Circuit Court for Montgomery County
Case No. 376268V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 99

September Term, 2018

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

v.

THE FUND FOR ANIMALS, INC.

Meredith,
Kehoe,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 30, 2019

This insurance coverage dispute has been in litigation for over seven years and is before this Court for the second time. In the first appeal, we held that as a matter of law, based on evidence adduced at trial in the Circuit Court for Montgomery County, National Union Fire Insurance Company of Pittsburgh, Pa., Inc. ("National Union"), appellant/cross-appellee, was required to provide indemnity coverage to The Fund for Animals ("FFA"), appellee/cross-appellant, for FFA's settlement of a lawsuit brought against it by Feld Entertainment, Inc. ("Feld"). *Fund for Animals, Inc. v. Nat'l Union Fire Ins. Co*., 226 Md. App. 644 (2016) ("*FFA I*"). The Court of Appeals affirmed. *National Union Fire Ins. Co. v. Fund for Animals, Inc.*, 451 Md. 431 (2017) ("*FFA II"*).

On remand from *FFA II*, on the same evidence, the court entered judgment against National Union for $3,586,997.32 in damages, which was FFA's entire share of the settlement payment and its defense costs and prejudgment interest, less certain setoffs. National Union noted this appeal, and FFA noted a cross-appeal. At issue generally is whether the the court should have allocated FFA's settlement payment between a covered claim and a non-covered claim and whether the court properly quantified damages.

For the following reasons, we shall affirm the circuit court's judgment.

FACTS AND PROCEEDINGS[1]

FFA is a national non-profit organization dedicated to the protection of animals. In 2005, it affiliated with the Humane Society of the United States ("HSUS"). It operates

[1] We draw upon this Court's prior opinion in *FFA I* for the background facts.

animal sanctuaries and wildlife centers around the country and engages in lobbying and advocacy, including litigation, to advance its goals.

National Union issued a "Not-For-Profit Individual and Organization Insurance Policy" to HSUS that was in effect between January 1, 2007, and June 8, 2008 ("the 2007 Policy"). FFA is an "Additional Insured" on that policy. As relevant, Coverage C provides:

> This policy shall pay on behalf of the Organization [FFA] Loss arising from a Claim first made against the Organization during the Policy Period . . . and reported to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act of the Organization. The Insurer shall, in accordance with and subject to Clause 8, advance Defense Costs of such Claim prior to its final disposition.

"Loss" is defined in the 2007 Policy to include damages, judgments, settlements, pre- and post-judgment interest, and defense costs. "Loss" excludes amounts for which the insured is not "financially liable[.]" A Retention Clause in the policy provides that National Union only is liable for "the amount of Loss arising from a claim which is in excess of the Retention amount stated in Item 5(B) of the Declarations[.]" Item 5(B) states that there is a self-insured retention of $175,000 under Coverage C "for Loss arising from Claims alleging the same Wrongful Act or related Wrongful Acts[.]"

The genesis of this litigation is two related federal lawsuits in the United States District Court for the District of Columbia: one brought by FFA and others, as plaintiffs, under the Endangered Species Act ("ESA"), for alleged abuse of animal rights ("the ESA Case"), and one brought against FFA and others, as defendants, for alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and other state laws

("the RICO Case"). We set out the facts of these cases as relevant to the issues on appeal.

A. The ESA Case

In 2000, FFA, other animal rights organizations, and one Thomas Rider sued Feld, the owner of Ringling Brothers and Barnum & Bailey Circus ("Ringling Brothers"), for declaratory and injunctive relief, alleging that Ringling Brothers was mistreating Asian elephants in its circus, in violation of the ESA. Standing to sue under Article III of the federal constitution hinged upon allegations by Mr. Rider that for the two years he worked for Ringling Brothers as a barn man he suffered emotional distress due to the mistreatment of the elephants.

In 2001, the ESA Case was dismissed for lack of Article III standing. That ruling was reversed on appeal. *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003).[2] A bench trial in the ESA Case took place for six weeks in February and March of 2009. In December of 2009, the court issued a lengthy memorandum opinion and order, entering judgment in favor of Feld. The court concluded that neither Mr. Rider nor any of the organizational plaintiffs had established Article III standing. *Am. Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 677 F.Supp.2d 55, 91, 97-98 (D.D.C. 2009). It rejected Mr. Rider's

[2] Thereafter, FFA and the other plaintiffs dismissed their original action without prejudice and filed a new lawsuit making the same allegations against Feld and Ringling Brothers.

testimony in its entirety, finding that he was "essentially a paid plaintiff and fact witness who is not credible." *Id*. at 67. The court concluded that because none of the plaintiffs had standing to sue under the ESA, it lacked jurisdiction; and for that reason, it declined to reach the merits of whether Feld had violated the ESA in its treatment of the Asian elephants. Subsequently, the judgment was affirmed. *See Am. Society for Prevention of Cruelty to Animals v. Feld*, 659 F.3d 13 (D.C. Cir. 2011).

Thereafter, Feld moved for prevailing party attorneys' fees under a fee-shifting provision in the ESA. In March 2013, the district court granted the motion, finding that the ESA Case was "meritless, frivolous, and vexatious." *FFA I* at 653. The court directed the parties to submit written recommendations for further proceedings to quantify the attorneys' fees Feld should be awarded.

B. The RICO Case

On August 28, 2007, while the ESA Case was pending, Feld sued FFA and the other organizational plaintiffs in the ESA Case for violations of RICO and the Virginia Conspiracy Act.[3] "Feld alleged that the ESA organizational plaintiffs had engaged, and were continuing to engage, in illegal conduct in their prosecution of the ESA Case," including by bribing Mr. Rider to testify falsely that "he had suffered an emotional injury as a result of the alleged mistreatment of the Asian elephants[.]" *Id.* at 654. Feld asserted

[3] Feld had attempted to bring his RICO and state law claims within the ESA Case as a counterclaim, but its request to amend its answer was denied as untimely.

that the "actual damages" it was seeking were the "attorneys' fees, costs, and other expenses that [it] incurred in defending the ESA [Case]."

The RICO Case was stayed pending the resolution of the ESA Case. The stay was lifted in 2010, about a month after judgment was entered in favor of Feld in the ESA Case. Feld then filed an amended complaint in the RICO Case, adding HSUS and other defendants and common law claims for abuse of process, malicious prosecution, and maintenance and champerty. The core claim "was that the ESA organizational plaintiffs and their attorneys had conspired to bribe [Mr.] Rider to lie about his attachment to the elephants to give the ESA organizational plaintiffs standing to pursue, by litigation, their campaign to bring a halt to Ringling Brothers' use of Asian elephants in its circuses." *FFA I* at 655.

In March 2010, HSUS and its affiliates, including FFA, gave their insurance carrier notice of the RICO Case and demanded coverage under the National Union Policy for the 2010 term year ("the 2010 Policy"), which was substantially the same as the 2007 Policy. In May 2010, National Union, through its claim administrator, informed HSUS and FFA that, subject to a reservation of rights, it was "disclaiming coverage for both of them in the RICO Case under the 2010 Policy and under the 2007 Policy because the claim was made against [] FFA in 2007 and notice of the claim was not given during the 2007 Policy term." *Id*. at 655-56.

In February of 2014, FFA, the other defendants in the RICO Case, and Feld engaged in settlement negotiations. A global settlement was reached in May of 2014. Under the terms of the settlement agreement, Feld would receive $15.75 million in exchange for its dismissing, with prejudice, the RICO Case and the pending prevailing party attorneys' fees claim in the ESA Case. FFA and HSUS would pay $10.675 million of the $15.75 million settlement. Of that amount, FFA's share was $6.2 million.

C. The Coverage Case

Meanwhile, on September 6, 2012, FFA filed this Coverage Case against National Union, in the Circuit Court for Montgomery County. It alleged that National Union had breached the 2007 Policy by disclaiming coverage in the RICO Case based on late notice. From January 12 through 15, 2015, the Coverage Case was tried before a jury. FFA called four witnesses: Michael Markarian, its president; George Wade, the CFO of HSUS; Roger Kindler, General Counsel for HSUS; and Roger Zuckerman, a partner at the Zuckerman Spaeder law firm, which had defended FFA in the RICO Case and had negotiated the settlement on behalf of FFA.

Mr. Zuckerman recounted the strategic decisions made by lawyers with his firm in representing FFA. He opined that, for two independent reasons, "Feld's request . . . for legal fees [in the ESA Case] had virtually no impact on the settlement decision." First, Feld "would not succeed to any substantial degree" on its fee petition in the ESA Case. Because prevailing party fees awarded to a defendant under the ESA are intended to deter future meritless litigation, any fees awarded are "calibrated" to the financial resources of

the losing party. Taking into account FFA's annual income and expenses, Mr. Zuckerman estimated that its total liability for fees would not exceed $1.5 million.

Second, because the district court had ruled in favor of Feld based on lack of jurisdiction, not on the merits, FFA had a reasonable chance of prevailing on appeal on the ground that the court also lacked jurisdiction to award statutory prevailing party attorneys' fees. Mr. Zuckerman testified that for these reasons the "real risk" to FFA, and the impetus for the settlement, was "not the payment of legal fees to Feld in the [ESA C]ase[, i]t was the damages that Feld claimed in the [RICO Case.]" Although Mr. Zuckerman was of the view that FFA had a reasonable chance of prevailing in a trial in the RICO Case, the potential damages in the event of a defeat were too enormous to justify the risk of going to trial.

FFA introduced evidence about other insurance payments it had received. Before its 2005 affiliation with HSUS, FFA had its own liability insurance policies from American Empire Surplus Lines Insurance Company, OneBeacon Insurance Company, and their affiliates ("AESLIC/OneBeacon"). It kept that insurance after the affiliation. In November 2011, FFA sued AESLIC/OneBeacon for failing to provide coverage for the RICO Case. Ultimately, in September 2012, FFA and AESLIC/OneBeacon settled that dispute, which involved fifteen separate policies, in an agreement by which AESLIC/OneBeacon bought back the policies for $1.1 million.

FFA and HSUS also were insured by Travelers Property Casualty Company of American and the Charter Oak Fire Insurance Company ("Travelers"). In July 2014, they settled with Travelers for $5 million in exchange for a release of any claims arising out of the ESA and RICO Cases. They agreed to allocate the entire $5 million payment to FFA's $6.2 million share of the settlement with Feld so as to permit FFA to limit the liability it would need to carry on its books. The Travelers' settlement was subject to a claw-back provision requiring FFA to pay Travelers up to $2 million if and when it recovered from National Union.

Like Mr. Zuckerman, Mr. Markarian testified that it would cost millions of dollars to defend the RICO Case to verdict and therefore even though FFA was likely to prevail, it could not afford to litigate the case. He further testified that HSUS had paid FFA's $6.2 million share of the settlement in consideration for a loan to FFA of $1.2 million and FFA's agreement to apply the $5 million in other insurance proceeds it received to HSUS, in repayment of the settlement amount. (For that reason, as Mr. Markarian explained, FFA only carried a liability of $1.2 million on its books).

At the close of FFA's case, National Union moved for judgment on two grounds: 1) the evidence adduced by FFA proved that National Union had suffered actual prejudice, as a matter of law, from the late notice of the RICO Case; and 2) alternatively, FFA had failed to prove its damages with reasonable certainty. The court reserved on the motion.

National Union called one witness, Maureen Conboy, an assistant vice president with its claim administrator. She testified, as pertinent, that "the fees that . . . [Feld] . . . was claiming in the ESA [Case] [were] going to be the damages in the RICO Case."

At the close of all the evidence, National Union renewed its motion for judgment on both grounds. Ruling from the bench, the court granted National Union's motion for judgment, concluding that as a matter of law National Union had been prejudiced by the late notice of the claims against FFA in the RICO Case. Accordingly, the court did not reach the issue of damages.

D. The First Appeal (FFA I and FFA II)

On appeal from that judgment, this Court reversed, holding that as a matter of law National Union was not prejudiced by the late notice. We explained that "[t]he allegations of wrongdoing in the RICO Case were premised on the conduct of [] FFA and the other organizational plaintiffs in the ESA Case and the damages Feld was seeking [in the RICO Case] were the fees it had incurred and was continuing to incur in the ESA Case." *FFA I* at 668. We reasoned that although the judgment in favor of Feld in the ESA Case was prejudicial to National Union, there was no evidence that the *late notice of the RICO Case* prejudiced it because National Union had no right to control the litigation of the ESA Case. *Id*. at 668-69.

With respect to the proceedings on remand, we remarked in a footnote:

> Because . . . FFA satisfied its burden of proof on coverage, upon the failure of proof on National Union's late notice defense, . . . FFA was entitled to judgment in its favor as a matter of law on liability. If . . . FFA had moved for judgment, we would direct the circuit court to enter judgment in its

> favor on liability. . . . FFA did not move for judgment, however. If, on remand, . . . FFA moves for summary judgment on liability, the same result should obtain. *The adequacy of the evidence on damages is not before us on appeal and damages will need to be decided on remand*.

Id. at 669, n.12 (emphasis added).

As noted, National Union filed a petition for writ of *certiorari*, which was granted, and the Court of Appeals affirmed. *FFA II*. It held that, as a matter of law, National Union was not prejudiced by the late notice of the RICO Case and this Court "did not exceed its authority and abuse its discretion[] by instructing the trial court on remand to permit the filing and granting of a belated motion for judgment, even though such a motion was never filed at the time of trial." *FFA II* at 466.

E. Proceedings on Remand

On May 9, 2017, in the circuit court, FFA filed a motion for judgment on liability. As one would expect given the outcome of the First Appeal, National Union conceded liability for coverage. It argued, however, that its only responsibility for damages was for the settlement of the covered RICO Case, and not the uncovered ESA Case, and because FFA had not produced evidence showing how it had allocated "its share of the settlement payment between the non-covered ESA [Case] and the [covered RICO Case,]" FFA could not recover any damages. On May 17, 2017, the court held a hearing and granted judgment in favor of FFA on liability. The court directed the parties to submit additional memoranda on damages.

Thereafter, the parties filed motions for judgment on damages. National Union again argued that it was entitled to judgment on damages as a matter of law because FFA had failed to meet its burden to adduce evidence at trial supporting an allocation between the covered and non-covered claims.

FFA argued that it was entitled to $4,614,275 in damages, comprising its "settlement costs and defense costs, together with prejudgment interest." It maintained that allocation between the covered and non-covered claims was not required because, as National Union had conceded, the damages Feld had sought in the ESA Case (its prevailing party attorneys' fees), for which FFA did not have coverage, were subsumed within the damages Feld had sought in the RICO Case, for which FFA did have coverage.

Alternatively, FFA argued that if allocation were required, National Union had forfeited its right to demand allocation by breaching the 2007 Policy and refusing to participate in the settlement negotiations with Feld; or, at the very least, National Union had thereby assumed the burden to prove allocation. In any event, FFA asserted that it had met any burden to prove allocation through Mr. Zuckerman's testimony, that the ESA Case had "virtually no impact" on the decision to settle, and that it was the prospect of a large damages award in the RICO Case that posed an "existential threat" to FFA.

FFA maintained, moreover, that the policy definition of "Loss" that included any sums for which it was "financially liable" necessarily included any amounts it had agreed to pay in settlement, which would encompass amounts HSUS had paid on its behalf pursuant to a loan agreement. Although FFA did not contest that its damages would be

offset by other insurance payments it had received for the same "Loss," it argued that the set off should be the amount of the other insurance paid minus the costs and fees it had incurred in pursuing those insurance payments and Travelers' claw-back provision. In addition, it argued that the self-insured retention had been fully satisfied by HSUS and therefore did not apply to reduce its (FFA's) "Loss."

FFA calculated its damages as follows:

Component of Damages	**Amount**
1. Settlement costs	$6,200,000
2. Defense costs[4]	$1,100,000
3. Prejudgment interest	$475,397
4. Travelers' Net Credit	($2,701,039)[5]
5.AESLIC/OneBeacon Set Off	($460,082.90)[6]
Total	$4,614,275

National Union filed a reply and opposition. It disputed FFA's position that by not participating in the settlement negotiations, it forfeited its right to demand proof of allocation. It maintained that Mr. Zuckerman's testimony was insufficient to satisfy

[4] The parties had stipulated to the amount of the defense costs.

[5] This amount was calculated by subtracting FFA's attorneys' fees ($298,961) from its net recovery after accounting for the $2 million claw-back.

[6] This amount was calculated by deducting $639,917 in attorneys' fees from the $1.1 million AESLIC/OneBeacon settlement.

FFA's burden of proof on allocation because it was post-hoc and self-serving. National Union maintained that to the extent FFA had proven damages, it was not entitled to reduce the offsets attributable to other insurance payments by the fees incurred pursuing those payments, nor had the self-insured retention been satisfied by HSUS given that National Union's liability, if any, to HSUS still was being litigated in federal court.

On July 5, 2017, the court heard argument on the cross-motions for judgment and held the matter *sub curia*.

F. The Circuit Court's Opinion and Order

On February 15, 2018, the court issued a 29-page opinion and order, concluding that FFA was entitled to judgment in the amount of $3,586,997.32. The court explained that it was FFA's burden to prove the amount of the settlement "attributable to covered claims" with "'reasonable certainty.'" (quoting *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007)). Relying upon *Perdue Farms, Inc. v. Travelers Casualty & Surety Co. of America*, 448 F.3d 252, 264 (4th Cir. 2006), the court identified the following factors as relevant to allocation: "'(1) the underlying complaint and settlement agreement, (2) the intent of the parties entering the settlement, and (3) the relative merits of the underlying claims.'"

Addressing the first factor, the court noted that the fee petition in the ESA Case and the complaint in the RICO Case "allege the same wrongdoing and seek almost identical damages – that is attorneys' fees arising from the meritless ESA Case." The RICO Case did not allege a "separate cause of injury, but rather a different theory for

measuring damages." It pointed out that, as the Court of Appeals had explained in its opinion in the First Appeal, because the damages Feld sought in the RICO Case were the same attorneys' fees it had incurred in defending the ESA Case, "each dollar that Feld received in settlement was one less dollar Feld could recover in the ESA Case." *FFA II* at 458.

Turning to the intent factor, the court found that the evidence adduced at trial showed "that, at the time the parties entered into the Feld Settlement, FFA's concern was almost exclusively about the potential exposure in the RICO Case." The court credited Mr. Zuckerman's testimony that he believed that FFA's exposure was minimal in the ESA Case and that FFA could prevail on appeal if any attorneys' fees were awarded to Feld. In the RICO Case, by contrast, Feld sought $75 million in damages, plus $15 million in additional fees, and Mr. Zuckerman estimated that FFA and the other organizational plaintiffs had even odds of prevailing, making the settlement value $45 million. Furthermore, Mr. Zuckerman had advised FFA that the costs of litigating the RICO Case to a verdict would be "astronomical[.]"

Finally, with respect to the "relative merits" of the claims, the court reiterated that the "two claims [were] part and parcel."

The court concluded that FFA had satisfied its burden on the issue of allocation and found, "based on the similarity between the two [cases], the testimony presented at trial, and the fact that the RICO Case was built upon the findings in the ESA Case, the entire settlement [was] covered under the 2007 Policy."

The court rejected National Union's argument that FFA did not sustain a "Loss" of $6.2 million, as that term was used in the 2007 Policy, because HSUS had paid its share of the settlement. It reasoned that the loan agreement between HSUS and FFA, about which Mr. Markarian had testified, established that FFA was "financially liable" to HSUS for that amount of the settlement payment.

The court then turned to the insurance setoffs. FFA did not dispute that National Union was entitled to a credit for the AESLIC/OneBeacon settlement proceeds. As noted above, it argued, however, that the $1.2 million credit should be reduced by the litigation expenses it had incurred to recover it. The circuit court concluded that no such reduction was warranted under Maryland law and that, under the terms of the 2007 Policy, the full $1.2 million payment from AESLIC/OneBeacon would be credited.

There was likewise no dispute that the Travelers' payment should be applied to reduce National Union's liability. The parties had stipulated that, after accounting for the claw-back provision, the amount of the credit was $3 million. FFA also requested a deduction from that amount for its litigation expenses, which the court denied.

With respect to the self-insured retention, the court ruled that because whether National Union is liable for coverage to HSUS remains the subject of pending federal litigation, the $175,000 retention had not been exhausted by HSUS's settlement payment to Feld and, therefore, FFA was responsible for it. If the federal court later were to determine that National Union is liable to HSUS for coverage under the 2007 Policy, then FFA may seek to recoup the self-insured retention from HSUS.

The court calculated FFA's total loss to be $7,861,997.32, comprising its $6.2 million share of the settlement plus $1.1 million in defense costs in the RICO Case, as stipulated by the parties, and $561,997.32 in prejudgment interest. The court deducted from that amount the $3 million Travelers set-off, the $1.1 million AESLIC/OneBeacon set-off, and the $175,000 self-insured retention, to reach $3,586,997.32 in damages. It entered judgment against National Union for that amount.

We shall include additional facts as pertinent to the issues.

QUESTIONS PRESENTED

National Union presents three questions[7] for review on appeal and FFA presents five questions for review on cross-appeal.[8] We have combined and rephrased their questions as follows:

[7] The questions as posed by National Union are:

> 1. Did the trial court err in finding that allocation of the settlement amount between covered and noncovered claims was not required?
>
> 2. Did the trial court err in granting FFA's motion for judgment and awarding the entire settlement amount as damages when (a) it was undisputed that the settlement resolved both the covered and noncovered cases and (b) the evidence was sufficient for the jury to have found that a portion of the settlement amount was to resolve the noncovered claim?
>
> 3. Did the trial court err in denying National Union's motion for judgment when FFA failed to meet its burden of introducing evidence sufficient to provide a non-speculative basis from which the jury could allocate the settlement between covered and noncovered claims?

[8] The questions as posed by FFA are:

(continued…)

Appeal

I. Did the trial court err by ruling that allocation of the settlement payment was not required, making National Union liable for the entire payment, minus setoffs?

Cross-Appeal

I. Did the trial court err by allowing National Union to challenge the allocation of the settlement proceeds even though it failed to participate in the settlement negotiations or by ruling that that failure did not shift the burden to National Union to prove an exclusion from coverage of some portion of the proceeds?

(…continued)

1. Whether National Union forfeited its right to complain about allocation of settlement proceeds between the covered and uncovered action by refusing to participate in the settlement of those actions.

2. Assuming National Union did not forfeit its right to complain about settlement of the underlying RICO Action, whether by refusing to participate, National Union assumed the burden of establishing an exclusion from coverage as a result of allocation of some portion of the settlement proceeds to the uncovered action which arose out of the same set of facts.

3. Whether under a so-called "excess other insurance clause," a policyholder is required to sue its other insurance companies to obtain from them settlement funds and then credit all of those funds against the defendant-insurers's policy even when the policyholder incurred enormous attorneys' fees to obtain those settlement funds.

4. Whether settlement proceeds from co-insurers which contest coverage constitute "valid and collectible insurance."

5. Whether The Fund for Animals had to incur the $175,000 self-insured retention under the 2007 Policy when the retention already had been exhausted through the same underlying settlement payment by the Humane Society of the United States, the other member of insured "Organization: defined in the 2007 Policy.

II. Did the trial court err by ruling that the setoffs for the AESLIC/OneBeacon and Travelers' insurance settlements should not be reduced by the sums FFA expended to obtain those insurance settlements?

III. Did the trial court err by ruling that the self-insured retention had not already been exhausted by HSUS?

For the following reasons, we answer National Union's question in the negative. Our resolution of that issue obviates the need to address the first cross-appeal question. We answer the remaining cross-appeal questions in the negative.

APPEAL

I.

Allocation of Settlement Between Covered and Non-Covered Claims

On appeal, National Union contends the trial court's allocation decision was incorrect. First, it maintains that allocation of damages between covered and non-covered claims was required as a matter of law and the court should have granted its motion for judgment on damages because "even when the facts and inferences are weighed in FFA's favor, there was no evidence upon which the jury could have determined allocation." Second, and alternatively, National Union asserts that allocation "should have gone to the jury," *i.e.*, that a new jury should have been empaneled to decide damages, and the trial court "impermissibly resolved disputed facts and inferences in favor of FFA, the moving party with the burden of proof."

FFA responds that the trial court properly granted its motion for judgment on damages because the only inference that reasonably could be drawn from the evidence at

trial was that Feld had been seeking to recover the same damages in the non-covered ESA Case and the covered RICO Case and, therefore, the entire amount FFA paid to settle those cases was covered under the 2007 Policy. Alternatively, FFA maintains that National Union "participated willingly" in the hearing in which FFA affirmatively waived its right to a jury trial on damages and the court made clear that it was interpreting this Court's mandate in the First Appeal to require it (not a jury) to decide issues of law and fact on damages based on the record in the jury trial that had taken place, but voiced no objection and accordingly waived any right it may have had to a jury trial on damages. (Relatedly, in its cross-appeal, FFA argues that if we were to conclude that allocation was required, the trial court should have ruled that National Union forfeited any right to challenge the ruling on allocation by not participating in the settlement negotiations, or at least in that situation the burden of proof on allocation should have shifted to National Union.)

We hold that the trial court correctly granted FFA's motion for judgment because on the facts adduced at trial National Union was liable for FFA's entire share of the settlement payment as a matter of law. We explain.

The 2007 Policy obligated National Union to indemnify FFA for any "Loss arising from a Claim . . . for any actual or alleged Wrongful Act of the [HSUS or FFA]." As explained, a "Loss" includes amounts paid in settlement of a "Claim" if the insured is "financially liable" to pay the claim. The settlement agreement between the parties resolved the only outstanding claim in the ESA Case – Feld's claim for prevailing party

attorneys' fees – and all outstanding claims in the RICO Case. As we have explained, the settlement agreement required HSUS and FFA to pay Feld $10.675 million, of which FFA was responsible to pay $6.2 million.

Maryland law is clear that "[u]nder the typical liability insurance policy, the insurer has a duty to indemnify the insured, up to the limits of the policy, for the payment of a judgment based on a liability claim which is covered." *Mesmer v. Md. Auto. Ins. Fund*, 353 Md. 241, 257 (1999). There is no dispute that any judgment that would have been entered in the RICO Case was covered under the 2007 Policy and that the settlement of that case amounted to a "Loss" to the extent that FFA was liable for the payment. Likewise, the parties agree that any liability for fees FFA might incur in the ESA Case was not covered by the 2007 Policy. Neither party points us to any Maryland state case law addressing the allocation of a settlement payment resolving covered and non-covered claims and our research reveals none.

Courts in other jurisdictions have addressed the question whether, and if so how, an insurer's responsibility to pay a settlement by its insured that resolved covered and non-covered claims must be allocated. In *Perdue Farms*, 448 F. 3d at 252,[9] Travelers insured Perdue under a Pension and Welfare Fund Fiduciary Responsibility Insurance Policy that covered claims arising from violations of the Employee Retirement Income Security Act of 1974 ("ERISA") but did not cover claims arising from violations of

[9] *Perdue Farms* has been cited with approval in *dicta* by the Court of Appeals. *See Bd. of Trs., Cmty. Coll. of Baltimore Cnty. v. Patient First Corp.*, 444 Md. 452, 479 n.16 (2015).

federal and state wage and hour laws. Employees of Perdue brought a class action against it in federal court, alleging that Perdue had violated the Fair Labor Standards Act ("FLSA") and various state wage and hour laws by not paying them for time spent putting on, taking off, and cleaning required protective clothing. They further alleged that in doing so Perdue had violated ERISA by crediting less time toward their eligibility for retirement plans and/or by not making contributions to their retirement plans based upon the wages they should have earned for that time. Travelers undertook Perdue's defense, subject to a reservation of rights. After the class action was certified and various subclasses were created, Perdue settled the case for $10 million. The settlement agreement did not allocate that sum between the covered ERISA claims and non-covered wage and hour claims.

When Travelers refused Perdue's demand for indemnification of the entire settlement amount, Perdue filed suit. It sought to recover the full settlement amount minus that portion of the settlement the parties agreed had been paid to employees who only had asserted wage and hour claims and for attorneys' fees attributable only to those claims. The district court granted summary judgment in favor of Perdue, ruling that it was entitled to indemnity for the entire settlement amount because it was "potentially

liable" for the covered ERISA claims and the non-covered wage and hour law claims were reasonably related to those claims.[10]

On appeal, the Fourth Circuit reversed. While recognizing that there may be cases in which the "nature of the . . . litigation" will necessitate full indemnification of a settlement of both covered and non-covered claims, it concluded that the record in the Perdue class action litigation did not justify that result. *Id*. at 261. It emphasized that the class action plaintiffs were "pursuing relief for distinct injuries under statutes that govern separate aspects of the employer-employee relationship" and the non-covered wage and hour claims were a "not insignificant part" of the settled litigation. *Id*. at 261-62. The court vacated and remanded, instructing the district court to make a "rough apportionment of settlement amounts among covered and non-covered claims." *Id*. at 263. It did not "pass upon the appropriate guideposts" to govern the apportionment analysis but identified several non-exclusive factors that other courts had considered when faced with similar allocation issues: the "complaint and settlement agreement"; "the intent of the parties entering the settlement"; and "the relative merits of the underlying claims." *Id*. at 264.

Cases from other jurisdictions illustrate situations in which as a matter of law allocation of a settlement of covered and non-covered claims was not required. In *In re Feature Realty Litigation*, 634 F. Supp. 2d 1163 (E.D. Wash. 2007), USF&G issued an

[10] Travelers filed a counterclaim seeking reimbursement of defense costs attributable to non-covered claims. The district court ruled that it was not entitled to reimbursement. That ruling was upheld on appeal.

excess policy that covered the City of Spokane ("City) for losses sustained by a developer for delays in permitting. After the developer sued the City for a statutory violation and for tortious interference, the developer and the City settled the case for $5.5 million. USF&G then brought a declaratory judgment action against the City seeking a determination of its duties under the excess policy, including its duty to indemnify.

The claim for a statutory violation was not covered by the policy but the claim for tortious interference potentially was covered. Neither the settlement agreement nor the consent judgment entered upon the settlement specified how liability was allocated between the two claims. The court applied Washington state law, which holds that, generally, when "a judgment or settlement includes several claims, some of which are covered and some of which are not covered, allocation of the judgment or settlement is allowable when there is a reasonable means of doing so." *Id*. at 1172. The court determined that "given the undisputed facts of this case, there is no question of fact and there are no reasonable means of segregating any portion of the $5.5 million global settlement amongst the potentially covered and non-covered theories of liability." *Id*. It explained that the case did not "involve a settlement covering distinct causes of action related to different categories of covered and non-covered types of acts, injuries, or losses." *Id.* at 1172-1173. The claims were based on "the same factual core" of wrongful acts that "caused a single loss and a single claim for damages:

> Although the settlement resolved multiple theories of liability, it is undisputed that both counts were based on the same covered acts and the same harm arising from those acts. [The developer's] statutory cause of

> action was not an independent cause of injury, but rather a theory for imposing liability.

Id. at 1173.

For those reasons, the court concluded that "because there is no evidence that the liability under the statutory claim was any more extensive than the liability under the tortious interference claim, no burden of allocation exists as the damage calculation encompassed only covered items of damages." *Id*. The court distinguished *Perdue*, explaining that it "involve[ed] multiple separate injuries each constituting a 'wrongful act' under the policy and some of them covered and some of them not." *Id*.

Likewise, in *Carolina Casualty Insurance Company v. Nanodetex Corporation*, 733 F. 3d 1018, 1026 (10th Cir. 2013), the court concluded in a diversity case that allocation of a judgment entered against the insured was not "necessary or appropriate." The insured had been sued for malicious abuse of process, a newly recognized tort in the state of New Mexico, and for tortious interference. The jury returned a verdict of $1 million on the malicious abuse of process claim, $1 in nominal damages on the tortious interference claim, and $1 million dollars in punitive damages, without specifying which claim those damages pertained to.

The Carolina policy excluded coverage for malicious prosecution claims. After the judgment was affirmed on appeal, Carolina brought a declaratory judgment action in federal court seeking a determination that its policy did not cover any of the judgment. The district court granted its motion for summary judgment.

The Tenth Circuit reversed. It explained that the newly recognized tort of malicious abuse of process combined the torts of malicious prosecution, which was excluded under the policy, and abuse of process, which was not excluded; and the new tort could be proven using either cause of action as a theory of recovery. The court recognized that, "[o]rdinarily, when a damages award could be based on both a covered theory of liability and an excluded theory, the court must allocate the damages between the two theories (or rule against the party with the burden of persuasion on the issue when apportionment is impossible.) *Id.* It held that allocation was not "necessary or appropriate" in that case, however, because the two theories of liability "were based on a single injury" and "[a]ny damages awarded under an excluded malicious-prosecution theory of liability would. . . have to have been totally duplicative [of the damages awarded under the covered theory of liability]; it would have been for all or a part of the same damages." *Id*. at 1026-27.

We return to the case at bar. At every stage of this litigation, until the instant appeal, National Union has taken the position that the damages Feld sought in the RICO Case were the same as the monies Feld was attempting to recover as prevailing party attorneys' fees in the ESA Case. National Union's sole witness at trial in the Coverage Case – Ms. Conboy – testified that the monies sought in the two actions were identical. At the close of all the evidence at trial, National Union argued in support of its motion for judgment on the actual prejudice/late notice issue that "it made no difference that the judgment in question was entered in the ESA Case, not in the RICO Case, because . . .

the damages Feld was seeking in the RICO Case were the fees it had incurred in defending the ESA Case[.]" *FFA I* at 660 (emphasis added). It likewise argued in its brief in the First Appeal that "National Union offered evidence that Feld's attorney's fees in the ESA [Case] . . . constituted the damages in the [RICO Case.]" Not surprisingly, this Court (and later the Court of Appeals) concluded in the First Appeal that "the damages Feld was seeking [in the RICO Case] were the fees it had incurred and was continuing to incur in the ESA Case." *FFA I* at 668; *see also FFA II* at 458 ("[T]he allegations in the RICO Case were premised on the findings entered against FFA in the ESA Case and the damages were fees incurred and continued to be incurred in the ESA Case"). And on remand after the First Appeal, in its motion for judgment on damages, National Union again asserted that in the RICO Case, "Feld sought its ESA Litigation fees as damages."

To be sure, Feld amended its complaint in the RICO Case to include additional claims for which it could have sought damages in addition to the attorneys' fees it had incurred and was continuing to incur in the ESA Case. Nevertheless, as National Union has conceded throughout this litigation until now, and as the facts adduced at trial (including the testimony of National Union's sole witness) made plain, in the RICO Case Feld was seeking to recover from FFA the exact same attorneys' fees it was seeking to recover from FFA in the ESA Case. To the extent that, as National Union now puts it, "the damages sought [in the ESA Case and the RICO Case] were different," that is only because in the covered RICO Case, Feld could have recovered its attorney's fees in the

ESA Case and more, while in the ESA Case, it only could have recovered those same attorney's fees.

The bottom line, then, is that *all* the damages potentially recoverable in the ESA Case were potentially recoverable in the RICO Case. In the two cases, Feld simply was pursuing different theories of liability to recover the same attorneys' fees. In the ESA Case, Feld was seeking prevailing party attorneys' fees under a fee-shifting provision of the ESA, *see* 16 U.S.C. § 1540(g)(4), whereas in the RICO Case, Feld was seeking the same attorneys' fees, trebled, for alleged RICO and state law violations. Moreover, the underlying wrongs giving rise to the incurred attorneys' fees as damages were based on the same operative set of facts, *i.e.*, FFA's fraudulent attempt to establish standing in the ESA Case.

The *Perdue* case stands in stark contrast to the case at bar. There, the two settled claims were distinct in nature and the damages sought were neither identical nor overlapping. Perdue was facing liability for damages on those distinct claims, only some of which were covered. A "rough apportionment" of the settlement payment therefore was necessary, reasonable, and feasible. This case, by contrast, is like *Feature Realty* and *Carolina Casualty*, in which the same damages for the same core wrongdoings were sought through covered and non-covered claims.

As a matter of law, allocation of the settlement payment was not required between the covered RICO Case and the non-covered ESA Case. Accordingly, the trial court properly granted FFA's motion for judgment on damages. [11,12]

[11] National Union argues that the fees incurred in the ESA Case "already had been awarded against FFA" in that case, making them unrecoverable in the RICO Case as a matter of law. In National Union's view, it follows that the settlement of the claim for those fees only could be attributable to the non-covered ESA Case. That is incorrect. Although Feld's petition for prevailing party attorneys' fees had been granted in the ESA Case, the fees had not been quantified and the district court had directed the parties to "submit recommendations" on that issue. *FFA II* at 446. That had not occurred when the parties began the negotiations that resulted in the settlement. Because there was not a final judgment on fees in the ESA Case, Feld still could withdraw its petition and choose to pursue that recovery in the RICO Case, which, considering the availability of treble damages, could have proven more lucrative.

[12] Even if allocation were required, which it was not, we would affirm the judgment. On the question of process, National Union waived any right it had to a jury trial on allocation of damages by its conduct at the July 5, 2017 hearing. At the outset, the trial judge made clear that he understood this Court's remark that "damages will need to be decided on remand" to mean that it was to "enter judgment on the damages based upon the evidence presented at [the 2015 jury] trial." Counsel for FFA agreed, stating: "That's how we read it Your Honor, . . . that's what we presumed the Court would be doing when we filed these motions [for judgment]." The trial judge subsequently reiterated that he thought "we're all agreeing I gather that what the mandate says is that I have to enter the judgment based upon the evidence that was presented during the course of the case." Again, counsel for FFA made clear that he agreed, stating that "another jury trial doesn't make any sense here" and adding that FFA had "no problem with the Court finding any facts that need to be found to perform an allocation[.]" (He emphasized, however, that FFA's primary position was that allocation was not required as a matter of law.) Throughout these colloquies, National Union's counsel remained silent. In the face of the trial judge's statement that he understood that the parties agreed that the court would determine the allocation of damages based on the record at the jury trial, National Union was obligated to make known to the court any objection it had to proceeding in that manner. Instead, by her silence, she implicitly consented to a bench trial on allocation and waived any right to jury trial. *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied intentional relinquishment of a known right."); Md. Rule 2-325(f) (continued…)

CROSS-APPEAL[13]

II.

Other Insurance Set-Offs

The 2007 Policy provides, in pertinent part:

> Such Insurance as is provided by this policy shall apply only as excess over any valid and collectible insurance. This policy shall be specifically excess of any other policy pursuant to which any other Insurer has a duty to defend a Claim for which this policy may be obligated to pay Loss.

As discussed, before bringing this Coverage Case against National Union, FFA settled its primary policy coverage claims against AESLIC/OneBeacon for $1.1 million and against Travelers for $5 million, subject to a claw-back agreement in the Travelers policy. The trial court ruled that both insurance settlements, less the claw-back, applied to reduce National Union's liability to FFA.

FFA contends the trial court erred in crediting these insurance settlements in full instead of deducting from the insurance settlements the attorneys' fees FFA incurred to obtain them. It relies solely upon this Court's decision in *Kramer v. Emche*, 64 Md. App.

(…continued)
("An election for trial by jury may be withdrawn only with the consent of all parties not in default.").

On the merits, the trial court's findings were not clearly erroneous. Mr. Zuckerman's testimony established that the impetus for entering into the settlement was FFA's exposure to treble damages in the RICO Case, coupled with its anticipated defense costs, not its exposure to prevailing party attorneys' fees in the ESA Case. The court also made the non-clearly erroneous finding that the damages sought in the two cases were the same.

[13] As noted, given our holding on allocation in National Union's single appeal issue, it is not necessary for us to address FFA's cross-appeal issue I.

27 (1985), to advance this contention. National Union responds that *Kramer* is inapposite, and we agree.

In *Kramer*, owners agreed to sell their real property to the buyers for $86,000 and to take back a mortgage of $60,000. The lawyer who handled the settlement failed to timely record the mortgage and the deed and before they finally were recorded, two deeds of trust were recorded against the property. The sellers sued the purchasers, the lawyer, and the trustees on the deeds of trust for negligence, fraud, and other causes of action. Eventually, the property was sold at foreclosure.

Before trial, the sellers settled with the lawyer for $80,000. The settlement agreement designated that the full $80,000 would be used to pay identified sums, which excluded the balance due on the mortgage. These identified sums included the sellers' $35,000 in attorneys' fees and $3,150 in litigation expenses, $39,000 for forbearing to pursue a claim for punitive damages, $1,000 for forbearing from complaining to the Attorney Grievance Commission, and $1,850 for agreeing not to go to the media. Although the settlement agreement contained general release language, it also stated that the sellers were not joint tortfeasors and that only the lawyer was being released.

The sellers prevailed in a bench trial against the buyers (who had defaulted) and the trustees on the deeds of trust. The court ordered that the sellers' mortgage be put in first position over the deeds of trust and therefore the sellers would be entitled to receive awarded $83,247, plus interest, of the net proceeds from the foreclosure sale (which exceeded that sum). The court refused to credit the $80,000 received in the settlement

with the lawyer against the judgment, instead giving effect to the allocations in the settlement agreement. The trustees appealed, arguing that the sellers had obtained an unlawful double recovery.

This Court reversed and remanded. We held that the conduct of the lawyer, the buyers, and the trustees had combined to cause an injury to the sellers and that, moving the sellers' mortgage to the first position over the deeds of trust while allowing them to keep the full amount of the settlement received from the lawyer amounted to a double recovery. We explained, however, that the sellers were entitled to recover the reasonable attorneys' fees they had incurred in pursuing their claim against the lawyer as part of the settlement of that claim because "mere recovery of the amount due them under the mortgage [would] not fully compensate them for their injury." *Id.* at 42. The amount of the settlement with the lawyer that was attributable to these reasonable attorneys' fees was to be determined on remand.

This case is not like *Kramer*, a tort case in which several actors contributed to an injury sustained by the plaintiff and there was a settlement with one actor. Here, National Union insured FFA under an insurance contract for excess coverage, over other "valid and collectible insurance." FFA's settlements with AESLIC/OneBeacon and Travelers, in compromise and release of its indemnification claims against them under its primary policies, were valid and collectible other insurance that triggered National Union's liability for indemnification in excess to that insurance. The National Union insurance contract did not call for the other insurance settlements to be reduced by the sums paid in

attorneys' fees to obtain the settlements, so as to expand its excess coverage. Furthermore, National Union played no role in the coverage disputes between FFA and its other insurers that preceded the initiation of this Coverage Case and did not contribute to FFA's costs in recovering under its primary policies.

We further conclude that the common fund doctrine does not apply in the context of this insurance coverage dispute. That doctrine applies when a plaintiff seeks relief on behalf of a class of plaintiffs and obtains a "'common fund for the benefit of persons other than himself[.]'" *Garcia v. Foulger Pratt Dev., Inc*., 155 Md. App. 634, 661 (2003) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Under those unique circumstances, a plaintiff may recover his or her fees against the "common fund" recovered. *Id*. FFA's settlement with its other insurers were not benefits for a class.

III.

Self-Insured Retention

As discussed, the 2007 Policy included a $175,000 self-insured retention applicable to a loss arising from the same wrongful acts or related wrongful acts. FFA contends that because HSUS also was insured under the 2007 Policy, was sued by Feld in the RICO Case, and paid Feld damages in excess of $175,000, the self-insured retention was exhausted and FFA was not required to satisfy it a second time.

"Only payments made that are covered by the policy should be applied to satisfy [a] . . . self-insured retention." Windt, Allan D., 3 *Insurance Claims & Disputes* § 11:31 (6th ed.). Thus, HSUS's payment to Feld only would satisfy the self-insured retention if

National Union is liable to indemnify HSUS for the settlement of the RICO Case. When the trial court entered its judgment, National Union's liability to HSUS was being litigated in federal court and had not finally been determined. For that reason, the self-insured retention had not been exhausted by HSUS's payment to Feld and the trial court's ruling that FFA must satisfy it was not in error. If National Union subsequently is determined to be liable to indemnify HSUS, FFA may have a claim for contribution against HSUS.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANT AND APPELLEE.