

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUL 20 2004

JAMES R. LARSEN, CLERK
DEPUTY
RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

**ORDER REGARDING MOTIONS
RELATED TO SETTLEMENT OF
PLAINTIFFS' CLAIMS**

On May 27, 2004, the Court heard motions of the City, Foster Pepper, and Walker Parking Consultants/Engineers, Inc. ("Walker") related to a settlement of Plaintiffs' claims. (Ct. Recs. 1829, 1824, 1802.) All parties were represented by counsel. At the commencement of this hearing, counsel for the non-settling Defendants (hereinafter, "NSDs") advised the Court that they had reached an agreement to stipulate to Bar Orders for both Walker and Foster Pepper, the effect being that Walker, Foster Pepper, and NSDs will not seek contribution or indemnity from one another. Those Stipulations were later filed and Bar Orders were entered for Walker and Foster Pepper. (Ct. Recs. 1891 & 1892.) After reviewing the pleadings and listening to the oral advocacy of counsel for various parties, the Court concludes that the Walker payment is reasonable, or alternatively, that at the very least, it is not unreasonable and that the Foster Pepper payment is reasonable. While the Court is inclined to grant the City's Motion that no NSD is discharged by the corresponding

1 release and discharge of Foster Pepper, in light of the City's recent
2 election to pursue contribution, the Court will defer a final ruling
3 until after the conference on July 21, 2004, as is more fully explained
4 hereafter.

5 **A. Background**

6 The City reached an agreement with Plaintiffs and Intervening
7 Plaintiffs to settle all of their claims. As part of that agreement,
8 Walker agreed to pay \$1,490,000.00, the balance remaining from its
9 liability insurance policy, to settle the claims of the Plaintiffs and
10 cross-claims of the City against it. Foster Pepper also agreed to pay
11 \$1,300,000.00 toward that settlement in return for its release and
12 discharge.

13 Plaintiffs' claims against Walker and Foster Pepper include a
14 Securities Exchange Act of 1934 claim, a Washington State Securities Act
15 (W.S.S.A.) claim as a "seller" per R.C.W. § 21.20.430(1), and two common
16 law claims: fraud and negligent misrepresentation. The City's remaining
17 cross-claims against Walker are for breach of the Consultant Agreement
18 between them and for contractual indemnity for any damages its sustains
19 as a result of Walker's work under that contract. As part of the
20 agreement, the City will release Walker and dismiss these cross-claims.

21 Also, as part of this agreement, Walker seeks a reasonableness
22 determination under R.C.W. § 4.22.060. That statute provides:

23 A release, covenant not to sue, covenant not to enforce
24 judgment, or similar agreement entered into by a claimant and
25 a person liable discharges that person from all liability for
26 contribution, but it does not discharge any other persons
liable upon the same claim unless it so provides. However, the
claim of the releasing person against other persons is reduced
by the amount paid pursuant to the agreement unless the amount
paid was unreasonable at the time of the agreement in which

1 case the claim shall be reduced by an amount determined by the
2 court to be reasonable.

3 *Id.* § 4.22.060(2). Walker, having paid the balance of its liability
4 policy, seeks the discharge from all liability for contribution and
5 indemnity from the NSDs. Alternatively, Walker seeks a court finding
6 that its settlement is not "unreasonable," a finding that would satisfy
7 the language of the Settlement Agreement.

8 The City also seeks a determination that Foster Pepper's payment is
9 reasonable, whether only for the common law claims or if the Court
10 determined it necessary, under W.S.S.A. It also moves for an order that
11 no NSDs are discharged by the Foster Pepper settlement, an action
12 designed to prevent Prudential from claiming that the legal effect of the
13 release and discharge of its legal advisor during its underwriting of
14 these bonds is a release of it. Foster Pepper joins in the City's
15 request for a reasonableness determination of its payment as part of the
16 settlement with the Plaintiffs.

17 **B. Issues**

18 The City and Walker each take the position that a reasonableness
19 determination is required, that such a determination is not premature as
20 the NSDs contend, and that on the merits, the amounts paid by Foster
21 Pepper and Walker are reasonable as measured by the nine factors first
22 enunciated by the Washington State Supreme Court in *Glover v. Tacoma*
23 *General Hospital*, 98 Wash. 2d 708, 717 (1983), and reaffirmed in *Besel*
24 *v. Viking Insurance Company of Wisconsin*, 146 Wash. 2d 730, 738 (2002).
25 Foster Pepper supports the City's position regarding the reasonableness
26 of its payment.

As the River Park Square Defendants ("RPS") state, reasonableness

1 hearings were the product of the Tort Reform Act of 1981 which created
2 a right of contribution among jointly and severally liable defendants.
3 R.C.W. § 4.22.060. They point out that such hearings became virtually
4 unnecessary after the Tort Reform Act of 1986 which imposed a general
5 rule of several liability for cases involving multiple tortfeasors with
6 two exceptions: cases involving tortfeasors acting in concert and fault
7 free plaintiffs. R.C.W. §§ 4.22.070(1)(a)&(b). RPS assert that there
8 is virtually no evidence that the Defendants acted in concert, hence no
9 need for a reasonableness hearing on that basis. RPS points to the total
10 amount to be paid as part of the Settlement Agreement, approximately
11 \$31,465,000.00 which includes both the Walker payment and the City's
12 buyout of the bonds held by the Plaintiffs and Intervening Plaintiffs.
13 However, only Walker seeks release from Plaintiffs and the City. The
14 City will either take an assignment from the Plaintiffs and Intervening
15 Plaintiffs to pursue recovery from NSDs or will seek discharge of all
16 Defendants and seek contribution. The legal effect of either remains to
17 be determined at some future date when the City has elected its
18 position.¹

19 RPS argues in the alternative that of the Plaintiffs' four claims:
20 violation of the 1934 Securities Exchange Act of 1934 and Rule 10(b)(5),
21 violation of W.S.S.A., and common law fraud and negligent
22 misrepresentation, only the last claim requires a reasonableness hearing.

24 ¹ By letter dated June 25, 2004, the City notified the Court and
25 other parties that it had filed a Notice of Election (to seek
26 contribution) and a motion to dismiss most of the Plaintiffs' and
Intervenor Plaintiffs' claims except for those related to Walker and
Foster Pepper which are the subject of earlier motions. This order of
the Court deals with them.

1 RPS notes that under PSLRA, 15 U.S.C. §78u-4(f)(7)(B), the amount of any
2 verdict is reduced by the proportionate share of the settling defendant
3 or the settlement amount paid. Therefore, no reasonableness hearing is
4 necessary thereunder. As for W.S.S.A., it is argued that there is no
5 precedent for requiring a reasonableness hearing for settlement of claims
6 thereunder, in particular, because of the language of R.C.W. § 21.20.430.
7 However, Foster Pepper notes that an Oregon court did make reference to
8 that state's statutory provisions governing multiple tort-feasors in
9 analyzing a settlement under the Oregon Securities Statute (O.R.S. §
10 59.115). To the extent that the securities statutes of both states are
11 similar, this may imply the possibility of a similar approach in
12 Washington on settlement and contribution issues not otherwise addressed
13 in R.C.W. § 21.20.430(1).

14 The City does not believe that a reasonableness determination is
15 required under W.S.S.A. and Walker believes that it is.

16 **C. Discussion**

17 The case has been vigorously contested on all issues by all parties.
18 These motions are no exception. The Court addresses the motions
19 regarding Foster Pepper and Walker together.

20 While there are different positions on the degree to which Foster
21 Pepper was involved and the extent of its duties to the public, it was
22 the last professional brought into the financing process. It has raised
23 significant defenses to the allegations against it and while nothing is
24 ever certain in a jury trial, there remained appreciable risks for both
25 it and the Plaintiffs on both its liability and Plaintiffs' damages.
26 This last statement is true as well of Walker, in particular of the
City's cross-claims against it.

1 It is certain that R.C.W. § 4.22.020 applies to the common law
2 claims against both Foster Pepper and Walker. While less certain, the
3 Court will assume without deciding that it also applies to R.C.W. §§
4 21.20.010 and 21.20.430. The reasonableness of the settlements under
5 R.C.W. § 4.22.020 is determined by trial courts utilizing the non-
6 exclusive *Glover* factors which are:

7 [T]he releasing party's damages; the merits of the releasing
8 person's liability theory; the merits of the released person's
9 defense theory; the released person's relative faults; the
10 risks and expenses of continued litigation; the released
11 person's ability to pay; any evidence of bad faith, collusion,
12 or fraud; the extent of the releasing person's investigation
13 and preparation of the case; and the interests of the parties
14 not being released.

15 *Besel v. Viking Ins.*, 146 Wash. 2d 738, citing *Glover v. Tacoma Gen.*
16 *Hosp.*, *supra*.

17 **1. Releasing Party's Damages**

18 The various positions on damages expressed in support of and in
19 opposition to these motions indicate a wide range of potential damages:
20 from \$0.00 to more than \$30,000,000.00. While the Court takes no
21 position on where in this range damages of the Plaintiffs and Intervening
22 Plaintiffs or the City on its cross-claims against Walker might fall, the
23 Court concludes that there is risk aplenty for all and therefore, an
24 understandable incentive to settle.

25 **2. Merits of the Releasing Person's Liability Theory, Merits of**
26 **the Released Person's Defense Theory, and the Released Person's**
Relative Fault

Foster Pepper believes it could defeat any liability under any
theory of Plaintiffs and Intervening Plaintiffs. To be sure, no one can
predict what a jury or the Ninth Circuit would say about its role here.

1 It might be correct in its view that it had no role as a "seller" under
2 W.S.S.A., that its duty ran only to Prudential, the underwriter, rather
3 than the public, and that its role was decidedly limited by virtue of a
4 narrow engagement letter, a role that it performed competently; or not.
5 Additionally, there is a viable position that the Plaintiffs and
6 Intervening Plaintiffs bought these bonds not because of the Offering
7 Statement but because they were almost certain to be paid either by the
8 Parking Garage revenue stream or if not, then from City parking meter
9 revenue. Accordingly, there is considerable room for conjecture and
10 that, of course, after all of the zealous advocacy on either side of
11 these issues, is a sound reason to compromise these claims.

12 As to Walker, it argues that it had no role in drafting or issuing
13 the Offering Statement, no contact of any kind with the Plaintiffs or
14 Intervening Plaintiffs, and only a limited role for the City. On the
15 City's cross-claims, it makes a strong argument that with all of the
16 City's actions following receipt of its report to it including the
17 involvement of other experts such as Coopers & Lybrand and its own staff,
18 a jury would not likely find any basis for relieving the City from the
19 consequences of its actions. There is little, if any, quarrel with these
20 positions in the responses to this motion where other *Glover* points are
21 emphasized and certainly no agreement with them either. For the same
22 reasons as cited above, settlement is a reasonable compromise of the
23 claims and cross-claims against Walker.

24 **3. Risks and Expenses of Continued Litigation**

25 The pre-trial costs of litigating this case are likely to have been
26 several million dollars, if not more. The projected expenses for trial
litigation for Walker alone were \$152,000.00, all of which would reduce

1 the amount of liability insurance available to pay any damages awarded
2 against it. If one assumes \$200,000.00 for the same expenses for the
3 Plaintiffs, Intervening Plaintiffs, City, and Foster Pepper, trial
4 expenses saved by compromising these claims enables the dollars saved to
5 be paid in settlement.

6 **4. Released Person's Ability to Pay**

7 Walker has agreed to pay \$1.49 million, the remainder of its
8 professional liability policy in settlement and has no other assets
9 readily available to pay any amount beyond that amount according to sworn
10 submissions filed. No other party contests those facts nor the
11 supporting declarations nor seeks a continuance to undertake discovery.²

12 Foster Pepper is situated differently. It makes no representations
13 about the limits of its liability coverage nor of its assets beyond such
14 coverage. It simply states that though it is confident of a favorable
15 outcome, it compromised these claims against it for sound business
16 reasons and its analysis of possible exposure.

17 **5. Evidence of Bad Faith, Collusion or Fraud**

18 No party asserts any concern about the proposed settlement on these
19 bases.

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22 ² General Counsel for Walker filed a declaration with a copy of
23 Walker's liability insurance policy attached thereto, (Ct. Rec.
24 1817). Essentially, his declaration stated that \$1,490,000.00 is the
25 remaining balance of Walker's insurance coverage, a fact not disputed
26 by any party. Additionally, Walker's Chief Financial Officer filed a
declaration to the effect that Walker has no other assets, (Ct. Rec.
1818). No party disputed that declaration nor sought discovery to
challenge it.

1 **6. Extent of the Releasing Party's Investigation and Preparation**
2 **of the Case**

3 The Plaintiffs and Intervening Plaintiffs have vigorously litigated
4 their claims throughout the pretrial period demonstrating extensive
5 investigation and preparation. The Court observes that all counsel have
6 zealously contested all issues on behalf of all parties. Accordingly,
7 the Court is certain that the releasing parties and released parties as
8 well as the NSDs each have a reliable basis for the cost-benefit analysis
9 of these proposed settlements.

10 **7. The Interests of the NSDs**

11 The Court believes that the NSDs' interests are protected by the
12 pertinent federal and state statutes and that they will receive the
13 appropriate offset based upon the reasonableness of these two settlements
14 and the determination as to the reasonableness of the entire settlement.

15 **8. Conclusion**

16 The Court, having reviewed the pleadings of the parties on these
17 issues and the law cited therein, finds that the settlement paid by
18 Walker in the sum of \$1.49 million dollars is reasonable or
19 alternatively, is not unreasonable and that the settlement amount paid
20 by Foster Pepper in the sum of \$1.3 million dollars is reasonable.

21 **D. Non-discharge of any NSDs**

22 As clarified in its Reply (Ct. Rec. 1883), the City asks the Court
23 to rule as a matter of law that the settlement and release of Foster
24 Pepper does not discharge any other defendant from liability for the
25 Plaintiffs' and Intervening Plaintiffs' claims.

26 R.C.W. § 4.22.060(2) provides:

 A release, covenant not to sue, covenant not to enforce judgment,

1 or similar agreement entered into by a claimant and a person liable
2 discharges that person from all liability for contribution, but it
3 does not discharge any other persons liable upon the same claim
4 unless it so provides.

5 Different NSDs oppose the request for different reasons. The issue
6 primarily involves Prudential who engaged Foster Pepper. It takes the
7 position that the City seeks an advisory opinion because the City has not
8 announced whether it will elect assignment of Plaintiffs' and Intervening
9 Plaintiffs' claims or contribution. As previously noted, as of June 25,
10 2004, it has chosen to pursue contribution, (Ct. Rec. 1893), and
11 therefore, the Court regards the issue as ripe. It also argues that a
12 trier of fact might find that it is liable only based on the conduct of
13 Foster Pepper. However, in this case on the eve of trial after extensive
14 discovery and motion practice, Prudential cites to no claim in the record
15 by any party that it is vicariously liable in whole or part for the
16 conduct of Foster Pepper, nor does it cite to any discovery response by
17 any party that would support a jury instruction on that issue. If, after
18 three years of intense litigation, no party has claimed that Prudential
19 is vicariously liable for the acts of Foster Pepper and no evidence
20 thereof is identified by any party, why would the Court submit that issue
21 to the jury? What is evident is that the City did not explicitly agree
22 that the settlement and release of Foster Pepper acted to discharge any
23 party.

24 However, in light of the recent election of the City to pursue
25 contribution, the Court will defer ruling on the issue of whether the
26 discharge of Foster Pepper acts to discharge Prudential in order that
Prudential, or such other NSDs who as may wish to do so, may for no more
than a total of ten (10) minutes state positions on this issue given the

1 current posture of the case during the July 21, 2004, conference. The
2 City may have a like amount of time to respond.

3 **Accordingly, IT IS HEREBY ORDERED:**

4 1. Walker Parking's Motion for Bar Order, (Ct. Rec. 1799), is
5 **GRANTED.**

6 2. Walker Parking's Motion for Determination fo Reasonable
7 Settlement, (Ct. Rec. 1802), is **GRANTED.**

8 3. Foster Pepper's Motion for Bar Order and for Certification of
9 entry of Final Judgment, (Ct. Rec. 1824), is **GRANTED.**

10 4. The City's Motion for Determination of Reasonableness of foster
11 Pepper's Settlement, (Ct. Rec. 1829), is **GRANTED.**

12 5. A ruling on the City's Motion for Finding of Non-Discharge of
13 Non-Settling Defendants, (Ct. Rec. 1833), is **WITHHELD IN ABEYANCE.**

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter
15 this Order and to furnish copies to counsel.

16 **DATED** this 20th day of July 2004.

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20 EDWARD F. SHEA
21 United States District Judge
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