IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PREMIER PARKS, INC. (n/k/a Six Flags, Inc.), a Delaware corporation, Plaintiff,	)	
v.	)	C.A. No. 02C-04-126-PLA
TIG INSURANCE CO., a Texas corporation, Defendant.	)	

Submitted: July 28, 2006
Decided: September 21, 2006

UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. **GRANTED**.

UPON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. **DENIED**.

Richard L. Horwitz, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware and Rikke Dierssen-Morice, Esquire, Faegre & Benson, Minneapolis, Minnesota, Attorneys for Plaintiffs.

Carmella P. Keener, Esquire, Rosenthal Monhait & Goddess, P.A., Wilmington, Delaware and Thomas J. Judge, Esquire, Thompson Loss & Judge LLP, Washington, D.C., Attorneys for Defendants.

ABLEMAN, JUDGE

This is an ongoing declaratory judgment action, now before the Court on cross motions for summary judgment to resolve the counterclaims to the complaint. Plaintiff, TIG Insurance Company ("TIG"), seeks a declaration that TIG is, as a matter of law, only liable to pay an allocated share of a global settlement negotiated and entered into by its insured, Six Flags, Inc. ("Six Flags") in a class action civil rights lawsuit (the "class action").[1] The class action alleged that Six Flags engaged in discriminatory practices at its Los Angeles Magic Mountain amusement park in violation of California statutes and common law, by employing racial profiling to detain and search persons for security purposes on the basis of race, color, national origin, or physical appearance. The complaint also asserted a number of tort causes of action in connection with the alleged discriminatory practices.

I. Contentions of the Parties

TIG alleges that at least two, and at most six, of the twelve total claims against Six Flags are not covered under its policy. Therefore, if the claims are properly weighted, TIG submits that it is responsible for no more than 42 percent of the total settlement amount.[2] Because the settlement agreement did not allocate the damages as between covered and non-covered

[1] Six Flags and the class action plaintiffs agreed to a payment of $5.625 million for a global settlement of all claims. Six Flags also stipulated to certain additional injunctive relief under the agreement, for which it is bearing the entire cost. That portion of the settlement is therefore not at issue here.
[2] *See* Docket 134, p. 9-10.

claims, and because TIG and Six Flags cannot even agree which claims are covered, let alone in what amounts, TIG requests that this Court (1) hold TIG liable only for covered claims, and therefore allocate the settlement; and (2) decide, as a matter of law, which of the asserted causes of action in the class action are, or are not, covered under the policy. TIG further contends that if an allocation cannot be accomplished, it should not be liable for even the covered claims. Therefore, TIG submits that it is entitled to summary judgment.

In response, Six Flags argues that TIG's coverage position comes too late. If TIG desired an allocation of the settlement by claim, it should have directed the attorneys negotiating the settlement on behalf of Six Flags, or its own counsel, who attended nearly every mediation session, to request an apportionment of the claims during the settlement process. In addition, Six Flags maintains that there is no logical way to apportion the settlement, due to the complexity of the lawsuit. Although the claims arose from the same factual core, not all class action plaintiffs alleged all of the same causes of action,[3] and in none of the theories of liability were the damages exclusive as to the other claims. As a result, during settlement negotiations, counsel

[3] Not all plaintiffs alleged all the torts set forth in the complaint, which are the claims upon which Six Flags and TIG tend generally to agree are covered under the policy. This is because the class action plaintiffs alleged a number of different theories of liability, none of which were mutually exclusive as to the other claims.

for Six Flags never parsed the claims nor were any of them valued individually.

As set forth in greater detail hereafter, the Court holds that it cannot reasonably be expected to perform a post-settlement allocation of the class action claims. TIG's request for the Court to do so, now that the settlement has been finalized, would require the Court to reenact the settlement negotiations after the fact, and attempt to divine what the parties had in mind when they finalized the global agreement. Given the complexity of the lawsuit, affecting potentially 9,000 to 15,000 claimants, who asserted a total of twelve different causes of action, the task of allocating this global settlement would require a Herculean effort on the part of the Court. In light of TIG's ongoing disregard for the interests of its insured, which will be discussed below, the Court will not at this late juncture perform an allocation that could and should have been accomplished by TIG. Accordingly, TIG is responsible for indemnifying Six Flags for the total amount of the negotiated settlement as determined by its applicable coverage period.[4]

In connection with its stance on indemnification, TIG also seeks a ruling that the attorneys fees incurred in defending the class action lawsuit and negotiating the settlement are not covered under the policy. It argues

[4] TIG is responsible for 58 percent of the settlement amount because 58 percent of the claimants identified during the settlement negotiations were allegedly injured during TIG's policy period. Docket 148 at 1.

that, rather than accepting representation by the law firm hired by TIG to defend against general negligence claims, Six Flags hired a law firm specializing in Justice Department investigations and civil rights class actions, without TIG's express consent. Specifically, TIG seeks a ruling that it is not liable to pay attorney's fees associated with the work performed by Wilmer Cutler & Pickering ("Wilmer Cutler") and Rintala, Smoot, Jaenicke & Rees ("Rintala Smoot") to defend and coordinate the class action with a U.S. Justice Department investigation that was then in progress, presumably spurred by the class action allegations. TIG contends that its chosen law firm, Prindle Decker & Amaro ("Prindle Decker"), had already been retained to handle the class action litigation, and that Wilmer Cutler's involvement was both redundant and unnecessarily expensive.

Six Flags, on the other hand, maintains that TIG acquiesced in the retention of Wilmer Cutler. Although the claims administrator for TIG indicated that he did not believe that TIG would be willing to pay for two law firms, the matter was never firmly resolved, with the issue left in abeyance for months. Both the claims administrator and TIG failed to maintain any contact with Six Flags with respect to the counsel selection issue, and never specifically communicated whether or not TIG would cover the Wilmer Cutler fees.

In addition, Six Flags submits that, although Prindle Decker usually handled Magic Mountain's general litigation needs, which tended to consist of individual negligence and tort claims, both the subject matter and the size of the class action litigation were beyond the scope of Prindle Decker's realm of expertise, as well as its staffing ability.

In the final analysis, the controversy in this litigation is directly attributable to the failure of an insurance company to pay attention to the needs of its insured, at a time when the insured required not only active interest, but active involvement. TIG's indifference and apathetic attitude regarding the litigation against Six Flags are responsible for the inability of the Court to apportion the settlement amount, as well as its decision to require it to cover all of Six Flags' attorney's fees. Under TIG's proposed rubric, Six Flags would essentially have been unrepresented in potentially devastating litigation, and the Court would be relegated to a seat at the settlement table, years after the fact. This position is plainly untenable.

II. Procedural Posture

This action was initially filed in this Court by TIG, seeking a declaratory judgment on the coverage of *Williams v. Six Flags*, not a class action suit but one alleging racially-motivated torts on behalf of five plaintiffs. Shortly after that complaint was filed by TIG, Six Flags

counterclaimed for declaratory judgment relief to determine the extent of TIG's duty to indemnify Six Flags for the settlement amount in *Armendaraz v. Six Flags*, the class action lawsuit alleging racial discrimination which is at issue in these motions.[5] The counterclaim included a count to determine TIG's liability for legal fees incurred by the law firm that Six Flags had hired, Wilmer Cutler.

TIG's declaratory judgment claim against Six Flags with regard to the *Williams* action was decided by this Court in March of 2004 by Order granting summary judgment in favor of Six Flags. TIG and Six Flags now submit cross motions for summary judgment on the issue of TIG's duty to indemnify and defend Six Flags with respect to the *Armendarez* action.

III. Statement of Facts

In June of 2000, Eddie Williams and five other plaintiffs filed suit against Six Flags in Maryland for a number of allegedly race-motivated torts, including assault, battery and false imprisonment, by Six Flags security personnel when a dispute arose regarding whether Williams' daughter was tall enough to be allowed on a certain amusement park ride (the "*Williams* action"). Trial was held during the last days of October 2001, resulting in a jury award of $1 million in compensatory damages and $1.5 million in

[5] Both *Williams* and *Armendarez* are explained in more detail in the Statement of Facts section, *infra*.

punitive damages. That award then became the subject of this declaratory action, wherein TIG sought to have this Court allocate the $1 million in compensatory damages for purposes of indemnification under the TIG policy. On its motion for summary judgment, TIG contended that its policy covered only the false imprisonment claim, and that the jury award should be allocated by the Court such that TIG be held liable only for that claim.

In a thorough and well-reasoned Opinion by Judge Slights ("*TIG I*"), this Court declined to conduct such an allocation, noting that TIG knew that coverage issues would arise after a verdict. Although it submitted some jury interrogatories, it failed to request interrogatories that would have required the jury to allocate the damages between the individual claims. The Court thus had no logical basis upon which to assess the jury's purpose when it awarded the lump sum damages. Accordingly, because the entire sum awarded by the jury could have been for a single covered count, the Court had no choice but to find the entire award covered under the TIG policy.[6]

One year after the *Williams* action was filed, in June of 2001, Armando Armendarez and a number of other plaintiffs[7] filed a class action complaint against Six Flags (the "class action" or "*Armendarez* action") in

[6] *TIG Ins. Co. v. Premier Parks, Inc.*, 2004 WL 728858 (Del. Super. Ct. Mar. 10, 2004).
[7] Initially, five separate class action complaints were filed. Four of those actions were consolidated with the *Armendarez* action. The plaintiffs filed a single master complaint November 27, 2001, less than a month after the *Williams* jury award.

Los Angeles, California. It is the resolution of this action that is the subject of the motions now before the Court. The *Armendarez* complaint alleged that Six Flags' security personnel engaged in a number of discriminatory practices in violation of the plaintiff's civil and privacy rights, as well as several resultant torts. Specifically, the *Armendarez* plaintiffs claimed that Magic Mountain Theme Park, apparently in an attempt to reduce gang activity within the park, employed racial profiling to detain, question, search and/or deny admission to the park. The plaintiffs also alleged that a number of torts arose from the alleged profiling, including assault and battery, false imprisonment, intentional infliction of emotional distress, and malicious prosecution. In all, the *Armendarez* plaintiffs alleged twelve causes of action against Six Flags' security practices at Magic Mountain.

Six Flags immediately tendered defense of the *Armendarez* action to TIG, which, in response, sent Six Flags reservation of rights letters, indicating that TIG would defend the action but reserving its right under the insurance contract to "obtain an allocation of damages between covered and uncovered claims in any future judgment, settlement, arbitration, mediation or similar disposition." The letters similarly reserved TIG's rights with respect to the defense costs, and indicated that Six Flags had the right to

consult an attorney at its own expense.[8] TIG then assigned the cases to Monte Machit ("Machit") of Prindle Decker, the law firm that customarily handled Magic Mountain's litigation needs in general negligence claims. Machit, as well as Prindle Decker, had significant experience in defending amusement parks against personal injury and a variety of general negligence actions. No evidence has been presented that either Machit or Prindle Decker had experience with class action disputes, or with racial discrimination claims, but the Magic Mountain management reassured Six Flags executives that the park's security practices had already been upheld in other court challenges, and had been further refined in consultation with several civil rights organizations.[9]

James Coughlin ("Coughlin"), Six Flags' general counsel, testified that initially he was only "mildly troubled" by the *Armendarez* case, and only because of the class action aspect of it.[10] He testified that he felt secure with Six Flags' position and was reassured by Magic Mountain management's account of how the security practices had been developed. By November of that year, however, Coughlin was becoming increasingly concerned about the seriousness of the class action. The jury in the *Williams* action had just returned a verdict of $2.5 million, allegedly for racially

[8] Docket 135, Exh. 4, p. 6.
[9] Docket 140, Exh 1, p. 50-51.
[10] Docket 143, Exh. 5, p. 57-58.

motivated torts against only five guests. Coughlin testified that he was "flabbergasted" by the verdict, and suddenly realized "the emotional impact allegations of race and racial discrimination can have on a jury and the results can be, you know, devastating."[11] The magnitude of the verdict concerned Coughlin, who observed, "[I]f that lawsuit is worth two and a half million dollars, what is a whole class of plaintiffs of an indeterminate amount, what's that lawsuit worth[?]"[12]

To make matters worse, within only a few days after the verdict was returned, on November 7, 2001, Coughlin received a letter from the United States Department of Justice ("DOJ"), informing him that the DOJ had received information related to the discrimination alleged in the *Armendarez* action, and that it would be investigating Six Flags' security practices under Title II of the Civil Rights Act. The letter set off warning bells for Mr. Coughlin, who noted, "this is two months after 9/11, and for them to be taking their resources and conducting an investigation meant that this was a very serious matter."[13]

In response to the impending DOJ investigation, Coughlin began looking for attorneys who specialize in DOJ civil rights investigations to defend Six Flags. After seeking referrals and recommendations, Coughlin

[11] *Id.* p. 60.
[12] Docket 153, Exh. 5, p. 78-79.
[13] Docket 130, Exh. 14, p. 63.

chose Stephen Preston ("Preston") of the Washington, D.C. firm of Wilmer Cutler. Preston was an attractive choice, having spent three years as Deputy Attorney General at the DOJ, and reportedly "a hands-on litigator" with not too high visibility. Coughlin immediately flew to Washington, D.C. to discuss the DOJ investigation with Preston. There he also met with one of Preston's partners, Juanita Crowley ("Crowley"), a specialist in class action and civil rights litigation. After discussing the matter with Preston and Crowley, Coughlin became increasingly alarmed when he learned that he could no longer rely on the assurances he had from the previous litigation over Magic Mountain's security practices, or from the civil rights community's involvement in the development of those practices. He was advised that these factors would have little applicability for the current DOJ investigation or the class action. He also began to realize that it would be strategically wise to involve Wilmer Cutler in both the DOJ investigation and the class action litigation. As Coughlin discussed the two cases with Preston and Crowley, it became apparent that "these were two forums for the same case"[14] because "[t]here's a complete identity of issues."[15] Coughlin would later discover that the DOJ investigation was likely instigated by the class action plaintiff counsel, possibly in an attempt to bolster the case.

[14] *Id.* p. 71.
[15] *Id.* p. 66.

Coordination of the defense of the class action with the DOJ investigation would thus be necessary for the successful defense of both. Moreover, as Coughlin put it, "it would be a waste for two sets of lawyers to completely duplicate each other's efforts."[16]

This did not mean that Coughlin necessarily wanted Wilmer Cutler to completely replace Prindle Decker. Wilmer Cutler would require local counsel in California to defend the class action in any event. Indeed, there had been previous occasions during which specialized counsel had been retained to consult on the defense of particularly complex, high-profile matters. Around the same time as the *Williams* litigation, Six Flags settled a case in Chicago involving injury to a young girl's toe. While the case was not nearly as complex, the demand was high. Accordingly, K&K, TIG's policy administrator, and Six Flags brought in more experienced special counsel to advise the settlement negotiations, after both the insured and K&K had become dissatisfied with the efforts of the law firm that it usually retained.[17]

A few weeks later, in December of 2001, Coughlin and Six Flags' risk manager, Walter Hawrylak, flew to Fort Wayne, Indiana to meet in person with Dave Sherman ("Sherman"), the administrator of their TIG policy.

[16] *Id.*
[17] *Id.*, Exh. 1, p.61.

Sherman, who was employed by K&K, the third party administrator for TIG, was Coughlin's point of contact for TIG. The purpose of the trip was to discuss outstanding claims issues with Sherman, but in particular to discuss the importance of the DOJ investigation, and what coverage might exist.

Coughlin testified that his working relationship with Sherman was extremely collegial and collaborative. Sherman gave Six Flags a great deal of leeway in administering the account, and took seriously its opinions and requests for defense counsel. Sherman also testified that K&K had previously approved counsel specifically requested by Six Flags, and that if Six Flags was dissatisfied with counsel, Sherman would seriously consider the matter and act accordingly. This responsiveness by K&K resulted from a recognized agreement between K&K and Six Flags, due in large part to the considerable premiums paid by Six Flags.[18] K&K also acknowledged that

[18] Docket 177, Exh. A. Interestingly, this circumstance became a point of contention during oral argument. The email memorializing the informal agreement produced for the Court is a response by K&K to an inquiry by TIG regarding "why we are allowing Premier Parks to select counsel" and asking whether "some sort of marketing agreement exists with Premier Parks that allows Premier Parks to select defense counsel." K&K's response indicated that the agreement was "an informal, handshake concession predicated on the huge premium the account was paying and perhaps as a condition precedent to obtaining the account." During oral argument, counsel for TIG produced another email response from K&K indicating that "Premier Parks do not select counsel nor have they ever been given the impression that they could. When the account was first written in 1997 I met with the General Counsel for the organization and he told me he suspected many of the parks were too friendly with defense counsel and asked that [I] bust up any good ole' boy situations that I found."

The email exchange reflects one of the more confusing aspects of dealing with Six Flags/Premier Parks. That is, Six Flags is a corporate entity that runs a number of amusement parks throughout the United States. Each amusement park has its own "park management," which interfaces with Six Flags Corporate, located in Oklahoma. As James Coughlin testified, each park is managed very differently, with some park managers maintaining more independence from Corporate than others: "[C]ertain of our parks are very free with information to Corporate, or more specifically me, you know, you hear from certain managers all the time, may hear I have this issue and then you have other parks that like to, you know, they

the agreement was likely a condition precedent to obtaining the Six Flags account. TIG was informed of this agreement by email in late October of 2001. While TIG questioned the agreement, there is no evidence of record that TIG ever took any measures to modify or revoke it.

In keeping with the collegial nature of the relationship between Coughlin and Sherman, the issue of the DOJ investigation and the class action first came up in an informal discussion in a hallway at the time of the Fort Wayne meetings. During that conversation, Sherman indicated that he would have to check on whether the DOJ investigation would be covered. When Coughlin expressed his desire that Wilmer Cutler take the lead in coordinating the two actions, as well as the lead on the class action, if necessary, Sherman replied that he did not think that TIG would be willing to pay for two lead lawyers on one case. Both Sherman and Coughlin testified that, after that informal conversation, the matter was left unresolved.

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think of themselves as standalone businesses and they can deal with their issues." Docket 140, Ex. 1, p.53. As a result, each park had its own ideas about how Corporate should manage issues the individual park faced. For example, the Magic Mountain management was pushing Coughlin to hire its choice of attorney, which Coughlin was reluctant to do. *Id*. The account with TIG and K&K was set up by Six Flags Corporate, paid out of their corporate headquarters in Oklahoma, and the defense of individual cases was orchestrated by Coughlin. *Id*. at 54-5.

With these facts in mind, it becomes apparent that the two emails, one indicating that Premier Parks had negotiated permission to select counsel, and the other indicating that Premier Parks "do not select counsel" are both correct. Six Flags Corporate was paying the TIG premiums for all of its amusement parks, and maintained control of the legal defense for all parks, together with the right to select counsel for its parks. When the account was set up, Six Flags Corporate (by way of the General Counsel) indicated to K&K that it was concerned that the individual parks had been exercising too much control over their own legal representation, and that K&K should not permit interference with a function reserved for the corporate office.

K&K, and thereby TIG, then went "radio silent." Coughlin would not hear anything further from K&K on the issue of whether the DOJ investigation or the Wilmer Cutler attorneys fees would be covered for the next eight months. Coughlin testified that he left a voicemail for Sherman sometime in early 2002. Finally, in April of 2002, Coughlin sent a letter to Sherman indicating that he did not feel that Prindle Decker had the experience in civil rights or class action lawsuits to defend the class action effectively. He also defended Wilmer Cutler's higher fees, noting "any firm that [does] possess such expertise, such as Wilmer Cutler, would of course have billing structures in excess of those of our outside counsel in ordinary matters."[19] Still, Coughlin received no reply. He next saw Sherman in May of 2002. When he inquired about payment of Wilmer Cutler's bills, he was told, "[i]t's out of my hands."[20] Coughlin testified that K&K was usually very responsive, and that he would have expected to hear something back, especially in the event that Wilmer Cutler was unacceptable as lead counsel.

Despite repeated attempts to elicit a response from TIG, Coughlin heard nothing. Coughlin faxed copies of the Wilmer Cutler invoices to TIG several times, but received no response. When TIG sued Six Flags in this Court for an allocation of the *Williams* verdict, Six Flags counterclaimed for

[19] Docket 140, Exh. 1, p. 109.
[20] *Id.*, p. 129.

indemnification of the Wilmer Cutler fees. Even this legal maneuver did nothing to spur action from TIG. It was not until August of 2002, eight months after Coughlin received notice of the DOJ investigation and met with Sherman in Indiana, that Coughlin received an email from Kenneth Jensen ("Jensen"), a claims administrator at TIG. In that email, Jensen indicated that he had spoken with Sherman, and that Sherman recollected telling Coughlin at the December meeting that TIG would not pay for two law firms. Moreover, Jensen notes, it appears that Wilmer Cutler began billing in November, before the meeting with Sherman, thus indicating that Six Flags had retained the law firm prior to obtaining approval from K&K or TIG. On August 30, 2002, Jensen again emailed Coughlin, stating that TIG would not indemnify Six Flags for the Wilmer Cutler invoices. He reasoned that, because Wilmer Cutler had been retained prior to consultation with TIG, their fees would not be covered.

Meanwhile, Wilmer Cutler attorneys were having their own problems receiving local counsel support from Prindle Decker. As early as December 14, 2001, frustrated Wilmer Cutler associates emailed Preston regarding outstanding requests that had not been satisfactorily addressed by Machit. Indeed, Machit had failed to provide such basic information as the legal descriptions of the elements of the claims contained in the class action

master complaint, the relevant state statutes of limitations, a master list of all class action civil rights cases filed against Six Flags in California, and the scheduling orders for the class action. Only a few months later, Machit left Prindle Decker, with no forewarning and no explanation either to Six Flags or to Wilmer Cutler. Remaining to assume responsibility was Machit's associate, Mike Vicencia ("Vicencia"), who was clearly overwhelmed. One of the Wilmer Cutler associates noted, "[H]e was just so busy, it was impossible to get him, and he was in trial and … he was very up-front about it, [but] it was just hard to deal with."[21] In March of 2002, Vicencia communicated to Wilmer Cutler attorneys that Six Flags could not expect any greater assistance from Prindle Decker in the next coming months, and that he, Vicencia, was also hoping to leave Prindle Decker shortly for a judgeship.

As a result of Prindle Decker's inability to provide the necessary support, Wilmer Cutler hired another California firm, Rintala Smoot, to act as local counsel. This firm was specifically selected because one of the partners had expertise in California class action litigation. Despite the potentially devastating exposure presented by the class action, and Prindle Decker's admitted difficulty in keeping up with the pace of the litigation,

[21] *Id.*, Exh. 11, p. 112.

TIG continued to remain silent. When TIG did finally respond to Six Flag's repeated inquiries, its response was, "if you can't have two [law firms], you … certainly can't have three."[22] In fact, Jensen, who is not legally trained, wondered, "why do you need one – both firms involved in the same action? Why can't the class action firm keep the Washington, D.C. firm advised of what's going on in California? It didn't make sense to me. You don't need three layers of counsel, certainly."[23]

By October of 2002, the class action litigation had been stayed for mediation. On October 3, 2002, Coughlin wrote to Jensen, acknowledging that while TIG and Six Flags clearly had differences of opinion regarding indemnification of attorneys fees, a fast resolution of the case would be beneficial to both parties, particularly since Wilmer Cutler had estimated that defense costs could run to $5 million, just for the initial phase of opposing class certification. Coughlin continued to keep TIG apprised of the litigation, sending a copy of the joint submission for the mediator on October 8, 2002 and updates regarding Six Flags representations to the mediator on October 17, 2002. On October 18, 2002, Six Flags informed TIG that it would like it to authorize a settlement offer of $1.1 million, and requested TIG's input and participation. The only response Six Flags

[22] Docket 143, Exh. 13, p. 114.
[23] *Id.* p. 126.

received from TIG was yet another reservation of rights letter from Jensen, this time informing Six Flags that it reserved the right to challenge Six Flags' unapproved retention of defense counsel.

TIG continued to be unresponsive and disinterested. The following day, Jensen wrote to Six Flags that the $1.1 million settlement offer was excessive because similar claims had previously been settled for approximately $12,500 per claimant. Six Flags was understandably taken aback by this proposal, noting that $12,500 per claimant would result in a settlement of $50 million for a class of 4,000. Considering that the class action was estimated to involve between 9,000 and 15,000 claimants, Jensen's unreasonable suggestion would have resulted in a settlement of between $112.5 and $182.5 million.

Six Flags continued to keep TIG informed of the progress of the litigation, sending updates on October 22, November 8, November 26 and December 18 of 2002. On January 16, 2003, the class action plaintiffs delivered a demand for $25.4 million. Six Flags communicated this demand to TIG on January 28, 2003 and requested TIG's input with respect to a counteroffer. TIG continued to be unresponsive, asserting that a counteroffer was premature because plaintiffs' demand permitted opt-outs. In response, Six Flags arranged a teleconference on February 3, 2003

between TIG representative and defense counsel. During that conference, Preston laid out in detail his analysis of the class action plaintiffs' demand, his resulting recommendations, and the rationale justifying them. Six Flags also reassured TIG that any counter-offer would not permit opt-outs. Despite Six Flags' ongoing efforts to engage its insurer, TIG informed Six Flags that it would not take part in devising a settlement strategy because it had not received Preston's analysis until two days before the mediation session, and because Six Flags still had not provided it with sufficient information to determine what a reasonable settlement would be. TIG did, however, agree to waive its argument that any settlement realized at mediation would be a voluntary payment, thereby communicating to Six Flags that it was simply not interested in taking an active role in negotiating the settlement.

TIG's actions confirmed this implicit message. Six Flags continued to send TIG updates and information on the defense strategy, sending eleven updates over the next month and a half. By late March 2003, mediation had resulted in a reduction of the class action plaintiffs' demand to $10 million, and an increase in Six Flags' offer to $3.1 million. On March 27, 2003, TIG wrote to Six Flags indicating that, contrary to all available evidence, it believed the case was overvalued, and that the claims were largely valueless.

In spite of the fact that a TIG claims handler had flagged the class action as likely being one of high exposure, and in spite of the $2.5 million award in the *Williams* case, and even in spite of a California verdict review showing exposure of $3,000 to $8 million on only one count of the complaint, TIG then offered Six Flags a mere $100,000 to satisfy its indemnification obligations.

Two days later, on May 29, 2003, Six Flags and the class action plaintiffs reached a settlement in principle. Over the next year, Six Flags continued to solicit feedback from its insurer, TIG, but without success. When Six Flags inquired whether TIG intended to attend the settlement hearing, Jensen of TIG replied, "I am not sure what purpose you believe would be served by having a TIG representative attend the hearing. TIG is not a party to the litigation and, as we understand it, insurance coverage for the settlement will not be discussed with the court or debated in any way at the hearing."

IV. Analysis

A. Choice of Law and Standard of Review

The motions before the Court are part of an ongoing declaratory judgment action. In the course of this litigation, the Court previously determined, also on motions for summary judgment, that the insurance

contract in issue is controlled by Oklahoma law under a choice of law analysis.[24] That holding is therefore appropriately the law of the case,[25] and the Court will continue to apply substantive Oklahoma law and Delaware procedural law.[26]

When considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and determine whether a party is entitled to judgment as a matter of law. Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate. If, however, there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law, summary judgment will be granted.[27]

The moving party bears the initial burden of demonstrating that the undisputed facts support its legal claims. Should the moving party make

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[24] *TIG*, 2004 WL 728858, at *4.

[25] The "law of the case doctrine requires that issues already decided by the court in a particular case should be adopted without relitigation and "once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears." *Taylor v. Jones*, 2006 WL 1566467, *5 (Del. Ch. May 25, 2006) (quoting *Odyssey Partners v. Fleming Co.*, 1998 WL 155543, at *1 (Del. Ch. Mar. 27, 1998). *See also Hudak v. Procek*, 806 A.2d 140, 155 (Del. 2002) (following previous decisions in the same case where the facts of the litigation have remained constant); *May v. Bigmar, Inc.*, 838 A.2d 283, 288 n.8 (Del. Ch. 2003) (holding that prior summary judgment motion determined the law of the case regarding a specific issue).

[26] *Int'l Bus. Mach. Corp. v. Comdisco, Inc.*, 1991 WL 269965, at *29 n.9 (Del. Super. Ct. Dec. 4, 1991) (citing *Connell v. Delaware Aircraft Indus.*, 55 A.2d 637, 640 (Del. Super. Ct. 1947)).

[27] *See* SUPER. CT. CIV. R. 56; *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. Ct. 2005); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

such a showing, the burden shifts to the non-moving party to demonstrate that genuine issues of material fact exist.[28]

In the case of cross motions for summary judgment, as here, the newly amended Superior Court Civil Rule 56(h) applies. Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

The Court, therefore, may decide the motions on the record if the parties do not dispute that there are no genuine issues of material fact that need to be resolved by a trier of fact.[29]

In this case, neither TIG nor Six Flags argued, or even appeared to contemplate, in more than one hundred thirty pages of briefing, that outstanding issues of fact on these cross motions remain. Indeed, the last sentence of TIG's introductory paragraph in the brief it submitted in support of summary judgment on the duty to defend reads in part, "[a]s shown

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[28] *See Storm*, 898 A.2d at 879-880; *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. Ct. 2006).

[29] *See e.g. Beneficial Delaware, Inc. v Waples*, 2006 WL 1880960, at *1 (Del. Super. Ct. July 3, 2006) (quoting Rule 56(h)) ("The parties have submitted cross-motions for summary judgment. In this posture, 'the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.'"). *Cf. Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855, at *5 (Del. Super. Ct. Aug. 31, 2006) (Although cross motions for summary judgment were filed, the "Court and both parties agree[d]" that Rule 56(h) did not apply because Plaintiff argued that there were still genuine issues of material fact.).

below, the 'material' facts are not in dispute…"[30] Despite a passing reference by TIG counsel at oral argument that issues of fact remain,[31] the substantial amount of briefing in this case clearly indicates the parties do not dispute that the record reflects the true and complete course of events leading up to this litigation, and the entire extent of relevant communications between the two parties. The Court will therefore evaluate the motions in accordance with the well-established principles guiding summary judgment disposition where the material facts are not contested by the parties.

B. Duty to Indemnify

Neither party disputes that the damages sought in the class action encompass both covered and non-covered claims under the terms of the insurance policy issued to Six Flags by TIG. There is also no dispute that the settlement of all the causes of action for the total amount of $5.625 million was reasonable and advantageous to both Six Flags and TIG, given the potential exposure facing the insured. What is in dispute is whether an insurance company's issuance of reservation of rights letters, without more, fulfills its duties to its insured. That is, is it sufficient for an insurance company to sit back while its insured negotiates a global settlement of all

[30] Docket 129, p. 1.
[31] TIG counsel commented during the last two minutes of a three-hour argument that the issue of TIG's duty of good faith and fair dealing was one of fact. The Court views these statements as a last ditch effort on TIG counsel's part to avoid summary judgment against it.

claims in a large class action lawsuit, to refuse to participate in any negotiations despite repeated requests from the insured to do so, and after the fact ask the Court to allocate the damages so that the insurance company's responsibility for covered claims can be determined?

It would appear at first glance that TIG has a duty to indemnify Six Flags for some portions of the settlement amount given that it concedes at least some of the class claims were covered under Six Flags' policy. And TIG does not deny that it would have a duty to indemnify Six Flags for the covered claims under the settlement *if* there was an allocation of the claims. TIG, however, maintains that Six Flags, and not TIG, has the burden of proof to allocate the settlement – that is, to show what portion of the settlement payment was made to resolve covered claims. According to TIG, if Six Flags is unable to meet that burden, then TIG is absolved of its duty to indemnify and is entitled to summary judgment. TIG insists that it fulfilled any duty it may have had simply by stating that an allocation was necessary because any settlement would, in large part, encompass damages for uncovered claims. The Court does not agree.

In support of its position, TIG relies heavily upon case law from other jurisdictions for the proposition that the insured carries the burden to establish what portion of the settlement is reasonably allocable to covered

claims and, if the insured fails to meet such burden, then the insurer is released from all liability, including liability associated with covered claims.[32] Even assuming these cases are controlling, which they are not, they also serve no persuasive value as the Court does not agree that the burden to allocate always lies with the insured. The Court instead concludes that, in this case, it is appropriate that such burden be shouldered by the insurer, TIG.

The law concerning whether the insurer or insured bears the burden of proving allocation varies among jurisdictions. Some "courts have placed the burden of proving allocation on the insurer, while others have placed it on the insured."[33] For those courts that have held that the burden is on the insured, an exception has been made in several jurisdictions, including Oklahoma, for those cases in which the circumstances of the "underlying action were such that the insurer was obligated to seek an allocated verdict or advise the insured of the need for one, but failed to fulfill that obligation."[34] That is, "the insured's burden may be reduced or shifted if the

[32] *See* Docket 150, p. 4, 7; *Golden Eagle Refinery Co. v. Associated Int'l Ins. Co.*, 102 Cal. Rptr. 2d 834 (Cal. Ct. App. 2001); *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 266 F.3d 859 (8th Cir. 2001); *Foremost Ins. Co. v. Fick.*, 1994 WL 87371 (9th Cir. Mar. 11, 1994).
[33] *Raychem Corp. v. Fed. Ins. Co.*, 853 F. Supp. 1170, 1176 (N.D. Cal. 1994).
[34] 1 Insurance Claims and Disputes 4th § 6:27.

carrier failed to adequately apprise the insured of the importance of apportionment."[35]

Under Oklahoma law, this "shifting" burden is best evidenced in *Gay & Taylor v. St. Paul Fire & Marine Ins. Co.*[36] In *Gay & Taylor*, the court diminished the insured's burden "on the ground that the carrier concealed the importance of allocation."[37] Because the insurer knew of the settlement negotiations, had a representative present at the negotiations, failed to inform the insured of the necessity of apportioning damages, and failed to object to the settlement, the insured was clearly not in a favorable position to meet the burden of proof that would have otherwise been its responsibility.[38] The court reasoned that if the insurer had adequately and timely apprised its insured "that it was critical that any settlement … reflect an apportionment between covered and noncovered … claims[,] … the insured would have insisted upon apportionment as part of a settlement[,] … and thus avoided the insurmountable problems encountered in post hoc prorating." [39] In other

[35] Davis J. Howard, Apportioning An Insurer's Liability Between Covered And Noncovered Parties And Claims, 369 PLI/Lit 597 (1989).
[36] 550 F. Supp. 710 (W.D. Okla. 1981). The Court in *Gay & Taylor* determined that as "to the issues of … apportionment … the law of Oklahoma would apply[.]" *Id.* at 714.
[37] Howard, 369 PLI/Lit 597 (discussing *Gay & Taylor*).
[38] *See id.*; *Gay & Taylor*, 550 F. Supp. at 716.
[39] Howard, 369 PLI/Lit 597 (discussing *Gay & Taylor*).

words, the insured's detrimental reliance upon the insurer's silence warranted the shifting of the burden from the insured to the insurer.[40]

In applying that same rationale to this case, TIG's lack of interest, action or involvement before and during settlement negotiations, and after Six Flags reached a settlement with the class, provides ample justification for requiring TIG to bear the burden of establishing what portion of the settlement is allocable to covered claims. The record reflects that TIG never adequately requested allocation from Six Flags. Instead, Six Flags continually attempted to establish TIG's contribution liability, but was repeatedly rebuffed by TIG, who claimed that it did not have enough information to discuss the issue.

During oral argument, the only instance TIG counsel could identify where an allocation was requested, was a single letter from TIG, sent two days before settlement for $5.625 million was reached in principle. In that letter, TIG rejected Six Flags' proposed allocation and offered $100,000 to fulfill its obligations in whole. This offer is in stark contrast to TIG's

[40] *See id. See also Duke v. Hotch*, 468 F.2d 973 (5th Cir. 1972) (same "shifting" burden holding as in *Gay & Taylor* with the only difference being that the case dealt with a jury verdict as opposed to a settlement); *Peterson Tractor Co. v. Travelers Indem. Co. of Ill.*, 156 Fed. Appx. 21, 24 (9th Cir. 2005) ("[T]he burden rests on the insured initially to show that at least a portion of the settlement involved compensation for damages attributable to claims that were covered by the insurance policy. Once the insured has satisfied that burden, the burden of proof shifts to the insurer to show what portion of the settlement is attributable to covered claims.").

arguments in this litigation, i.e. that it is responsible for between $1,606,651 and $2,500,650 of the total settlement amount.[41] Moreover, TIG clearly knew of the ongoing settlement negotiations as Six Flags consistently kept TIG informed, and TIG even had a representative present at nearly every mediation session. If TIG had wanted an allocation of the settlement by claim, it should have timely informed Six Flags that any settlement *must* reflect an apportionment between covered and non-covered claims. TIG, however, failed to adequately apprise Six Flags of the need for apportionment. Its issuance of reservation of rights letters, without more, did not fulfill its duties owed to Six Flags.[42] TIG should, therefore, assume the burden to allocate.

The Court is mindful of TIG's heavy reliance upon *Golden Eagle Refinery Co. v. Associated Int'l Ins.*,[43] which undisputedly held that the insured bore the burden to allocate. However, aside from not being

[41] TIG engaged in an elaborate mathematical procedure in an effort to estimate its range of liability. It determined that it is responsible for between 27 to 42 percent of the settlement amount. *See* Docket 134, p. 9-10. Such a broad range evidences the difficulty in determining TIG's actual liability. The Court, however, finds it ironic that TIG can engage in this effort in one of its many briefs to the Court, yet it refused to do so during the many negotiation discussions leading up to the settlement.

[42] An insurer has a duty to promptly adjust claims submitted by an insured, investigate claims thoroughly, and pay claims promptly once the investigation has indicated that the insured is entitled to payment under the insurance contract. *See Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991). An insurer may withhold payment where the insurer has conducted a thorough investigation, and after evaluating the results of the investigation determines that it has a justifiable reason to withhold payment. *See Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127 (Okla. Civ. App. 2005); *Bailey v. Farmers Ins. Co. Inc.*, 137 P.3d 1260 (Okla. Civ. App. 2006). Thus, an insurer, following an investigation reasonably appropriate under the circumstances, must promptly settle the claim for the value, or within the range of value assigned the claim as a result of its investigation.

[43] 102 Cal. Rptr. 2d 834 (Cal. Ct. App. 2001).

controlling, *Golden Eagle* is distinct in that it discusses the shifting of the burden to allocate between insurer and insured in the context of a California Code of Civil Procedure provision. It is also dissimilar to the facts in this case in that the insured in *Golden Eagle* entered into a consent order with the State of California in which it agreed to remediate the toxic contamination at the insured's refinery. The insured, however, did not seek indemnification from its insurer for the clean up costs until almost five years after the insured completed the clean up. The court held, in part, that because the insurer had no knowledge of its insured entering a consent order with the state and was not aware of its insured's clean up activities, it should not have the burden of proving what caused the contamination – "sudden, unintended and unexpected events" (covered under the policy) or "routine, repeated and intentional release" of contaminants (non-covered events). The court, therefore, placed the burden on the insured to make such a showing.

Contrary to the circumstances in *Golden Eagle*, in this instance TIG was aware of the litigation between Six Flags and the class from the start, and was continually kept informed by Six Flags until after a settlement was accomplished. As such, TIG was in a much better position than the insurer in *Golden Eagle* to seek an allocation given that it had ample opportunity to investigate the claims asserted by the class. Moreover, if the burden always

remained with the insured under these circumstances, as TIG would have the Court rule, then the insurer could consistently rely on a "technical defense," giving it "an easy opportunity to prejudice the rights of the insured by just allowing a general verdict, [or settlement,] and then requiring the insured to prove which damages were covered."[44] Such a rule would place an unreasonable and unjust burden upon the insured. Therefore, TIG's reliance upon *Golden Eagle* to support its argument that Six Flags should bear the burden to allocate is simply not convincing.

Moreover, Oklahoma law requires that TIG be estopped from denying Six Flags recovery simply because the settlement failed to apportion between covered and non-covered claims. Equitable estoppel precludes a party from asserting rights that might have existed where that party assumes a position or engages in conduct that causes another party to change its position to its detriment.[45] The essential elements of equitable estoppel, as stated by the Oklahoma Supreme Court are:

> First, there must be a false representation or concealment of facts. Second, it must have been made with knowledge, actual or constructive, of the real facts. Third, the party to whom it was made must have been without knowledge, or the means of knowledge, of the real facts. Fourth it must have been made with the intention that it should be acted upon. Fifth, the party

[44] *Gay & Taylor*, 550 F. Supp. at 716.
[45] *Chesapeake Operating, Inc. v. Carl E Gungoll Exploration, Inc.*, 116 P.3d 213 (Okla. Civ. App. 2005) (citing *Apex Siding & Roofing Co. v. First Fed. Sav. & Loan Ass'n of Shawnee*, 301 P.2d 352 (Okla. 1956)).

> to whom it was made must have relied on or acted upon it to his prejudice.[46]

Although it would appear that this rule tracks more closely a claim of fraud than estoppel, the element of false representation does not require malice,[47] or even an overt false statement. Rather, "the representation or concealment may arise from the silence of the party when he is under imperative duty to speak," and intent may be inferred from the circumstances.[48] Thus, estoppel may arise against a person who was silent when he should have spoken, and who stood by and permitted another to take detrimental action.[49]

In applying the theory of equitable estoppel to this case, TIG's failure to participate throughout the settlement process warrants that it be estopped from denying coverage regardless of whether an allocation of the claims is performed. As has already been stated, during settlement negotiations, Six Flags repeatedly requested TIG's input on its positions, and guidance on their settlement approach. To the extent TIG gave any input at all, its responses were unhelpful and uninformed, or were limited to complaints that TIG did not have enough information to respond to Six Flags' requests, despite Six Flags' efforts to keep TIG fully informed and aware of the

[46] *Flesner v. Cooper*, 162 P. 1112 (Okla. 1917).
[47] *See Burdick v. Indep. Sch. Dist. No. 52 of Oklahoma County*, 702 P.2d 48 (Okla. 1985).
[48] *Gypsy Oil Co. v. Marsh*, 248 P. 329 (Okla. 1926).
[49] *Dixon v. Roberts*, 853 P.2d 235, 238-39 (Okla. Civ. App. 1993). Such estoppel is known in Oklahoma as "estoppel by silence" and may only be applied against those who are in such a relationship that a duty to speak exists. *Sarkeys v. Russell*, 309 P.2d 723 (Okla. 1957).

progress of the litigation. TIG had every opportunity to impart to Six Flags the critical importance of allocation of the claims. Since TIG's efforts in this regard were untimely and inadequate, it is estopped from denying coverage, regardless of the fact that an allocation has not been performed.

Finally, this Court finds that TIG has also failed to implicate the Court's duty to allocate the settlement in this case. Once again, the record does not reflect any attempt by TIG to conduct any independent investigation of the claim. Instead, TIG sat back and demanded on numerous occasions that Six Flags provide it with sufficient information to evaluate the claim. In fact, TIG was so oblivious to the extent of its insured potential liability, it rejected Six Flags' request that it certify a settlement offer of $1.1 million. Instead, it informed Six Flags that such claims had settled before for $12,500 per claimant, a settlement that would have resulted in exposure of between $112.5 and $182.5 million. TIG thus appeared to believe that Six Flags should conduct the investigation for TIG, and also do the work of requesting and formulating an allocation. TIG's silence cannot now afford it protection from liability.

Even assuming the Court could attempt to allocate the claims, such an endeavor would be arbitrary and speculative as it would entail guesswork. It is clear that the parties to the settlement did not agree to the numbers on a

per-claim basis. In fact, Preston testified that parsing the claims and valuing each separately was pointless.[50] Instead, the parties came up with a number from which to begin negotiating, and went from there. Indeed, the situation of negotiating the settlement in this case is even less clear than a jury awarding damages on a series of claims, as was the case in *TIG I*. The two sides never reached agreement about how much money each claim would be worth, most likely because many of the claims were in the alternative. Thus, although twelve claims were alleged by the complaint, several were mutually exclusive. If the Court were to divide the settlement amount equally between the twelve claims, the analysis would result in a hypothetical double recovery for a number of claimants.

In short, the Court finds that TIG is estopped from denying Six Flags coverage for the settlement. TIG has the burden to allocate the settlement between covered and non-covered claims. This burden does not rest with Six Flags or the Court. Because TIG cannot possibly meet its burden, as any attempted allocation of the settlement at this late stage would be speculative and arbitrary, TIG is responsible for the total amount of the negotiated

[50] Docket 143, Exh. 3, p. 150-51.

settlement in the *Armendarez* litigation that falls within its coverage period – or 58 percent of the settlement amount.[51]

C. Duty to Defend - Payment of Attorneys Fees and Costs

The question of indemnification of attorneys fees incurred in the *Armendarez* litigation is also largely determined by TIG's indifference. Six Flags initially intended to hire Wilmer Cutler to represent it only for the DOJ investigation. However, when Coughlin discussed the matter with the attorneys at Wilmer Cutler, he realized that the Class Action and the DOJ investigation were interrelated, and that it would probably be in Six Flags' interest to coordinate the two actions. When he requested permission from K&K to hire Wilmer Cutler, Sherman, the K&K claims administrator, indicated that he would refer Coughlin's request to TIG executives. From that point on, Six Flags heard absolutely nothing on the subject of representation from either K&K or TIG for the next eight months. Due to TIG's silence, TIG is estopped from asserting its rights under the reservations of rights letters initially issued because it engaged in a course of dealing that had for years permitted K&K to give Six Flags substantial

[51] *See Republic Franklin Ins. Co. v. United Educators Reciprocal Risk Retention Group*, 847 N.E.2d 1139 (Mass. App. Ct. 2006) ("When allocation of a settlement would be speculative and arbitrary, the burden falls on the insurer to attempt to make an appropriate allocation of the settlement. Where, as here, that burden cannot be met, [insurer] is thus responsible for the full amount.").

leeway in choosing preferred counsel, particularly in large, high value, high exposure cases.

The elements of estoppel have already been set forth in greater detail in section B *supra*. Nonetheless, the Court will engage in a short discussion of the applicable principles again for purposes of the counsel fee issue. As noted above, estoppel prevents a party from asserting rights it may otherwise have had if that person was silent when a duty to speak existed.[52] Estoppel may therefore arise against a party who stood by and permitted another to take detrimental action. The Oklahoma courts have permitted estoppel to prevent enforcement of contractual provisions where there has been a contrary course of dealing.[53]

In this case, the evidence shows that K&K and Six Flags maintained a course of dealing that permitted Six Flags to choose the counsel it wanted to use on a regular basis, as well as expert counsel for situations involving more difficult specialized circumstances or high demands.[54] Jensen, Six Flag's K&K contact, testified that a list of attorneys was created with input from both Six Flags and TIG, and from that list, defense counsel was

[52] *Dixon*, 853 P.2d at 238-39.
[53] *Chesapeake Operating Inc.*, 116 P.3d at 216-17 ("Because of the way the parties conducted business for five years, the undisputed facts and circumstances of this case also support the defense of estoppel.")
[54] Docket 130, Exh. 14, p.61.

selected on a day-to-day basis.[55] Jensen also testified that if Six Flags specifically requested a law firm or attorney not on the list he would check with TIG and then hire that attorney.[56] On only one previous occasion did TIG refuse to hire a particular attorney that Six Flags requested, but TIG and K&K communicated this decision promptly to its insured.[57] Indeed, K&K had historically been quite responsive.[58]

Notwithstanding this long-standing course of dealing, when Six Flags requested that TIG pay for Wilmer Cutler's specialized expertise on the Class Action, K&K was noncommittal, and indicated that the decision would be left up to TIG. Six Flags made several attempts to contact K&K and TIG, but all of these efforts were met with silence. It was only after Wilmer Cutler had led the defense in the Class Action for a full eight months that TIG belatedly communicated to its insured that it would not cover Wilmer Cutler's bills.

When an insured is a defendant in high stakes litigation and requests specialized counsel, an insurer has the duty to respond in a timely manner. Six Flags could not afford to wait eight months for TIG's reply. Moreover, Six Flags was entitled to rely on its belief that its engagement of the Wilmer

[55] Docket 130, Exh. 3, p. 41.
[56] Docket 140, Exh. 5, p. 45, 62-63.
[57] Docket 153, Exh. 10, p. 73-74.
[58] Docket 140, Exh. 1, p. 117.

Cutler firm would be approved by TIG, as had virtually every request it had ever made before. Where TIG had denied a specific request for counsel, K&K had customarily been prompt in informing Six Flags.

Although it is not necessary for the purposes of this decision to consider the qualifications of the law firms involved, it is difficult to ignore the fact that PDA was, as circumstances played out, simply not up to the task. Notwithstanding TIG's insistence that PDA was highly qualified to defend the class action, PDA had difficulty completing even minimal local counsel work, thereby forcing Six Flags to hire Rintala Smoot as new local counsel. It is inconceivable that TIG, in fulfilling its responsibility, expected that Six Flags would be satisfied with a law firm that was so overwhelmed with other work that it was unable to fulfill even a minor "base-tending" role in this litigation. For TIG now to argue that Prindle Decker should have been primarily and solely responsible for defending this case, a case which could ultimately affect the very solvency of Premier Parks, is further evidence of just how out of touch and unjustified its position was.

Accordingly, due to the course of dealing that Six Flags maintained with K&K, of which TIG was aware, TIG is estopped from asserting the reservations of rights it issued with regard to the issue of defense counsel

expenses. The Court therefore concludes that the costs of Wilmer Cutler, as well as those of Rintala Smoot, shall be borne by TIG.

V. Conclusion

For all the foregoing reasons, the Court determines as a matter of law that TIG is responsible for the total amount of the negotiated settlement in the *Armendarez* litigation that falls within its coverage period, and that TIG likewise must bear the defense costs incurred by Six Flags in defending *Armendarez*.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary