to be work which it would have been reasonable for counsel to have done if the . . . case had alleged only [the covered] counts[]." Id.

parties^{2/}: when a particular legal service is "reasonably related" to the defense of a covered party -- which means that the service reasonably would have been provided in a suit against only the covered party -- the service is apportioned wholly to the covered party. (A copy of Federal Realty's proposed jury instruction, setting forth this standard, is attached hereto.) Such a rule enforces the terms of the bargained-for insurance, as required by Charles County, by causing the insurance company to pay those defense costs -- but only those defense costs -- reasonably related to the defense of the insured.]

The court in Nodaway Valley Bank v. Continental Cas. Co., 715 F. Supp. 1458 (W.D. Mo. 1989), applied the Charles County standard in precisely this manner in allocating defense costs between covered officers and directors and an uninsured employer -- the very kinds of parties present in the instant case. The underlying litigation in Nodaway was brought against a

^{2/} Pacific does not contest that this Court, in allocating costs between covered and uncovered parties, should adopt the standard most directly analogous to the standard set forth in Charles County. See Motion In Limine of Defendant Pacific Insurance Company Regarding the Applicable Legal Standard for Allocation (Pacific's Motion In Limine) at 8-9, 13; Pretrial Order at 31. In other words, Pacific does not argue that the allocation of costs between covered and uncovered parties is sufficiently different from the allocation of costs between covered and uncovered claims as to require a dissimilar standard. Indeed, Pacific pretends that its own proposed standard is but a natural extrapolation of Charles County. See Pacific's Motion In Limine at 8-9, 13; Pretrial Order at 31. As should be clear from even the briefest comparison of the standard proposed by Pacific and that set forth in Charles County -- and as will be explained infra at 7-9 -- this claim is flat-out wrong.

bank, its officers and directors, and its shareholders, including a holding company. Pacific, in its Motion In Limine, cites the Court's discussion of the appropriate allocation of costs as between the covered officers and a corporate shareholder sued under a theory of direct shareholder liability. See Pacific Motion In Limine at 11-12. But Pacific ignores the relevant aspect of the Court's decision -- i.e., the allocation of costs as between the insured officers and the uninsured bank as their employer.

In this portion of the decision, the Nodaway Court rejected the argument of the insurance company, similar to the one Pacific makes, that a "50-50 allocation" between the officers and the bank would be "more than fair," because the bank had substantial financial exposure in the action under a respondeat superior theory and therefore had a substantial interest in the defense. See 715 F. Supp. at 1459-60, 1465-66. The insurance company argued in Nodaway (much as Pacific does in this case) that the Court reasonably could assume, based on the employer/bank's financial exposure, that the bank, if separately represented, would have absorbed at least 50% of the legal fees expended in the case. The Nodaway Court rejected this approach and instead adopted the holding of Charles County that allocation should be based simply on whether a particular legal service was reasonably related to the defense of the covered parties on covered claims. The Court relied on the reasoning of Charles County that "[h]aving purchased this form of . . . insurance,

the [insured] is entitled to the full benefit of its bargain.'" Id. at 1465 (quoting Charles County, 489 A.2d at 545).

The Nodaway Court found the Charles County reasoning -- and the "insurer's complete responsibility" -- especially "compelling" when the "insured conduct vicariously implicates an uninsured party (such as a corporate employer)." Id. The Court explained why allocation of defense costs to an employer was inappropriate when an item of legal service was "reasonably related" to the defense of a covered employee, even if the item also benefited the employer:

The insurer's respondeat superior argument, to the effect that it was liable for the conduct of insured directors and officers but not for the corporate liability created by their acts and should therefore obtain an allocation, comes dangerously close to saying that D&O insurance is never adequate insurance, making whole the insureds, when the uninsured corporate employer is joined in litigation with insured officers and directors. This would defeat the reasonable expectations of insureds who have purchased insurance that supposedly gives full coverage for director and officer liability. It seems clear that merely derivative corporate liability should not cause an apportionment between the primary wrongdoer and a vicarious wrongdoer, where both are joined in litigation. My conclusion would not expand the insurance policy to unfairly create corporate coverage; it simply gives full effect to the D&O coverage.

Id. at 1466 (emphasis in original). The Court thus applied the rule of Charles County that defense costs be wholly apportioned to the insured directors if they reasonably would have been incurred in a suit against the directors alone -- regardless whether the uninsured company also benefited from these expenditures.

Nodaway, however, is merely supporting authority; Charles County itself is the decisive precedent. There, as noted, the Maryland Court of Appeals resolved the issue faced in this case. Under Charles County, a covered party is entitled to all costs reasonably related to his defense -- i.e., all costs that reasonably would have been incurred in a suit directed against the covered party alone.

II. PACIFIC'S PROPOSED LEGAL STANDARD FOR ALLOCATION IS INCONSISTENT WITH THE STANDARD ESTABLISHED IN CHARLES COUNTY

In its Motion In Limine, Pacific proposes a wholly novel and extraordinarily complex standard for allocating defense costs in this case. Pacific suggests that the jury imagine that the trustees (the covered parties) and Federal Realty (the uncovered party) were represented by separate and independent counsel. See Pacific's Motion In Limine at 3. Pacific then proposes that the jury assume that the separate attorneys enter into an arrangement whereby they divide up all the work necessary for the defense of both the covered and uncovered parties. See id. Pacific finally requires the jury to determine which particular items of legal service each attorney would have provided under this arrangement. See id. at 3-4. In order to make this determination, Pacific states, the jury is to consider "the relative exposure of the parties, the relative benefits to the parties to be achieved by the successful defense of the litigation, contractual agreements between the parties, if any, and the extent to which any work was done solely for the benefit

of one party and not the other." Id. at 4. The jury would attribute to the covered party only the particular items of legal service that the covered party's own attorney would have performed under the "joint defense agreement." Id. at 8.

Undergirding Pacific's proposed standard of allocation is the notion that an insured, by purchasing protection against litigation expenses, assumes a legal obligation to enter into worksharing agreements and to hand over matters admittedly related to his own defense to another party's attorney. The source of this legal obligation remains a mystery throughout Pacific's brief. There is no such requirement for uninsured parties, and there is no conceivable rationale for holding that such an obligation exists when the defendants had the foresight to purchase insurance covering the costs of litigation. Pacific's proposed standard of allocation thus rests upon a legal fiction -- i.e., that an insured has a duty to cede functions essential to his own defense to someone else's attorney.

Pacific attempts to support its novel standard by arguing that it is the "logical corollary" of Charles County. See id. at 8-9. Pacific's standard, however, is not the logical corollary, but the very antithesis of Charles County. The Charles County Court could have established the standard proposed by Pacific. The Court, in other words, could have asked the factfinder to assume that separate attorneys were responsible for the defense of the covered and uncovered claims and to determine the precise items of legal service each attorney would have

provided in the event that they had entered into a worksharing agreement. Under this standard, the defendant would have received some but not all of the costs reasonably attributable to legal services provided in defense of both covered and uncovered claims. The Charles County Court, however, rejected this approach. The Court specifically held that the defendant was entitled to receive the entire cost of legal services reasonably provided in defense of both covered and uncovered claims. See 489 A.2d at 545. Pacific's theory of allocation is therefore directly contrary to the standard set forth in Charles County.^{3/}

Pacific also argues that its proposed standard is supported by equitable considerations, claiming that the standard offered by Federal Realty (i.e., the Charles County standard) would impose "unreasonable" costs on an insurer. See Pacific's

^{3/} Pacific also attempts to use the Nodaway decision in support of its proposed legal standard. See Pacific's Motion In Limine at 11-13. As noted earlier, however, Pacific relies on a portion of the Nodaway opinion that is not relevant to the allocation issue before this Court and ignores the part of the Nodaway decision that is directly on point. See supra at 4-7. The key portion of Nodaway adopts Charles County and rejects the allocation of costs between officers/directors and their employer. See id. Finally, Pacific relies on PepsiCo, Inc. v. Continental Cas. Co., 640 F. Supp. 656 (S.D.N.Y. 1986). This decision held that a settlement award should be allocated among a corporation, its officers and directors, and an accounting firm based solely upon their relative financial exposure. Pacific's proposed standard, in which relative financial exposure is but one factor to be considered in a much more complex determination, is itself inconsistent with PepsiCo. More important, the PepsiCo standard diverges dramatically from the standard established by the Maryland Court of Appeals in Charles County. The Charles County Court declined to allocate costs based on the relative financial exposure created by the covered and uncovered claims.

Motion In Limine at 7-8. This position is precisely the one taken by the insurance company in Charles County. The simple answer to Pacific's argument is that regardless of what insurance companies may think about the way in which Charles County accommodated equitable considerations and policy interests, the Charles County standard is the prevailing law. Equally important, however, Pacific errs in believing that the Charles County standard does not incorporate a test of "reasonableness." Under this standard, Pacific is free to argue that any or all of the legal services actually provided in the underlying litigation would have been "unreasonable" in a suit brought against the trustees alone.^{4/} If a jury believes such services would have been unreasonable -- because, for example, they would have been disproportionate to the financial risk posed by the suit -- the jury may deny the claim for the costs of those services.^{5/} The

^{4/} What Pacific may not argue under the Charles County standard is that costs related to the defense of the insured on covered claims are "unreasonable" simply by virtue of the fact that the insured, in the actual litigation, could have spread those costs among attorneys representing uncovered parties and/or defending uncovered claims. As suggested earlier, see supra at 8-9, the insured in Charles County could have avoided costs for the insurance company by hiring separate attorneys to defend covered claims and uncovered claims and by directing these attorneys to divide all necessary common work. The Charles County Court held that there was no obligation on the part of the insured to take these steps: in other words, failing to get separate counsel to share costs reasonably related to the defense of both covered claims and uncovered claims does not constitute imposing "unreasonable" or "avoidable" damages on the insurer.

^{5/} For this reason, all of the cases Pacific cites at pp. 5-6 of its Motion In Limine are irrelevant. These cases stand merely for the proposition that an insured may not impose

standard thus ensures that the covered party will receive only the costs reasonably related to his defense -- a result that hardly can be considered unfair to the insurance company, which has contracted to pay all such costs.

The real "unfairness" lies in Pacific's standard, which allows an insurance company, in any case in which an uninsured party is named as a defendant, to escape its contractual obligation to pay all reasonable defense costs to an insured. In such cases, the use of Pacific's standard gives the insurance company a free ride at the expense of the insured. The mere fortuity that an uninsured person or entity is sued operates to relieve the insurance company of a portion of its contractual obligation to reimburse the insured for reasonable defense costs. Surely, this result is inequitable to the insured, which has contracted for full insurance and should not be deprived of it by the presence in the suit of a defendant who has not contracted for insurance.

Pacific has conjured up its standard, which accords neither with prevailing law nor with equitable considerations, for a single obvious reason: under Charles County, Federal Realty will receive at trial all of the damages it seeks. Counsel in a suit against only the trustees on only covered claims reasonably could have performed the services for which

"unreasonable" costs on an insurer. The Charles County standard allows a party to recover only costs reasonably related to his defense. Such costs, by definition, are not unreasonable.

fees are sought; thus, under the Charles County standard, the services (even if they also benefited the Trust) were reasonably related to the defense of the trustees.^{6/} Pacific therefore needed to devise a new standard to reach its desired result.^{7/}

This Court must understand that adopting Pacific's standard would work a radical and unprecedented change in D&O insurance law. In most cases in which directors and officers (or, as in this case, trustees) are sued, the corporation (or trust) also is joined as a party. Under Pacific's standard, the mere naming of the corporation would prevent the insureds from receiving the full benefit of the D&O policy for which they have bargained. Prevailing case law prohibits this result; basic

^{6/} Moreover, even under the alternative "relative financial exposure" standard adopted in PepsiCo, Inc. v. Continental Cas. Co., 640 F. Supp. 656 (S.D.N.Y. 1986), Federal Realty would receive at trial its entire claim for damages. In its Motion In Limine to prohibit certain expert testimony, Federal Realty explained that under settled Maryland authority, the ultimate financial exposure on the fraud claim in the underlying litigation rested with the individual trustees, rather than with the Trust. See Federal Realty's Motion In Limine at 17-19. Pacific, in its opposition to Federal Realty's Motion, made absolutely no response to this argument.

^{7/} It is worth noting that Pacific's proposed "standard" is completely standardless. The Charles County standard, aside from being the law, is both workable and comprehensible. By contrast, Pacific's test is unmanageable, precisely because it is premised on a fictional duty to engage in joint-defense arrangements. See Pacific's Proposed Instruction No. 4 ("In making such allocation, you must attempt to recreate the division of defense costs between counsel hired solely to protect the Trustees and separate counsel hired solely to defend" the Trust.). Although parties sometimes enter into joint-defense agreements, there is no standard for determining the appropriate or likely content of such agreements. Pacific's test, by its nature, thus allows a jury to decide allocation issues in an unbounded manner.

notions of fairness and equity prohibit it as well. This Court thus should repudiate Pacific's proposed legal standard and adhere to the standard set forth in Charles County.

**III. PACIFIC'S PROPOSED JURY INSTRUCTION NO. 3 IS
UNNECESSARY, MISLEADING, AND FACTUALLY INACCURATE**

Pacific precedes its erroneous proposed instruction on the allocation standard with an equally inappropriate and disingenuous instruction (Defendant's Proposed Instruction No. 3). This instruction purports to inform the jury of certain "stipulations" between the parties as to the coverage of the insurance policy between Pacific and Federal Realty. The instruction makes up stipulations that do not exist, misstates Federal Realty's position in several important respects, and misleads the jury by highlighting matters that are irrelevant to the trial.

As an initial matter, Federal Realty never has entered into the "stipulations" set forth in the instruction. The entire instruction is based not on stipulations, but on Pacific's own (partially erroneous) reading of the deposition testimony and expert witness statement of James Rocap, a witness for Federal Realty. To state that the parties have "stipulated and agreed" to each of the matters listed in the instruction is to misrepresent the record.

Moreover, in several critical respects, Pacific has misstated Federal Realty's position respecting the damages to which the Trust is entitled. For example, the second sentence of

the instruction states that "the parties have stipulated . . . that the Pacific policy does not cover any expenses incurred in connection with the defense of any claims asserted against FRIT or other work done for FRIT itself." But a large proportion of such expenses would have been incurred in a suit against the trustees alone (for one thing, most of the claims asserted against the Trust also were asserted against the trustees), and Federal Realty certainly does claim these expenses. Indeed, even under Pacific's own view of the proper standard of allocation (see Defendant's Proposed Instruction No. 4), Federal Realty is entitled to some of these expenses. On a slightly more mundane level, paragraph (e) of the instruction states that the parties have stipulated that Federal Realty is not entitled to any expenses incurred in defending trustees on Count Six of the Second Amended Complaint. But as Federal Realty's expert explained, the lion's share of the work done to defend against Count Six is covered under the Charles County standard because the same work was necessary to defend the trustees against the principle fraud claim. See Deposition of James E. Rocap at 97-99.

Finally, the instruction will mislead and confuse the jury even to the extent that it lists items of legal service for which Federal Realty is in fact not claiming expenses. Given that Federal Realty is making no claim for these items, the Court has no reason to highlight them. These items are simply not in the case. If the Court wishes to review deposition testimony and

fairly instruct the jury as to each party's concessions, the Court will have to list the many items of service that Pacific's expert conceded are covered by the insurance policy (including, but not limited to, preparing the trustees for depositions and trial and defending their depositions, answering interrogatories to the trustees, attending the principal court hearings and the depositions of the plaintiffs and other key witnesses on the fraud claim, and defending against the punitive damage claim). Federal Realty has not requested that the Court undertake this task because focusing on such individual items of service is time-consuming and wasteful and is not the proper function of a jury instruction. It is sufficient that the Court properly instruct the jury on the standard of allocation and advise within that instruction in a balanced way that (1) any items of legal service that Federal Realty has conceded are not reasonably related to the defense of the trustees on a claim covered by the insurance policy should not be included as damages, and (2) any items of legal service that Pacific has conceded are reasonably related to the defense of the trustees on such claims should be included as damages. The lengthy, fact-specific, unbalanced, and inaccurate instruction proposed by Pacific serves no valid purpose and should not be given.^{8/}

^{8/} Pacific also has included, as Defendant's Proposed Instruction No. 5, an instruction on the burden of proof in this case. Although Pacific is correct that under Maryland law, the burden of proof is on the plaintiff, Pacific once again has proposed an unbalanced instruction that repeats the errors of its allocation instruction and departs from the standard instruction in ways transparently designed to

CONCLUSION

For the foregoing reasons, Federal Realty respectfully requests this Court to deny Pacific's Motion In Limine and to reject Pacific's proposed Jury Instructions. Federal Realty further requests this Court to rule that the appropriate legal standard for allocation of defense costs in this case is the standard set forth in Federal Realty's proposed Jury Instruction and that this proposed Jury Instruction shall be read to the jury as part of the Court's charge at the end of trial in the case.

Respectfully submitted,

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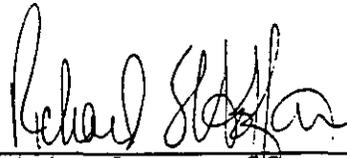
Dated: October 1, 1990

convey a pro-defendant bias. Federal Realty proposes that the Court give the standard Maryland instruction on the burden of proving a claim by a preponderance of the evidence. See Maryland Civil Pattern Jury Instructions (2d ed. 1984) 1:8(a).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum of Plaintiff Federal Realty Investment Trust in Opposition to Motion In Limine of Defendant Pacific Insurance Company Regarding the Applicable Legal Standard for Allocation was delivered by hand on the 1st day of October, 1990, to:

John R. Gerstein, Esq.
Eleni Constantine, Esq.
ROSS, DIXON & MASBACK
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Richard S. Hoffman

PLAINTIFF'S PROPOSED JURY INSTRUCTION ON
ALLOCATION OF FEES AND EXPENSES

In order to determine the amount of damages in this case, you must decide what portion of the total fees and expenses incurred in the ISM action was reasonably related to the defense of the trustees on claims covered by the insurance policy.

If Federal Realty has conceded that a particular fee or expense was not reasonably related to the defense of the trustees on claims covered by the insurance policy, you should not award that fee or expense to Federal Realty. Conversely, if Pacific has conceded that a particular fee or expense was reasonably related to the defense of the trustees on claims covered by the insurance policy, you should award that fee or expense to Federal Realty.

With respect to contested items, a fee or expense is reasonably related to the defense of the trustees on covered claims when an attorney engaged to defend a suit against only the trustees on only covered claims reasonably could have decided to perform the legal service for which the fee or expense was charged.

Thus, if a legal service provided in the ISM action could reasonably have been performed by an attorney defending a suit against only the trustees on only covered claims, Pacific is responsible for payment of that service.

If, however, a legal service provided in the ISM action could not reasonably have been performed by an attorney defending a suit against only the trustees on only covered claims, Pacific is not responsible for payment of that service.

In deciding whether a service was reasonably related to the defense of the trustees on covered claims, you should not consider whether such a service also aided in the defense of a claim not covered by the insurance policy. Likewise, you should not consider whether such a service also aided in the defense of a party not covered by the insurance policy -- here, Federal Realty. These matters are irrelevant under the governing law. An insurance company is obligated to provide all the insurance it has promised -- and an insured is entitled to receive all the insurance it has purchased -- even if this insurance also assists third parties. Thus, as long as an attorney defending a suit against only the trustees on only covered claims reasonably could have decided to perform an item of legal service, Pacific is liable for payment -- regardless of whether the service also benefited the defense of an uncovered party or the defense of an uncovered claim.

Sources: Continental Cas. Co. v. Board of Educ. of Charles County, 302 Md. 516, 489 A.2d 536 (Md. 1985); Nodaway Valley Bank v. Continental Cas. Co., 715 F. Supp. 1458 (W.D. Mo. 1989).

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