

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IU NORTH AMERICA, INC.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
THE GAGE COMPANY	:	
Defendant.	:	NO. 00-3361

MEMORANDUM

Reed, S.J.

June 4, 2002

This action concerns the proper allocation of liabilities for asbestos related personal injury claims between the buyer and seller arising out of the sale of an incorporated business. Jurisdiction is proper pursuant to 28 U.S.C. § 1332, as there is complete diversity among the parties and the amount in controversy exceeds \$75,000, exclusive of costs and interest. Presently before this Court are the cross- motions for partial summary judgment filed by plaintiff IU North America, Inc. (Document No. 27) and defendant The Gage Company (Document No. 26) pursuant to Federal Rule of Civil Procedure 56, and the responses and replies thereto. At the outset of this matter, the discovery and trial were bifurcated into liability and damages phases. Each party now moves for summary judgment on the issue of liability. For the reasons which follow, the motion of defendant for summary judgment will be granted in part and denied without prejudice in part, and the motion of plaintiff for summary judgment will be denied.

I. Background

In 1979, Robert Chute (“Chute”) formed The Egag Company for the purpose of purchasing The Gage Company business. The sale took the form of an asset purchase and

included the right to use the “Gage” name. On May 31, 1979, the business sale closed. Thereafter, Chute changed the name of The Egag Company to The Gage Company of Delaware (“Gage Delaware”). On August 22, 1980, Gage Delaware was merged into the newly formed The Gage Company (“Gage”), which is the defendant in this action (“Gage” or “New Gage”). After the close of the business sale, the company formerly known as The Gage Company changed its name to the Garp Company, which was owned by IU North America, Inc. (“IUNA”). Sometime thereafter, the Garp Company merged with IUNA, which is the plaintiff in this action (“IUNA” or “Old Gage”).

The business sale was actualized in the “Amended and Restated Agreement For Purchase and Sale of Assets” (“1979 Sale Agreement,” “Sale Agreement,” or “Agreement”). (Pl.’s Ex. A; Def.’s Ex. C.) The following portions of the Sale Agreement are most relevant to the adjudication of the motions pending before this Court:

SECTION 2. PURCHASE PRICE; ASSUMPTION OF LIABILITIES;
INDEMNIFICATION

....

2.3 Assumption of Liabilities. At the Closing, the Purchasers [defendant Gage] shall assume and agree to pay or discharge liabilities of the Sellers [plaintiff IUNA] arising in the regular and ordinary course of their business consistent with past practice and custom, specifically including:

(a) all trade accounts payable of the Sellers [plaintiff IUNA] which have not been paid or discharged prior to the Closing Date if such accounts payable are properly due and payable consistent with the Sellers’ [plaintiff IUNA] past practices;

(b) all other accrued liabilities of the types listed on the April Balance Sheet of the Sellers [plaintiff IUNA] which have not been paid or discharged prior to the Closing Date; provided, however, that the Purchasers [defendant Gage] do not assume any liabilities of the Sellers [plaintiff IUNA] with respect to federal, state or local income or franchise taxes imposed upon the Sellers [plaintiff IUNA];

(c) all liabilities and obligations of the Sellers [plaintiff IUNA] under open orders and blanket and system selling contracts and similar types of sales arrangements and in respect of the leases, contracts, commitments and agreements referred to in Exhibit D attached hereto and incorporated herein or entered into by the Sellers [plaintiff IUNA] between the date hereof and the Closing Date not in violation of the provisions of section 6; and;

(d) all liabilities and obligations of the Sellers [plaintiff IUNA] under the pension, profit sharing, welfare, severance and vacation plans and other personnel policies and practices set forth on Exhibit I attached hereto and incorporated herein.

2.4 Indemnification by the Purchasers [defendant Gage]. The Purchasers [defendant Gage] shall defend, indemnify and save the Sellers [plaintiff IUNA] harmless from and against any and all claims, liabilities or obligations on account of the liabilities of the Sellers [plaintiff IUNA] assumed by the Purchasers [defendant Gage] pursuant to paragraph 2.3 or arising out of, or resulting from the ownership of, the Assets To Be Acquired after the Closing Date. In no event shall the Purchasers [defendant Gage] assume or incur any liability or obligation with respect to any income or other tax payable by the Sellers [plaintiff IUNA] incident to or arising as a consequence of the consummation by the Sellers [plaintiff IUNA] of this Agreement other than as provided in paragraph 9.3.

2.5 Indemnification by the Sellers [plaintiff IUNA]. The Sellers [plaintiff IUNA] shall defend, indemnify and save the Purchasers [defendant Gage] harmless from and against any and all liabilities and obligations of, or claims against, the Purchasers [defendant Gage] not expressly assumed by the Purchasers [defendant Gage] pursuant to paragraph 2.3.

....

SECTION 11. CONDUCT FOLLOWING THE CLOSING

....

11.2 Responsibility for Litigation. The Sellers [plaintiff IUNA] shall be responsible for all present or future litigation and claims for injury and related expenses arising out of their businesses which are founded on events, all of which occurred on or prior to the Closing Date. The Sellers [plaintiff IUNA] shall direct or control, or continue to direct or control, the conduct of such litigation. . . .

(Emphasis added).

Prior to the business sale, Old Gage owned and operated an industrial supply distribution business. (Compl. ¶ 9.) After the business sale, New Gage continued to sell at least some of the same industrial supplies, (Second Am. Answer ¶ 19), though the record does not contain precise information with respect to which products remained in distribution, nor the duration of time those products continued in distribution. In the 1980s, individuals began to bring personal injury claims allegedly due to exposure to asbestos from products sold by Old Gage and New Gage. It appears that both parties have been served with process in these suits, and that defendant has forwarded at least some of these process to plaintiff. (Id. ¶¶ 19-22.)

The parties move for partial summary judgment, seeking a declaration of liability favorable to their respective positions. IUNA essentially seeks a declaration that: (1) Gage shall reimburse IUNA for any sums it has paid in connection with any personal injury asbestos claims founded on *events any* of which occurred *after* the date of the business sale; (2) Gage shall assume the defense, settlement or satisfaction of any pending or future personal injury asbestos claims founded on *events any* of which occurred *after* the date of the business sale; and (3) IUNA shall assume the defense, settlement or satisfaction of any personal injury asbestos claims founded on *events all* of which occurred on or before the date of the business sale, including the indemnification of Gage for any amounts incurred in connection with such claims.

Gage essentially seeks a declaration that: (1) IUNA is responsible for the defense, settlement or satisfaction of all past, pending and future personal injury asbestos claims against either party based on *sales* of products occurring *before* the date of the business sale; (2) Gage is responsible for the defense, settlement or satisfaction of all past, pending and future personal injury asbestos claims against either party based on *sales* of products occurring *after* the date of

the business sale; and (3) The parties are jointly liable for the defense, settlement or satisfaction of all past, pending and future personal injury asbestos claims against either party based on *sales* of products occurring both *before and after* date of the business sale.

Thus, IUNA categorizes the underlying asbestos claims by “events,” and Gage categorizes these claims by the “sale” of the injury causing products. The significance of this distinction is explained below. The parties agree that the purpose of Phase II of this case shall be to determine which specific personal injury asbestos claims fall into which respective category, and, of course, to assess the amount of damages owed by each party to the other. Defendant has also asserted affirmative defenses, including, *inter alia*, the statute of limitations and estoppel. These defenses are not discussed in the pending motion papers as defendant decided that those defenses relate to Phase II and not the issues presented here which involve contract construction and interpretation.

II. Standard

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the “test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Furthermore, “summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. at 250.

On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 176 (1962)). The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” Matsushita, 475 U.S. at 586, and must produce more than a “mere scintilla” of evidence to demonstrate a genuine issue of material fact and avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

When opposing parties file cross-motions for summary judgment, the court must consider each motion separately, and “each side must still establish a lack of genuine issues of material fact and that it is entitled to judgment as a matter of law.” U.S. ex rel. Showell v. Philadelphia AFL-CIO Hosp. Ass’n, Civ. No. 98-1916, 2000 WL 424274, at *1 (E.D. Pa. Apr. 18, 2000), aff’d, 275 F.3d 38 (3d Cir. 2001) (citation omitted).

III. Analysis

I note at the outset that the parties agree that Pennsylvania law applies in this diversity action, and this Court will therefore not engage in a conflicts of law analysis. It is well settled that when sitting in diversity, this Court is bound to accept the decisions of the state’s highest court as the “ultimate authority of state law.” Estate of Meriano v. C.I.R., 142 F.3d 651, 659 (3d Cir. 1998). If the Pennsylvania Supreme Court has not decided an issue, this Court is to consider the decisions of lower state courts, as well as federal appeals and district court cases interpreting state law. See State Farm Mut. Auto. Ins. Co. v. Coviello, 233 F.3d 710, 713 (3d Cir. 2000).

Plaintiff IUNA takes the position that under the clear and unambiguous language of

sections 2.3 and 2.4 of the 1979 Sale Agreement, defendant is liable for asbestos claims because they are a type of product liability claim, and product liability claims arose in the regular and ordinary course of the business consistent with past practice and custom. Plaintiff argues that section 11.2 of the Sale Agreement is a narrow “carve out” section of defendant’s liabilities under section 2.3 and places liability on IUNA only for those claims arising in the regular and ordinary course of their business consistent with past practice and custom in which *all* of the *events* occurred before the closing. IUNA contends that the word “events” includes not only the sale and distribution of the products, but also exposure of the injured person to the asbestos in the products and the manifestation of the injury in those persons, and, accordingly, these underlying asbestos claims do not fall within the purview of the carve out. This interpretation serves as the basis for IUNA’s categorization of the claims by its definition of the word “events” as detailed above.

Defendant Gage takes the position that because the parties agree that this case ultimately hinges on section 2.3 of the Sale Agreement, Pennsylvania law concerning indemnification governs this action because section 2.3 confers an “assumption” and concomitant “indemnification” obligation upon Gage. Gage argues that under this law, in order for a party to be indemnified for its own conduct, the indemnification provision must contain an express stipulation with respect to the specific claims for which indemnification is being sought. Gage contends that the terms in section 2.3 of the Sale Agreement do not expressly include language providing for indemnification for IUNA’s own tortious conduct, which takes the form of the *sale* of asbestos containing products and therefore, IUNA retains responsibility for these actions. This interpretation serves as the basis for Gage’s categorization of the claims as detailed above.

The key issue for this Court to determine is under what rules of law the indemnity and liability provisions of the 1979 Sale Agreement should be construed. In Gage's response brief, it contends that the Perry-Ruzzi rule directs this action. In Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 4, 588 A.2d 1, 7 (1991), the Pennsylvania Supreme Court reaffirmed its holding in Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907), and concluded that in order for an indemnity provision which covers losses due to the indemnitee's own negligence to be enforceable, the parties must contract "in clear and unequivocal language." See also Jacobs Constructors, Inc. v. NPS Energy Serv., Inc., 264 F.3d 365, 372 (3d Cir. 2001) (extending rule to indemnity claims for losses contractually assumed by the indemnitee); Brown v. Moore, 247 F.2d 711, 722-23 (3d Cir. 1957), disapproved on other grounds, Grbac v. Reading Fair Co., 688 F.2d 215 (3d Cir. 1982); Greer v. City of Phila., 795 A.2d 376, 378-79 (Pa. 2002).

"No inference from words of general import can establish such indemnification." Ruzzi, at 4; 588 A.2d 1, 7. In so holding, the Court reasoned that: "The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation." Id. at 4, 588 A.2d at 8 (quoting Perry, 217 Pa. at 262, 66 A. at 553). In Ruzzi, the indemnitor had agreed to indemnify "from any and all liability for claims for loss, damage, injury or other casualty to persons or property." Id. The Court held that the language constituted words of general import and therefore indicated that the parties did not intend to indemnify for acts of the indemnitee's negligence. Id. at 5, 588 A.2d at 9.

This well-established rule of the construction of indemnity provisions applies when the indemnitee is seeking indemnification for liability stemming from its own tortious conduct,

whether in the context of a claim asserted for negligence or for strict liability. See Keystone Aeronautics Corp. v. R. J. Enstrom Corp., 499 F.2d 146, 149-50 (3d Cir. 1974); Cf. Burgan v. City of Pittsburgh, 115 Pa.Cmwlth. 566, 577-78, 542 A.2d 583, 588-89 (1988) (concluding that indemnification provision covering negligent conduct did not cover claims arising from “ultra-hazardous” activity in which public safety is of the utmost concern). Applying the Perry-Ruzzi with equal force in the context of strict product liability claims is wholly consistent with the reasons behind the rule in that assuming liability for strict liability claims is as hazardous as assuming liability for negligent claims. It is notorious that liability stemming from exposure to asbestos containing products is always premised on claims for negligence or strict liability. Accordingly, I conclude that the Perry-Ruzzi rule governs this action.

Section 2.3 of the Sale Agreement requires defendant Gage (Purchasers) to “assume and agree to pay or discharge liabilities of the Sellers [plaintiff IUNA] arising in the regular and ordinary course of their business consistent with past practice and custom.” After this general language, the contract lists four specific situations, recited above, in which Gage must indemnify IUNA. Plaintiff contends that the product liability asbestos claims arose in the regular and ordinary course of the business consistent with past practice and custom and therefore defendant clearly and unambiguously assumed such liabilities under section 2.3.¹

Under Pennsylvania law, general expressions that either follow or precede “a specific list of included items should not be construed in their widest context, but apply only to persons or

¹ Plaintiff further notes that section 2.4 of the Sale Agreement provides that: “The Purchasers [defendant Gage] shall defend, indemnify and save the Sellers [plaintiff IUNA] harmless from and against any and all claims, liabilities or obligations on account of the liabilities of the Sellers [plaintiff IUNA] assumed by the Purchasers [defendant Gage] pursuant to paragraph 2.3.” Thus, section 2.4 reinforces the language in section 2.3.

things of the same general kind or class as those specifically mentioned in the list of examples.”

McClellan v. Health Maintenance Org. of Pa., 546 Pa. 463, 473-74, 686 A.2d 801, 805-06 (1996).

This doctrine of *ejusdem generis* applies not only to the construction of statutes, as in McClellan,

but also to contracts. See In re Beisgen’s Estate, 387 Pa. 425, 432, 128 A.2d 52, 56 (1956)

(construction of a will).

This Court agrees with Gage that product liability claims are not of the same general kind or class as the four enumerated situations which essentially include: (1) trade accounts which had not been paid or discharged; (2) all other accrued liabilities which were on the balance sheets; (3) all liabilities and obligations of the Sellers [plaintiff IUNA] which were under open orders and blanket and system selling contracts; and (4) all liabilities and obligations of the Sellers [plaintiff IUNA] under the pension, profit sharing, welfare, severance and vacation plans and other personnel policies. IUNA relies on the breadth of the term “arising in the regular and ordinary course of their business.” Thus IUNA’s principal argument, which focuses on the purported clear intent of general contractual terms, actually evidences the ambiguity of the contractual language. While the provision is conceivably open to plaintiff’s interpretation, I conclude that the language employed by the parties fails as a matter of law to clearly and unequivocally establish such indemnification. See Haynes v. Kleinewefers and Lembo Corp., 921 F.2d 453, 457 (2d Cir. 1990) (applying similar New York standard of “unmistakable intent” to similar “ordinary course of business” clause of a business sale agreement at issue in case in which party seeking indemnification argued that liability for personal injury as a result of a defective machine, as well as the negligent modification thereof, fell into the category of “ordinary course of business;” holding that the clause did not meet “unmistakable intent” standard). Accordingly,

IUNA is not entitled to relief under section 2.3 of the Agreement for any claims caused by its own conduct. With respect to the claims which underlie this action, such tortious conduct refers to the sale and distribution of asbestos containing products, as that is the act which led to liability.²

IUNA relies on Pennsylvania Engineering Corp. v. McGraw-Edison Co., 500 Pa. 605, 612, 459 A.2d 329, 332 (1983), for the proposition that the Agreement presented here allows for indemnification because it is clearly worded, was negotiated between two sophisticated parties, and allocates responsibilities for harm without impairing the ability of the injured party to recover damages. The problem with IUNA's argument is that the indemnification provision in McGraw-Edison is highly distinguishable from the 1979 Sale Agreement. The provision at issue in McGraw-Edison provided that the Purchaser of the assets would "save and hold harmless" the Seller of the assets for any "breach or alleged breach by [the Seller] of warranties, expressed or implied, on goods sold by [the Seller] in the operation of said business, including, but not limited to the claim or claims referred to" as four claims involving the modification of furnaces to meet performance standard and other terms and conditions of sale. Id. at 608-09, 609 n.2, 459 A.2d at 330, 330 n.2. For eight years following the execution of the indemnification agreement, the Buyer defended the Seller in several negligence and strict liability claims. See id. at 609, 459 A.2d at 331. The Buyer then announced it would no longer represent the Seller and filed a

² To the extent that IUNA contends that Gage agreed to the indemnification of the underlying asbestos claims because section 2.4 of the Sale Agreement provides that: "The Purchasers [defendant Gage] shall defend, indemnify and save the Sellers [plaintiff IUNA] harmless from and against any and all claims, liabilities or obligations . . . arising out of, or resulting from the ownership of, the Assets To Be Acquired after the Closing Date," such an argument similarly fails as a matter of law. I conclude that this term is equally broad and fails to signify with clear and unequivocal language that any liability in connection with the purchased assets includes liability stemming from plaintiff's own conduct.

declaratory action. See id. The Pennsylvania Supreme Court noted that in initially defending these actions, the Buyer had apparently taken the view that it was responsible for assuming the actions in dispute and affirmed the trial court ruling from a non-jury trial that the intent of the parties had been for the Buyer to indemnify the Seller in those disputes. See id. at 611-12, 459 A.2d at 332. Thus, unlike the agreement between IUNA and Gage, the McGraw-Edison agreement was clearly worded and contained specific language concerning the underlying product liability claims. In the present action, this Court has not been directed to any indemnity provisions within the 1979 Sales Agreement that discuss the allocation of liability for product liability claims or for any claim resulting from plaintiff's own tortious actions.

IUNA next relies on section 10.3 of the Sale Agreement which provides that Gage indemnify IUNA for "all damages, losses and out-of-pocket expenses . . . caused by or arising out of the breach of any agreements of the Purchasers [plaintiff IUNA] contained in this Agreement." Plaintiff argues that under this section, defendant agreed to indemnify plaintiff for any breaches of the Sale Agreement, and therefore plaintiff is entitled to recovery because defendant's failure to assume the asbestos liability is a breach of the Agreement. The flaw in this logic is that IUNA is presuming that Gage is responsible for such liability under section 2.3. This Court, however, for the aforementioned reasons, has concluded that IUNA's construction of section 2.3 fails to pass legal muster. Accordingly, I conclude that section 10.3 of the Agreement does not provide the relief IUNA seeks.

As previously explained, the parties agree that the language in section 11.2, which is entitled "Responsibility for Litigation," is only relevant in this case if IUNA is entitled to indemnification under section 2.3. Accordingly, I conclude that section 11.2 likewise cannot

serve as the basis for plaintiff's claims.

In conclusion, this Court declares and concludes that under the Perry-Ruzzi doctrine, Gage is not responsible for asbestos liability stemming from IUNA's own conduct, i.e., IUNA's sales and distribution of asbestos containing products. As conceded by Gage, however, defendant is obviously liable for its own tortious conduct, i.e., Gage's sales and distribution of asbestos containing products. To the extent that there is liability from sales and distribution of both parties, the parties will bear the burden of their respective share of liability. Phase II of this litigation will focus on sorting out these issues.

This Court must address one remaining issue. Gage has counterclaimed seeking contractual reimbursement and indemnification from IUNA for damages Gage paid due to the Missik case, an underlying asbestos case. Gage alleges that IUNA agreed to defend the Missik case, and upon a losing verdict informed Gage that Gage would be responsible for posting the necessary bond and taking any appeal thereof. Gage and IUNA jointly settled the action and each party paid \$387,500 of the settlement. Gage alleges that it settled the case to protect itself from the impending execution upon its assets. Defendant argues that it is entitled to indemnification under common law principles.

Under Pennsylvania law, "the express terms of [a] contract supersede the common law." Volkswagon of Am., Inc. v. Bob Montgomery, Inc., Civ. A. No. 82-3598, 1985 WL 2824, at *3 (E.D. Pa. Sept. 25, 1985), aff'd, 791 F.3d 923 (3d Cir. 1986) (citing Eazor Express, Inc. v. Barkley, 441 Pa. 429, 431, 272 A.2d 893 (1971) (concluding that written contract and not common law governs indemnity action)). Gage does not appear to dispute this legal conclusion. Rather, Gage's argument seems to rely on what it wrongly perceived IUNA's chief argument to

be. It seems Gage believed that IUNA's chief contention was that section 11.2 is the key provision of the 1979 Sales Agreement and should be interpreted as requiring that if any *event* that served as a basis for the underlying asbestos claims occurred after the sale date, Gage would be responsible for the litigation, regardless of the language in section 2 of the Sales Agreement. As explained above, IUNA in fact views section 11.2 as a "carve-out" of the indemnification obligations and actually centered its argument, like Gage, around section 2 of the Agreement. These important section 2 provisions are conspicuously absent from Gage's argument regarding its counterclaims.

Before further construing section 2 of the Agreement, this Court must decide whether it too is governed by the Perry-Ruzzi rule. Gage seems to argue that to the extent that the Missik case is premised on claims resulting from IUNA's sale of asbestos containing products, Gage is entitled to indemnification. Thus, Gage's prayer for indemnification is not premised on its own conduct; rather, it is based on IUNA's conduct. The Pennsylvania Supreme Court held that when a party seeking indemnification has not failed to perform any of its obligations under the indemnity provision and is not seeking to relieve itself of responsibility stemming from its own conduct, the Perry-Ruzzi rule has no application. See Mace v. Atlantic Refining Marketing Corp., 567 Pa. 71, 785 A.2d 491, 495-96 (2001). In Mace, the party seeking indemnification had been cleared of all liability in the underlying claim and pursued a claim for indemnification for defense costs and legal fees that it had expended defending itself in the underlying action. See id. at 494. The Supreme Court held that the Perry-Ruzzi doctrine would not be extended to situations where the party seeking indemnification had merely been *charged* with negligence. See id. at 494.

In such a situation, Pennsylvania law dictates that general principles of contract interpretation apply. See id. at 496. It is well-settled that under this law, when the words of a contract are clear and unambiguous, the contract is construed as a matter of law from its contents alone. See id. at 496 (citing Steuart v. McChesney, 498 Pa. 45, 49, 444 A.2d 659, 661 (1982)). Section 2.5 of the Sales Agreement provides that: “The Sellers [plaintiff IUNA] shall defend, indemnify and save the Purchasers [defendant Gage] harmless from and against any and all liabilities and obligations of, or claims against, the Purchasers [defendant Gage] not expressly assumed by the Purchasers [defendant Gage] pursuant to paragraph 2.3.” This language is abundantly clear: IUNA must assume any liability not expressly assumed by Gage in section 2.3. As determined by this Court, section 2.3 does not contain an express agreement that Gage will assume liability stemming from IUNA’s negligence or strict liability. Accordingly, under this Court’s construction of the Sale Agreement, Gage would be entitled to indemnification for liability stemming from IUNA’s misconduct and not its own.

The wrinkle here is that even assuming the truth of the allegations in the counterclaims, The Gage Company, with no distinction as between Old Gage and New Gage, was held liable and defendant Gage agreed to settle the case. In other words, unlike the factual scenario in Mace, in the present case, Gage, the defendant here, has not expressly been cleared of tortious conduct. Of course, were this Court to rule that Gage could not seek indemnification for liability it has accrued due to IUNA’s own conduct, such a holding would run counter to the bulk of the other legal conclusions herein. At the same time, the Court is struck by the fact that defendant

voluntarily entered into the 50-50 settlement agreement with plaintiff.³

Under Pennsylvania common law, in order to recover indemnity for voluntary payment, the indemnitee must show that “the party paying was himself legally liable and could have been compelled to satisfy the claim,” as well as that the settlement was “fair and reasonable.” Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 317 (3d Cir. 1985) (quoting Tugboat Indian Co. v. A/S Ivarans Rederi, 334 Pa. 15, 21, 5 A.2d 153, 156 (1939)). See also Sun Co., Inc. v. Carboline Co., Civ. A. No. 89-7255, 1992 WL 252265, at *1 (E.D. Pa. Sept. 28, 1992); McClure v. Deerland Corp., 401 Pa. Super. 226, 233, 585 A.2d 19, 23 (1991). While this Court may be able to presume that such a showing could be made on the present record, I find that the prudent action to take is to require defendant Gage to formally prove that these elements have been met. At first blush it may appear odd to request Gage to demonstrate that the settlement was fair and reasonable since both parties to this action entered into the settlement; however, this Court has some concern that IUNA entered into an agreement without express knowledge that it may have to pay Gage’s share of the settlement. I therefore conclude that the motion of defendant for summary judgment with respect to liability on its counterclaim will be denied without prejudice and may be reasserted upon a showing as instructed by the court in Hercules. This Court acknowledges that typically when a motion for summary judgment is denied, the moving party is not afforded the opportunity to renew a portion of its motion; rather, the case proceeds to trial. I conclude, however, that in this factually unique case, it would be more efficient for this Court and the parties to attempt to resolve this remaining issue through court

³ To be more precise, Gage alleges it entered into the settlement only because it was facing an impending execution of assets. (Presumably then, it settled out of a business expediency without regard to any finding of legal liability).

filings and not a trial.

I also note that it is not insignificant that the record does not establish what percentage, if any, of the liability from the Missik action came from product sales of New Gage and what percentage, if any, came from product sales of Old Gage, or whether those facts were even determined or are capable of determination. In addition, assuming such a showing is made, as with the main liability issues resolved above, the counterclaim concerning the Missik action will need further resolution in Phase II of this litigation.

IV. Conclusion

This Memorandum and attached Order adjudicates the liability phase of this litigation. In brief summary, I conclude that based on the 1979 Sales Agreement, each party is responsible for the defense, settlement or satisfaction of all past, pending and future personal injury asbestos claims resulting from such party's sales and distribution of asbestos containing products; to the extent that claims are based on the sales and distribution of both party's products, such claims shall be apportioned on a percentage basis. The appropriate Order which follows includes specific declarations concerning this summary statement of the Court.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IU NORTH AMERICA, INC.	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE GAGE COMPANY	:	
	:	
Defendant.	:	NO. 00-3361

ORDER

AND NOW, this 4th day of June, 2002, upon consideration of the cross-motions of plaintiff IU North America, Inc. (“IUNA”) (Document No. 27) and The Gage Company (“Gage”) (Document No. 26), for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the responses and replies thereto, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that:

1. The motion of plaintiff is **DENIED**.
2. The motion of defendant is **GRANTED** in part and **DENIED** without prejudice in part.
3. Defendant shall no later than July 8, 2002 file a renewed motion in support of its position that it is entitled to indemnification for the Missik action. Plaintiff shall file a response no later than July 29, 2002.
4. The trial scheduled for June 20, 2002 and the final pretrial conference scheduled for June 12, 2002 are **CANCELLED**.

IT IS FURTHER DECLARED that:

1. Plaintiff IUNA is responsible for all past, pending and future asbestos personal injury cases brought against “The Gage Company” (or variation of such name) in which the

injury is or was based exclusively upon exposure to asbestos containing products which were sold by IUNA before May 31, 1979. The scope of such responsibility includes the payment of defense costs, settlements, and judgments in all such cases, and further includes the defense and indemnification of Defendant Gage in all such cases. Plaintiff shall have the right and duty to control the defense of all such cases, and Defendant shall cooperate with Plaintiff, to the extent reasonably necessary, for the defense of such cases.

2. Defendant Gage is responsible for all past, pending and future asbestos personal injury cases brought against “The Gage Company” (or variation of such name) in which the injury is or was based exclusively upon exposure to asbestos containing products which were sold by Gage of asbestos containing products occurring after May 31, 1979. The scope of such responsibility includes the payment of defense costs, settlements, and judgments in all such cases, and further includes the defense and indemnification of Plaintiff IUNA in all such cases. Defendant shall have the right and duty to control the defense of all such cases, and Plaintiff shall cooperate with Defendant, to the extent reasonably necessary, for the defense of such cases.
3. Plaintiff IUNA and Defendant Gage are jointly responsible for all past, pending and future asbestos personal injury cases brought against “The Gage Company” (or variation of such name) in which the injury is or was based exclusively upon exposure to asbestos containing products which were sold by such companies of asbestos containing products occurring before and after May 31, 1979. The scope of such responsibility includes each party’s payment of defense costs, settlements, and judgments in all such cases in an amount that is proportionate to the quantity of sales for which that party bears

responsibility under Paragraphs (1) and (2) of this Court's declaration herein. The party with the greater proportionate share of applicable sales relevant to a particular case shall have the right and duty to control the defense of that case, and the other party shall cooperate with such party to the extent reasonably necessary for the defense of that case.

4. The purpose of Phase II of this case shall be to determine which specific asbestos personal injury claims fall into which of the three above categories, and to assess the amount of damages owed by each party to the other, taking into consideration any affirmative defenses asserted and found by this Court to be meritorious.

IT IS FURTHER ORDERED that the parties shall confer with each other and jointly submit to this Court in Chambers no later than June 19, 2002, a proposed case management Order governing Phase II of this litigation together with a separate report on the likelihood of settlement generated by this adjudication.

LOWELL A. REED, JR., S.J.