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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INDIAN HARBOR INSURANCE COMPANY, as Subrogee of TRUFOOD MANUFACTURING, INC., Plaintiff, vs J. F. BRAUN & SONS, INC., Defendant.

Civil Action No. 17-1325

August 19, 2019, Filed August 19, 2019, Decided

For INDIAN HARBOR INSURANCE COMPANY, as Subrogee of TRUFOOD MANUFACTURING, INC., Plaintiff: Thomas A. McDonnell, LEAD ATTORNEY, Summers, McDonnell, Hudock, Guthrie & Skeel, Pittsburgh, PA; Michael S. Errera, PRO HAC VICE, Foran Glennon Palandech Ponzi & Rudloff PC, Chicago, IL.

For J F BRAUN & SONS INC., Defendant: Bruce E. Rende, LEAD ATTORNEY, Robb Leonard Mulvihill LLP, Pittsburgh, PA; David A. Young, LEAD ATTORNEY, Mancheski & Bunker, Pittsburgh, PA.

Lisa Pupo Lenihan, United States Magistrate Judge. District Judge Peter J. Phipps.

Lisa Pupo Lenihan

ECF No. 30

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the Motion for Summary Judgement filed by Defendant, J. F. Braun & Sons, Inc. (ECF No. 30), be denied.

II. Report

Plaintiff, Indian Harbor Insurance Company ("Indian Harbor"), as subrogee of TruFood Manufacturing, Inc. ("TruFood"), brings this action alleging that Defendant, J. F. Braun & Sons, Inc. ("Braun"), breached its contractual duties with TruFood by supplying roasted pumpkin seeds (pepitas) that were tainted with peanuts for use in snack bars which were supposed to be peanut-free, resulting in a recall of approximately 5.2 million snack bars and causing a loss of millions of dollars.

Currently pending before the Court is a motion for summary judgment, filed by Defendant Braun. Braun contends that, because TruFood entered into a Settlement Agreement and Release with Braun, neither TruFood nor Indian Harbor (TruFood's subrogee) can seek further damages from Braun.

A. Facts

Kind initially contracted with TruFood to exclusively manufacture peanut-free snack bars. Amended Compl. at ¶¶ 7-8 (ECF No. 8). TruFood contracted with Braun to supply roasted pumpkin seeds as one of the ingredients for the snack bar. *Id.* at ¶¶ 9-10. Braun was required to roast the seeds at a peanut-free facility before sending them to TruFood, but had them roasted instead at a facility where peanuts were roasted in the same equipment. *Id.* at ¶¶ 11, 13.

When Kind discovered that the seeds were roasted in a facility that was not peanut-free, it tested the bars TruFood produced with the seeds supplied by Braun, and the results were positive for peanut protein. *Id.* at ¶ 14. Subsequently, 5.2 million snack bars were recalled "due to the contamination of peanut protein in the snack bars." *Id.* at ¶ 15.1

Due to the snack bar recall, Kind placed TruFood and Braun on notice of potential claims which it intended to assert against them for the expenses it expected to incur in conjunction with the recall. Def's App. Ex. E-1, Tsudis Dep. pp. 21-22, (hereinafter "Tsudis Dep.") (ECF No. 34-5).

During the manufacture of the snack bars, TruFood was insured under a Product Contamination Insurance Policy ("Policy") issued by Indian Harbor. Amended Compl. at ¶ 2. TruFood placed Indian Harbor on notice of Kind's potential claim. Tsudis Dep. p.17.

As a result of TruFood's notification of Kind's potential claim, **[*2]** XL Group, an affiliated entity of Indian Harbor, retained Charles Taylor Adjusting and, in particular, David Perry, to investigate the sequence of events giving rise to the recall initiated by Kind, and to explore potential third-party liability for the ongoing Kind claim. Def's App. Ex. F-1, Perry Dep. pp. 18-21, (hereinafter "Perry Dep.") (ECF No. 34-8).

Communications with Braun

On June 5, 2014, Perry wrote to Stephen O'Mara, President of Braun. Def.'s App. Ex. G (ECF No. 34-11). The letterhead stated "Charles Taylor Adjusting," and the subject line of the June 5, 2014 correspondence provided, "TruFood Manufacturing, Inc. Recall of Kind Snacks health bars, 21st May 2014 Notice of Intention of Recover Costs and Damages." The subject line did not mention Indian Harbor. *Id.* Perry stated in the letter that he was instructed by "products contamination insurers of TruFood" to "investigate" the recall on their behalf. *Id.*

Perry's letter further states: "TruFood and their insurers are holding you directly liable for any costs they have incurred and may incur in the future with regard to this matter." *Id.* Perry did not provide a quantified amount as to costs but did state that the recall involved approximately 5.2 million snack bars. *Id.* It did not identify any insurance carrier on TruFood's behalf to Kind as a result of the snack bar recall. *Id.* The letter concludes with: "We would suggest that you immediately notify your insurance carriers of this Incident and of TruFood's claim for damages and costs." *Id.*

As of June 5, 2014, Kind had not submitted a claim to TruFood or Indian Harbor that specified an amount. Perry Dep. p. 23 (ECF No. 34-8). Nor had either TruFood or Indian Harbor made any payments to Kind to compensate it for any damages it incurred due to the recall. Braun's Material Facts at ¶ 31 (ECF No. 32).

Braun states that Perry's intention in sending his June 5, 2014 correspondence was simply to place Braun on notice that there may be some further action taken against it at some point in the future. *Id.* at ¶ 32. Indian Harbor responds that the June 5, 2014 correspondence was to place Braun on notice of the possibility that there may be further action taken against Braun at some point in time by someone, including Indian Harbor. Indian Harbor's Response, at ¶ 32 (ECF No. 36).

Braun notified its insurer, Federal Insurance Company ("Federal"), of Kind's potential claim. Def.'s App. Ex. H, Leibowitz Dep. p. 33 (hereinafter "Liebowitz Dep.") (ECF No. 34-12). On June 12, 2014, Larry Stopol, counsel for Braun, responded to Perry's June 5, 2014 correspondence. Def.'s App. Ex. I (ECF no. 34-17). Stopol denied any responsibility or liability for the Kind claim. *Id.* On or shortly after June 12, 2014, Perry conveyed to Mr. Peter Tsudis, the president of TruFood, and Ms. Keri Ryan at XL, that Braun was denying any liability or responsibility for the snack bar recall. Perry Dep. p. 59-60 (ECF No. 34-9).

On July 10, 2014, Perry issued a second letter to Braun through its counsel, Stopol. Def.'s App. Ex. J (ECF No. 34-18). The subject line of the July 10, 2014 correspondence provided, "TruFood Manufacturing, Inc. Recall of Kind Snacks health bars, 21st May 2014 Notice of Intention of Recover **[*3]** Costs and Damages from JF Braun." *Id.* Neither the subject line nor the letter mentions Indian Harbor or any other insurer. Perry Dep. p. 68. Braun emphasizes that, in this letter, Perry reiterated TruFood's position that Braun was, in fact, the party responsible for the Kind recall. Braun's Material Facts at ¶ 40 (ECF No. 32). Indian Harbor responds that the letter carbon copies XL Insurance America, Inc., which is an Indian Harbor affiliate. Indian Harbor's Response, at ¶ 40 (ECF No. 36). Perry testified in his deposition that his purpose in the July 10, 2014 letter was to respond to Braun's June 12, 2014 letter and to provide documentation to contest Braun's position that Braun had no liability for the recall. Perry Dep. p. 67 (ECF No. 34-9).

Perry next wrote to Stopol approximately one year later, on June 4, 2015, and advised him that Kind's damages stood at approximately $3,500,000.00. Def.'s App. Ex. K (ECF No. 34-19). Perry's purpose in sending this letter was to reiterate TruFood's and its insurers' intention to transfer responsibility for the damages to Braun. Perry Dep. pp. 72-73 (ECF No. 34-9). The subject line of the June 4, 2015 letter provided, "TruFood Manufacturing, Inc. Recall of Kind Snacks Strong and Maple Pumpkin health bars, 21st May 2014 Notice of Intention to Recover Costs and Damages from JF Braun." Def.'s App. Ex. K (ECF No. 34-19). The subject line did not mention Indian Harbor or any other insurer. *Id.*

Braun states that Perry's June 4, 2015 correspondence did not identify Indian Harbor as one the "products contamination insurers" of TruFood. Braun's Statement of Facts at ¶ 53 (ECF No. 32). Indian Harbor responds that, while Perry's letter did not identify "Indian Harbor" specifically by that name, it did reference, similar to his July 10, 2014 letter to Braun, that a carbon copy recipient was Keri Ryan with XL Catlin Insurance, of which Indian Harbor is a member. Indian Harbor's Response at ¶ 53 (ECF No. 36).

The June 4, 2015 correspondence did not identify any sums of money which had been paid by TruFood, Indian Harbor or any other insurance carrier on TruFood's behalf to Kind as a result of the snack bar recall. Braun's Statement of Facts at ¶¶ 54-57 (ECF No. 32). It did not set forth a specific demand for payment from Braun or any entity acting on its behalf. *Id.* It did not identify any subrogation claims raised by XL Group or Indian Harbor at that time. *Id.* The letter concluded by Perry advising Braun that, "In view of the proximity of a formal claim presentation, we wish to reiterate our intention to tender responsibility for meeting Kind's substantiated costs to Braun." *Id.*

As of June 4, 2015, neither TruFood nor Indian Harbor had made any type of payment to Kind to compensate it for any damages as a result of the snack bar recall. Perry Dep. pp. 71-72 (ECF No. 34-9). Kind had also not submitted a formal, final claim presentation to TruFood, Indian Harbor and/or XL Group as of that date. *Id.*

TruFood Settles with Kind

On November 19, 2015, TruFood entered into a settlement with Kind. Perry Dep. p. 93 (ECF No. 34-9). That settlement was memorialized in a Settlement Agreement and Release prepared by TruFood, and executed by Kind and TruFood. **[*4]** Perry Dep. p. 93; Tsudis Dep. pp. 25-26 (ECF No. 34-5). Based upon the quantification of Kind's claim by Indian Harbor's forensic accountant and adjuster, TruFood agreed to pay Kind $2,686,174.27. Tsudis Dep. pp. 98-99 (ECF No. 34-6).

TruFood Settles with Indian Harbor

On or about December 1, 2015, TruFood and Indian Harbor entered into a settlement agreement wherein Indian Harbor reimbursed TruFood for the monies it paid to Kind in settlement of Kind's claims against it. Perry Dep. p. 99. Indian Harbor paid TruFood $2,436,174.27 and TruFood paid a $250,000 deductible. Tsudis Dep. pp. 98. That settlement was memorialized in a Final Proof of Loss and Release which was prepared by Indian Harbor and executed by TruFood. Perry Dep. pp. 98-100 (ECF No. 34-10).

Braun states that TruFood did not notify Braun of the TruFood/Indian Harbor Settlement. Braun's Statement of Facts at ¶ 68 (ECF No. 32). Indian Harbor responds that TruFood's counsel informed and provided Braun with confirmation that the Kind claim was settled, that TruFood incurred an uninsured loss that included its $250,000 deductible as evidenced by a Declaration Page reflecting Indian Harbor as TruFood's insurer. Indian Harbor's Response at ¶ 68 (ECF No. 36).

Braun further states that TruFood also did not inform it of the amount of its settlement with Indian Harbor. Braun's Material Facts at ¶ 69 (ECF No. 32). Indian Harbor responds that Chubb's handling adjuster admitted that Chubb was on notice of a subrogation claim because TruFood disclosed that Kind's claim was settled and that the payment was for the "lion's share" of what Kind demanded and that the valuation of the claim had been verified by Chubb's forensic account. Indian Harbor's Response at ¶ 69 (ECF No. 36). Indian Harbor also reiterates that TruFood had notified Braun that it was seeking to settle with Braun for only TruFood's out-of-pocket and uncovered losses. *Id.*

Communications Between TruFood and Braun's Insurer Prior to Settlement

On December 9, 2015, TruFood notified Braun that it was still calculating its losses in conjunction with the recall, but fully expected its losses to exceed $500,000. It further advised Braun that it was withholding payment to Braun in the amount of $500,000, as a set off against the losses that Braun had caused. Def.'s App. Ex. M. (ECF No. 34-21). The December 9, 2015 letter did not notify Braun of: (a) the November 19, 2015 settlement between TruFood and Kind; (b) the December 1, 2015 settlement between TruFood and Indian Harbor; (c) any sums which had been paid to Kind by TruFood or Indian Harbor on behalf of TruFood; and (d) any subrogation claim which Indian Harbor had informed TruFood it intended to pursue against Braun. Braun's Statement of Facts at ¶ 73 (ECF No. 32).

Thereafter, TruFood and Braun attempted to resolve their dispute relating to the snack bar recall. Seigworth Dep. p. 24 (ECF No. 34-20). On January 9, 2016, Charles Young, counsel for Braun's insurer Chubb, wrote to Bryan Seigworth, counsel for TruFood, that in order for Braun to evaluate liability and potential exposure, it wanted to know "the amount of money paid to Kind by [TruFood], the source of those funds (**[*5]** insurance, out of pocket, etc.)" and to be provided with a copy of "any agreements memorializing the terms of payment." Def.'s App. Ex. N (ECF No. 34-22). In addition to not informing it of the amount of the settlement between TruFood and Kind, Braun ws also not told that Indian Harbor had paid any monies to TruFood in reimbursement, or that Indian Harbor or XL Group planned on pursuing a subrogation claim against Braun. TruFood did not provide Braun with a copy of the Settlement Agreement and Release it entered into with Kind. Braun's Statement of Facts at ¶ 76 (ECF No. 32). Indian Harbor responds that Chubb was on notice of a subrogation claim, as was Braun's counsel. Indian Harbor's Response at ¶ 76 (ECF No. 36).

Charles Young testified that he was provided with a Declaration Page on March 16, 2016 which identified Indian Harbor as an insurer for TruFood. Def's App. Ex. O, Young Dep. pp. 50-52 (hereinafter "Young Dep.") (ECF No. 34-24). Young was concerned with how much was paid to Kind, wanting to prevent a claim from Kind against Braun. Id. at p. 58. Young testified that he had no reason to assume that an insured (TruFood) would enter into a settlement without notifying its insurer (Indian Harbor) and would sign a release which had the effect of releasing all claims. Id. at p. 76. He did not ask to specifically include the words "Indian Harbor" or "insurer" in the Settlement Agreement and Mutual Release because he did not believe it was necessary to do so, as it was a release of all claims and referenced successors. *Id.* at pp. 84-85. When asked if Indian Harbor is a party to the agreement, Young replied "it depends on how you look at it. To me, I was looking at it as extinguishing any claim that [TruFood's] insurers could have had." Id. at p. 82.

Seigworth (TruFood counsel) believes he informed Young through documents and a possible phone call that TruFood's insurer had made a payment to Kind. Def's App. Ex. L, Seigworth Dep. pp. 38-39 (hereinafter "Seigworth Dep.") (ECF No. 34-20). Seigworth testified that he "certainly" told Young that there could be third party claims of which a subrogation action could be a part, but he did not tell Young that a subrogation action was definitely coming. Id. at p. 40.

On January 11, 2016, Seigworth sent Young an email which stated, in part, "Further, TruFood's claim against J.F. Braun does not seek recovery of all amounts paid to Kind in connection with the pepitas recall." Pl.'s App. Ex. 19 (ECF No. 38-19). On March 17, 2016, Seigworth sent an email to Young which identified the claim presented by TruFood and noted, in part, "Here is a summary of the unrecovered damages TruFood has incurred" and also noted, in part, "TruFood's settlement demand resolves only TruFood's claim against J.F. Braun." Pl.'s App. Ex. 18 (ECF No. 38-18). In that same email, Seigworth wrote, "TruFood is not in a position to seek Kind's participation in settlement or to provide any other assurance that Kind will not make a claim against J.F. Braun." *Id.*; Seigworth Dep. p. 30 (ECF No. 34-20).

On April 5, 2016, Seigworth noted to Young in part:

> I had a chance to discuss with TruFood representatives J.F. Braun's settlement offer of $275,000, which was conditioned on TruFood indemnifying **[*6]** J.F. Braun for any claims that Kind or any third party may bring against J.F. Braun related to the adulterated pepitas. TruFood cannot accept this offer.
>
> TruFood cannot be in a position to indemnify J.F. Braun for third party losses that J.F. Braun may have caused by delivering adulterated pepitas. While we appreciate J.F. Braun's desire for complete closure of this matter, I am sure J.F. Braun can appreciate that TruFood cannot shoulder the risk that third parties bring claims against J.F. Braun arising from J.F. Braun's supply of adulterated pepitas.
>
> ***
>
> At bottom, I believe it serves each of our client's interests to resolve this matter amicably and promptly. To that end, TruFood is willing to reduce its settlement demand to $380,000, if the parties can resolve this matter within ten days from today. This represents a nearly $40,000 compromise by TruFood of its claim for

> documented, out-of-pocket costs and readily quantifiable lost profit, and evidences a good faith effort by TruFood to resolve its claim and continue its business with J.F. Braun.

Def.'s App. Ex. L at p. 50 (ECF No. 34-20). To support the out-of-pocket claim submitted by TruFood to Braun, Seigworth provided a copy of the declaration page which showed Indian Harbor was TruFood's insurer and that TruFood incurred a $250,000 deductible. Seigworth Dep. pp. 25, 30 (ECF No. 34-20); Pl.'s App. Ex. 21 (ECF No. 38-21).

As of February 16, 2016, before the TruFood/Braun agreement was executed, Chubb's adjuster Cynthia Leibowitz wrote in an email: "We know that KIND had a claim for $3,504,427 with $1,769,192 for value of recalled inventory." Def's App. Ex. H, Leibowitz Dep. p.109 (ECF No. 34-14). She admits that it was her understanding that TruFood had paid to Kind the "lion's share" of Kind's claim. Id. at p. 110. She testified that at no time prior to the closure of her file did she know if Indian Harbor had made a payment to Kind, nor had Indian Harbor or XL submitted a formal demand for payment or demand for reimbursement of any sums to Chubb. Id. at 122-25.

She confirmed that there was an understanding within Chubb that part of what TruFood sought in its settlement with Braun was the $250,000 deductible incurred by TruFood as a result of Kind's claim submission. Leibowitz Dep. p.110 (ECF No.34-14). On April 5, 2016, Leibowitz wrote in her file note: "we feel like there is something amiss for Tru not to tell us what they paid KIND other than 'the lion's share.'" Id. at p. 107-08; Pl.'s App. Ex. 13 (ECF No. 38-13). On April 7, 2016, Paul Cusumano, a supervisor, wrote in a File Note, in part, "I agree with your recommendations and analysis. It appears to me that TRU must have paid a significant amount, if not all of KIND's claim, and is simply trying to recoup whatever they can at this point." *Id.* at pp. 113-15; Pl.'s App. Ex. 14 (ECF No. 38-14).

On April 13, 2016, Young conveyed the final counteroffer from Braun, "My client is willing to offer $335,000 to settle this matter. This covers 100% of Tru's out-ofpocket costs and lost profit, which I believe is reasonable. This would be with no indemnification by Tru and would constitute a release of all claims that Tru currently may have against J.F. Braun." Pl.'s App. Ex. 20 (ECF No. 38-20).

Seigworth **[*7]** sent a first draft of the TruFood/Braun release to Young on April 8, 2016, and subsequently the draft was revised and added to by both of them. Young Dep. p.68 (ECF No. 34-24); Pl.'s App. Exs. 23-24 (ECF Nos. 38-23, 38-24). Young agreed that the agreement does not identify that Indian Harbor incurred any losses, because at that time the information was known only to Indian Harbor, TruFood and its counsel and that, when TruFood was asked for that information, it did not provide it. Young Dep. pp. 78-79.

TruFood Settles with Braun

Between September 2015 and December 2015, TruFood and Indian Harbor held discussions about jointly or independently pursuing claims against Braun in an attempt to recover any monies which had been paid to Kind on it's claims against TruFood. Perry Dep. pp. 87-88 (ECF No. 34-9); Tsudis Dep. pp. 48 (ECF No. 34-5).

On or about April 30, 2016, TruFood and Braun entered into a Settlement Agreement and Mutual Release relating to the snack bar recall. Def.'s App. Ex. D (ECF No. 34-4). Indian Harbor refutes the claim that the settlement relates to "any and all claims between them arising from or which could have arisen from the snack bar recall." Rather, it was only related to TruFood's out-of-pocket uninsured claims. Indian Harbor's Response at ¶ 77 (ECF No. 36). Braun agreed to pay TruFood $335,000, with TruFood remitting $165,000 out of the $500,000 it was withholding from Braun as offset. Def's App. Release Ex. D (ECF No. 34-4).

The Settlement Agreement and Mutual Release ("Release") executed by and between TruFood and Braun contains the following terms and provisions:

> WHEREAS, TruFood commenced a voluntary recall and destruction of the Food Products due to the Event (the "Recall");
>
> WHEREAS, TruFood incurred certain costs, damages, expenses, and losses in connection with the Recall;
>
> WHEREAS, TruFood advised J. F. Braun that it believes that the Pepitas were the cause of the Event, and that TruFood was making a claim

against J F Braun for all Losses TruFood suffered in connection with the Event and the Recall ("the Claim");

WHEREAS, TruFood and J. F. Braun wish to achieve a full resolution of all actual or potential claims that each Party has or may have that arise out of or in any way relate to the Pepitas, the Food Products, the Event, the Recall, the Losses, the Claim, and the Setoff.

NOW, THEREFORE, in consideration of the foregoing Recitals, which are a substantive part of this Agreement, and the mutual covenants and agreements of the Parties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agrees as follows:

...

2. Mutual Release.

(a) Except for the Parties' respective obligations expressly stated in this Agreement, the Parties, on behalf of themselves, their predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, and its and their past, present and future officers, directors, shareholders and employees, hereby release and discharge the other Party, together with **[*8]** its predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, expenses (including attorney's fees and costs actually incurred), and punitive damages, of any nature whatsoever, known or unknown, which either Party has or may have, against any other Party, whether or not apparent or yet to be discovered, or which may hereafter develop, or any acts or omissions related to or arising from the Pepitas, the Food Products, the Event, the Recall, the Losses, the Claim, and the Setoff.

(b) This Agreement resolves any claim for relief no matter how characterized, including, without limitation, compensatory damages, damages for breach of contract, bad faith damages, reliance damages, liquidated damages, punitive damages, costs and attorney's fees related to or arising from the Pepitas, the Food Products, the Event, the Recall, the Losses, the Claim, and the Setoff.

4. Agreement is Legally Binding. The Parties intend this Agreement to be legally binding upon and shall inure to the benefit of each of them and their respective successors.

...

6. Authority to Execute Agreement. By signing below, each Party warrants and represents that the Party signing this Agreement on its behalf has authority to bind that Party and that the Party's execution of this Agreement is not a violation of any by-law, covenants, and/or other restrictions placed upon them by their respective entities.

Def.'s App. Ex. D (ECF No. 34-4).

Lack of Notice to Indian Harbor

There is no indication that Indian Harbor was notified of the settlement between TruFood and Braun. Perry testified that he learned of the settlement between Braun and TruFood sometime in 2018. Perry Dep. p. 63 (ECF No. 34-9).

Charles Young, Counsel for Chubb, did not speak to Perry or Indian Harbor about TruFood's claim agaionst Braun, nor provide a copy of TruFood/Braun Release to Indian Harbor or Perry. Young Dep. pp. 20-21 (ECF No. 34-23).

Stephen O'Mara (Braun President) admitted that he had received three pieces of correspondence from Perry, but he has never spoken with Perry and did not attempt to contact him after receipt of TruFood's counsel's December 9, 2015 correspondence. Pl.'s App. Ex. 15 O'Mara Dep. pp. 57-58 (ECF No. 38-15). O'Mara testified that when he received Perry's June 12, 2014 letter, he had an appreciation that there may be a claim presented by TruFood and its insurance carrier insurer for damages that might be incurred and paid

under a policy, but that he did not view Perry's June 6, 2014 letter as the presentation of a potential claim by an insurer of TruFood, nor did he view that letter as the presentation of a claim for damages that may be incurred under a policy held by TruFood. *Id.* at pp. 38-42.

Counsel for TruFood, Bryan Seigworth, testified that he does not believe that he ever had any communications with Perry **[*9]** and that he was not familiar with the XL Group. Seigworth Dep. pp. 10-11 (ECF No. 34-20). Nor did he recall interacting with Perry or anyone from Indian Harbor before TruFood and Braun entered into their Release. *Id.* at pp.17-18. He did not provide a copy of the Release to Perry and did not know if anyone at TruFood provided a copy to Perry or anyone else at Indian Harbor or XL Group. Id. at p.37.

Peter Tsudis (TruFood President) testified that he did not provide a copy of the Release to Perry or Ryan, nor did he instruct anyone else to do so or specifically to not do so; he does not know if his counsel did. Tsudis Dep. at pp. 91 (ECF No. 34-6). Tsudis' interpretation was that the scope of the Release only concerned the settlement of TruFood's uninsured, unrecovered, or out-of-pocket costs and did not include the subrogation claim of Indian Harbor. *Id.* at pp. 82-84. In seeking to settle TruFood's out-of-pocket claim against Braun, Tsudis had two goals: TruFood recovering its uncovered damages and not doing anything that would hurt XL Insurance's claim against Braun. Id. at p. 83.

Chubb adjustor Leibowitz testified that she did not recall speaking with anyone from XL Insurance or Indian Harbor about the settlement agreement reached between TruFood and Braun or the payment issued by Chubb under Braun's insurance policy. Leibowitz Dep. p.106 (ECF No. 34-14). Nor does she recall reaching out to any of those same parties to inquire about the amount of settlement between Kind and TruFood. *Id.* at pp. 116-17.

On May 4, 2017, more than one year after TruFood and Braun entered into their Release, Indian Harbor, for the very first time, submitted a demand for settlement to Braun for $2,686,174.27. Def.'s App. Ex. P (ECF No. 34-26). Indian Harbor maintains that this was not the first time Braun was made aware of the situation. Indian Harbor's Response at ¶ 80 (ECF No. 36). Braun responded to the settlement demand by informing Indian Harbor that it had entered into a Settlement Agreement and Mutual Release with TruFood and that as a result, no additional sums would be paid to Indian Harbor. Def.'s App. Ex. Q (ECF No. 34-27). Indian Harbor then commenced this action against Braun.

B. Procedural History

Plaintiff filed this action on October 13, 2017 and filed an Amended Complaint on December 29, 2017 (ECF No. 8). Subject matter jurisdiction is based on diversity in that: Plaintiff is a Delaware corporation with its principal place of business in Stamford, Connecticut and TruFood is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania; Defendant is a New York corporation with its principal place of business in Elizabeth, New Jersey; and the amount in controversy, exclusive of interest and costs, exceeds the sum of $75,000.00. (Am. Compl. ¶¶ 1-5); *28 U.S.C. § 1332* . Count I (the only count) alleges a claim of breach of the implied warranty of fitness for a particular purpose.

On November 12, 2018, Defendant filed the pending motion for summary judgment (ECF No. 30). On December 11, 2018, Plaintiff filed a brief in opposition (ECF No. 37) and on December 31, 2018, Defendant filed a reply brief (ECF No. 40).

C. Legal Standard

The Federal **[*10]** Rules of Civil Procedure provide that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a) . Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 , 322 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial" or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 , 587 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v.*

Liberty Lobby, *Inc.*, 477 U.S. 242 , 248 (1986). The Court of Appeals has held that "where the movant bears the burden of proof at trial and the motion does not establish the absence of a genuine factual issue, the district court should deny summary judgment even if no opposing evidentiary matter is presented." *National State Bank v. Federal Reserve Bank*, 979 F.2d 1579 , 1582 (3d Cir. 1992).

In following this directive, a court must take the facts in the light most favorable to the non-moving party, and must draw all reasonable inferences and resolve all doubts in that party's favor. *Hugh v. Butler County Family YMCA*, 418 F.3d 265 , 266 (3d Cir. 2005); *Doe v. County of Centre, Pa.*, 242 F.3d 437 , 446 (3d Cir. 2001).

Determining State Law

The Court of Appeals has stated that:

> In adjudicating a case under state law, we are not free to impose our own view of what state law should be; rather, we are to apply state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before us. *Kowalsky v. Long Beach Twp.*, 72 F.3d 385 , 388 (3d Cir. 1995); *McKenna v. Pacific Rail Serv.*, 32 F.3d 820 , 825 (3d Cir. 1994). In the absence of guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule. *McKenna*, 32 F.3d at 825 ; *Rolick v. Collins Pine Co.*, 925 F.2d 661 , 664 (3d Cir. 1991) (in predicting state law, we cannot disregard the decision of an intermediate appellate court unless we are convinced that the state's highest court would decide otherwise).

Gares v. Willingboro Township, 90 F.3d 720 , 725 (3d Cir. 1996). Because this is a diversity action, the Court must predict how the Pennsylvania Supreme Court would rule if presented with this situation. Whether a doctrine applies in this case is an issue of law to be resolved by the court. *Bohler-Uddehom America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79 , 103 (3d Cir. 2001).

D. Discussion

Braun argues that: 1) Indian Harbor can have no greater rights than that of its subrogor, TruFood, and TruFood entered into the Settlement Agreement and Release with Braun and thus could not proceed against Braun; and 2) even if the Court finds the line of reasoning **[*11]** in the cases cited by Indian Harbor convincing, they do not apply in this case, in which Braun had no knowledge of Indian Harbor's payment to TruFood at the time it entered into the settlement and did not know about it until eighteen months later.

Plaintiff responds that: 1) the Settlement Agreement between TruFood and Braun was limited to "out-of-pocket costs" and Indian Harbor was not a party to it or made aware of it; 2) if Braun knew or had reason to know of a subrogation claim, it cannot avoid such a claim by settling with the insured and not the subrogating insurer and the cases Braun relies on are distinguishable; 3) the TruFood/Braun Release is not a general release, it does not apply to "any and all persons," it makes no references to insurers and Indian Harbor is not a "successor" to TruFood (and Braun cites no authority to suggest that it could be); 4) in the alternative, the Settlement Agreement is ambiguous and presents a jury question; 5) in the alternative, the Settlement Agreement is based on a mutual mistake about its scope and intended parties and claims covered; and 6) equity supports denying the motion for summary judgment under these circumstances.

In a reply brief, Defendant argues that: 1) Indian Harbor had no right to subrogation at the time that Braun supposedly had knowledge of the subrogation claim between May 2014 and November 19, 2015, because Indian Harbor had not yet made any payments to TruFood or Kind; Braun was not notified of the subrogation claim until May 4, 2017; thus, the right to subrogation is waived; and 2) the Settlement Agreement is clear and unambiguous and there was no "mutual mistake" and the term "successor" can apply to an insurer such as Indian Harbor.

a. Contract Interpretation

Braun argues that the language of the Release provided that the intentions of entering into it were to achieve "a full resolution of all actual or potential claims that each Party has or may have that arise out of or in any way relate" to "(a) 'the Event'; (b) 'the Recall'; (c) 'the Losses'; (d) 'the Claim'; and (e) the 'Setoff.'" Braun Br. in Supp p. 16 (ECF No. 33). Braun cites to the section in the Release titled "Mutual Release," to

contend that this section should be interpreted to include Indian Harbor. Braun maintains that each party, individually and on behalf of their respective "successors," agreed to release the other from

> all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, expenses (including attorney's fees and costs actually incurred), and punitive damages, of any nature whatsoever, known or unknown, which either Party has or may have, against any other Party, whether or not apparent or yet to be discovered, or which may hereafter develop, or any acts or omissions related to or arising from the Pepitas, the Food Products, the Event, the Recall, the Losses, the Claim, and the Setoff.

Def's App. Ex. D. (ECF No. 34-4). Thus, Braun argues, the terms are clear and unambiguous, and they should be construed by the court **[*12]** as a matter of law." Braun's Br. in Supp. p.17 (ECF No. 33). Braun cites to Pennsylvania state law which directs courts to "ascertain and give effect to the parties' intent," which must be ascertained from the language of the contract, and the words should be given their "plain and ordinary meaning." *Id.* (citing to, inter alia, *Laudig v. Laudig*, 624 A.2d 651 , 653 (Pa. Super. 1988); *Steuart v. McChesney*, 444 A.2d 659 , 661-62 (Pa.1982)). Braun calls special attention to the phrase "any claim for relief," which it claims "unquestionably includes any and all tort claims which TruFood could have asserted against Braun. *Id.* The term "successors" would include a subrogee such as Indian Harbor, who "can only subsequently stand in the shoes of TruFood by way of legal substitution" through subrogation. *Id.* at pp. 17-18.

Braun states that it had requested information from Trufood regarding all the monies that Trufood paid to Kind and the source of those funds, including any payments by an insurance company. Braun's Br. in Supp. at p.18. But TruFood did not respond to this request. *Id.* Thus, Braun entered the agreement with TruFood intending for the release to extinguish any claims that TruFood or related entities such as an insurance company may bring. *Id.*

Indian Harbor argues that the communications between Trufood and Braun, as well as the depositions, indicate that the settlement between them was not intended to bar its subrogation claim. Indian Harbor Br. in Opp. p. 6. (ECF No. 37). Based on only the terms in the Release, Indian Harbor counters that it does not constitute a general release, but one that is "specific" and "narrowly tailored." Id. at p. 15. For example, the terms "Party" and "Parties" do not refer to any insurance in general or to Indian Harbor specifically. *Id.* Furthermore, from the context of the settlement discussions and documentation exchanged between TruFood and Braun, the scope of the settlement is only meant to cover Trufood's out-of-pocket costs. Id. at p. 16. In addition, Braun sought indemnity from Trufood in the course of negotiating the agreement, which was ultimately not agreed to by Trufood. *Id.* Indian Harbor also argues that the word "successor" as it appears in a settlement release refers to an entity that acquires or takes over the assets and operation of another company, not an insurance company. *Id.* at pp. 16-17. (citing *In re H.K. Porter Co. Inc.*, 358 B.R. 231 , 236 (W.D. Pa. 2006); *McClinton v. Rockford Punch Press & Mfg. Co., Inc.*, 549 F.Supp. 835 (E.D. Pa. 1982).).

Alternatively, Indian Harbor argues that the Release presents ambiguities that makes its interpretation a question of fact for a jury. Indian Harbor Br. in Opp. p. 18 (ECF No. 37). The attorneys for Trufood and Braun's insurance company testified that they had diametrically opposed understandings of whether the Release covered Indian Harbor's subrogation claim. Id. at p. 18. Braun's insurance counsel claimed that at the time of the agreement, he believed that it did include Indian Harbor's subrogation claim. *Id.* Indian Harbor infers that this means he had knowledge of the subrogation claim at the time the agreement was signed. Id. at p. 19. Thus, Indian Harbor argues, the court should either find against Braun based **[*13]** on Pennsylvania law or let a jury make the determination. *Id.*

Braun refutes that there are questions of fact and maintains that the Release "contains clear and unambiguous contractual terms that are capable of only one reasonable interpretation which must be given effect." Braun Reply Br. p. 11 (ECF No. 40). Under Pennsylvania law, Braun argues, Summary Judgement is appropriate when the contractual terms are unambiguous. Id. at p. 10. Braun also argues that the integration clause prohibits Indian Harbor from raising

evidence outside the four corners of the contract. Id. at p. 13.

The Third Circuit, applying Pennsylvania law, has provided ample guidance with regard to interpreting ambiguous contract terms:

> "'Where the intention of the parties is clear, there is no need to resort to extrinsic aids or evidence,'" instead, the meaning of a clear and unequivocal written contract "'must be determined by its contents alone.'" *Steuart*, 444 A.2d at 661 (quoting *East Crossroads Ctr., Inc. v. Mellon—Stuart Co.*, 416 Pa. 229 , 205 A.2d 865 , 866 (1965)). "[W]here language is clear and unambiguous, the focus of interpretation is upon the terms of the agreement as *manifestly expressed*, rather than as, perhaps, silently intended." *Id* . "Clear contractual terms that are capable of one reasonable interpretation must be given effect without reference to matters outside the contract." *Krizovensky*, 624 A.2d at 642 .
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> A court may, however, look outside the "four corners" of a contract if the contract's terms are unclear: "[w]here the contract terms are ambiguous and susceptible of more than one reasonable interpretation, ... the court is free to receive extrinsic evidence, i.e., parol evidence, to resolve the ambiguity." *Id* . But because Pennsylvania presumes that the writing conveys the parties' intent, a contract
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> > will be found ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.
>
> [citations omitted] To determine whether ambiguity exists in a contract, the court may consider "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001 , 1011 (3d Cir. 1980).
>
> Ambiguity in a contract can be either patent or latent. While a patent ambiguity appears on the face of the instrument, "a latent ambiguity arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous." *Duquesne Light*, 66 F.3d at 614 (citing *Easton v. Washington County Ins. Co.*, 391 Pa. 28 , 137 A.2d 332 (1957)). A party may use extrinsic evidence to support its claim of latent ambiguity, but this **[*14]** evidence must show that some specific term or terms in the contract are ambiguous; it cannot simply show that the parties intended something different that was not incorporated into the contract. "[L]est the ambiguity inquiry degenerate into an impermissible analysis of the parties' subjective intent, such an inquiry appropriately is confined to 'the parties [sic] linguistic reference.' ... [T]he parties' expectations, standing alone, are irrelevant without any *contractual hook* on which to pin them." Id. at 614 & n. 9 (quoting *Mellon Bank*, 619 F.2d at 1011 n. 12) (emphasis added).
>
> Furthermore, the alternative meaning that a party seeks to ascribe to the specific term in the contract must be reasonable; courts must resist twisting the language of the contract beyond recognition. "In holding that an ambiguity is present in an agreement, a court must not rely upon a strained contrivancy to establish one; scarcely an agreement could be conceived that might not be unreasonably contrived into the appearance of ambiguity. Thus, the meaning of language cannot be distorted to establish the ambiguity." *Steuart*, 444 A.2d at 663 .
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> ....
>
> ....Once the court determines that a party has offered extrinsic evidence capable of establishing latent ambiguity, a decision as to which of the competing interpretations of the contract is the

> correct one is reserved for the factfinder, who would examine the content of the extrinsic evidence (along with all the other evidence) in order to make this determination. *See Mellon Bank*, 619 F.2d at 1011 , 1013-14 .

Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79 , 92-94 (3d Cir. 2001).

Braun argues that the integration clause of the release prevents any consideration of outside evidence. Braun's Reply Br. p. 11 (ECF No. 40). However, the Third Circuit recognizes extrinsic evidence to explain ambiguity in contract terms, regardless of the presence of an integration clause. *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223 , 233 (3d Cir. 2001) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible, however, to establish the meaning of ambiguous terms in the writing, whether or not the writing is integrated.").

In this instance, proper extrinsic evidence supports the argument that a latent ambiguity exists regarding the interpretation of the contract, including the term "successors" as it appears in the release between Braun and TruFood. There are indirect references to the existence of an insurance company in the communications between TruFood and Braun. The record shows that while the individuals representing Braun and Chubb may not have been aware that TruFood's insurer was an entity that was specifically called "Indian Harbor," they had reason to be aware that an insurer for TruFood existed, and thus a subrogation claim was a possibility. David Perry was the first to notify Braun of the recall in his letter to Stephen O'Mara. While his first letter presented himself as working under TruFood's direction, his company name, Charles Taylor Adjusting, displayed prominently in the letterhead, indicates that an insurance company was involved. Perry also stated **[*15]** that he was instructed by "products contamination insurers of TruFood" to investigate the recall on their behalf. That phrase could reasonably have put Braun on notice that an insurance company was involved in TruFood's claim against them. For the same reason, both the July 10, 2014 and June 4, 2015 letters that Perry sent to Braun's counsel Larry Stopol carbon copied Ms. Keri Ryan at "XL Insurance America, Inc." Charles Young had also received a Declaration Page itemizing TruFood's losses, which identified Indian Harbor as TruFood's insurer. There is ample evidence that Braun should have been aware of the existence of an insurance entity for TruFood, but neglected to make reference to it in the Release it signed with TruFood.

Secondly, Braun's awareness of the total value of the recall in contrast to the amount it settled on with TruFood constitutes a discrepancy. TruFood never provided Braun with the exact amount of the settlement between TruFood and Kind, nor did it provide notice that Indian Harbor had paid any monies to TruFood in reimbursement. Yet the totality of circumstances indicates that there are reasons for Braun, its counsel, and its insurer Chubb, to be aware that the Release it signed with TruFood did not cover all of the costs associated with the recall. TruFood informed Braun that it had incurred a deductible of $250,000. This should also have made Braun aware that TruFood was compensated for its losses in the recall by an insurer. There is evidence that TruFood had made known to Braun that it was seeking simply its own out-of-pocket costs and that the rest of the amount, the "lion's share" of damages to Kind, was not part of the settlement it was seeking from Braun.2 Chubb was also aware that the total value of the recall damages was approximately over $3 million. Thus, for Braun to settle with TruFood for close to one-tenth of the total cost of the recall and not expect to be liable for more, is at best a tenuous reason to grant Braun summary judgement.

In addition, the term "successor" as it appears in the Release between TruFood and Braun, is at the very least ambiguous as to whether it includes an insurer. It is reasonable to assume that "successor" could simply refer to another company that takes over the finances and operations of the company, but not to the insurer that has always been in the background, providing financial protection to the company when claims are made against it. This in no way twists the meaning of the word. The Third Circuit as well as courts in this jurisdiction have used "successor" in the sense of one company taking over the operation of another. *See AmeriSteel Corp. v. Int'l Bhd. of Teamsters*, 267 F.3d 264 , 267 (3d Cir. 2001) (discussing whether a "successor employer" is bound by the collective bargaining terms that bound the company it had purchased); *Fed. Ins. Co. v. Glenn D. Livelsberger, Inc.*, 868 F. Supp. 686 , 690 (M.D. Pa. 1994) (Insurance coverage for successor corporation is irrelevant to issue of whether claimant has available

remedy against predecessor corporation, and, thus, it is irrelevant to applicability of product line exception to **[*16]** general rule that successor corporation is not liable for torts of predecessor corporation under Pennsylvania law).3

The Court finds that Indian Harbor has offered sufficient extrinsic evidence to establish latent ambiguity in the Release between TruFood and Braun such that the interpretation of that Release is reserved for the factfinder.

b. Subrogee's Rights

Braun relies on a series of cases for the general proposition that the derivative nature of an insurer's subrogation right limits its claims to those that are available to the insured. Braun's Br. in Supp. at pp. 10-11 (ECF No. 33). This argument is based on cases that generally outline the nature of subrogation under Pennsylvania law. *Kiker v. Pa. Fin.*, 742 A.2d 1082 (Pa. Super. 1999); *Pub. Serv. Mut. Ins. Co. v. Kider-Friedman*, 743 A.2d 485 (Pa. Super. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999). Braun maintains that when an insured executes a general release, it extinguishes the insured's right to sue. Braun's Br. in Supp. pp. 11-12 (ECF No. 33). Consequently, the release also extinguishes the *insurer's* right to sue due to the derivative nature of subrogation rights. *Id.* Braun further argues that broad and general language is sufficient to extinguish both the direct and derivative rights to sue the tortfeasor. *Id.* Braun bases its argument on a Pennsylvania Supreme Court case, *Republic v. Paul Davis Systems of Pittsburgh South*, 670 A.2d 614 (Pa. 1996). Braun also cites to the Pennsylvania Superior Court decision of *Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc* . 916 A.2d 686 (Pa. Super. 2007) for the proposition that the right of subrogation is dependent on the viability of an insured's cause of action against a third-party tortfeasor, and where any such cause of action has been waived, the insurer waives its subrogation claim as well, regardless of notice or consent. *Id.* at pp. 13-14.

Indian Harbor cites a line of cases that stand for the proposition that if there is evidence a tortfeasor had knowledge, or sufficient facts that if followed up by tortfeasor would lead to knowledge that a subrogation claim exists, then the tortfeasor loses the right to claim laches in defense to a subrogation claim if that tortfeasor elects to settle only with the plaintiff and does not include the subrogating insurer. Indian Harbor Br. in Opp. p. 6-7 (ECF No. 37) (citing to *St. Paul Fire & Marine Ins. Co. v. Pennsylvania Mfr. Ass'n Ins. Co.*, No. CIV. A .85-4285, *1985 WL 4459* (E.D. Pa. 1985) and *Donegal Mutual Ins. Co. v. Silverblatt*, 36 D. & C.2d 394 (C.P.Cambria Cty. 1964).).

Subrogation is generally recognized in the Third Circuit as an equitable doctrine. *Zurich-Am. Ins. Co. v. Eckert*, 770 F. Supp. 269 , 272 (E.D. Pa. 1991) ("Where the right of an insurer to subrogation is expressly provided for in the insurance policy, the insurer's right to subrogation is measured by, and depends solely upon, the terms of such provision. 16 Couch on Insurance 2d § 61:23, p. 101 (2d ed. 1983)."). However, whether contractually declared or founded in equity, the right to subrogation is to be governed by equitable principles. *Associated Hospital Service v. Pustilnik*, 497 Pa. 221 , 439 A.2d 1149 (1981).") Under Pennsylvania law, "it is generally held that **[*17]** where the tortfeasor obtains a release from the insured with knowledge that the latter has already been indemnified by an insurer, such release does not bar the right of subrogation of the insurer." *St. Paul Fire & Marine Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, No. CIV. A .85-4285, *1985 WL 4459* , at *3 (E.D. Pa. Dec. 16, 1985) (citing *Donegal Mut. Ins. Co. v. Silverblatt*, 36 D. & C.2d 394 , 397 (C.P.Cambria Cty. 1964); See also *Bill Gray Enterprises, Inc. Employee Health & Welfare Plan v. Gourley*, 248 F.3d 206 , 222 (3d Cir. 2001). The court in *St. Paul* found that the question of whether the tortfeasor in that instance had knowledge of the insured's settlement with its insurance company, was a question of material fact and summary judgment on that issue would be inappropriate. *St. Paul* at *3.

There is no decision by the Pennsylvania Supreme Court that conclusively settles the question of when an insurer has the right to subrogation in a situation where it is not a party to a release of claims. Braun cites to two cases, *Republic and Universal*, both of which are factually distinguishable from the case at hand. In *Republic*, a Pennsylvania Supreme Court case, the release at issue was between the insurer (Republic Insurance Company) and the insured. *Id .* at pp. 614-15. It was also drafted by the insurer. *Id .* In contrast, Indian Harbor was not a party to the release, and it is not clear that Indian Harbor was aware of the release until well after it was signed. Second, the

Republic court reiterated that parties to the release may discharge each other as well as a third party who has not contributed consideration but did not discuss whether a general release between the insured and the tortfeasor could discharge an unsuspecting insurer. Id. at p. 615 . The crucial distinction between *Republic* and the present matter is that, "Republic, having prepared the release and directed the insured to sign it, will not now be heard to assert that the release was unauthorized." Id. at p. 616 fn.3.

The second case argued by Braun is a Superior Court case, *Universal Underwriters*. Applying the reasoning of that decision would allow TruFood to waive the subrogation rights of Indian Harbor and transfer liability for negligence away from Braun, the putative tortfeasor. *See Universal Underwriters* at 693 . Braun and/or its insurer Chubb would be released from a possible liability of approximately $2.4 million. In *Universal*, the two parties, a contractor and its client, had agreed to mutually take on the risks of each party's negligence by requiring each to purchase insurance and agreeing not to sue each other for damages covered by that insurance. *Id* . The agreement was a pre-incident alleged waiver of the subrogation claim and specifically waived subrogation. The relevant clause in the contract is entitled "Waivers of Subrogation." Id. at 688 . The only similarity with the present case is that the insurer was also not a party to the contract. The *Universal* court acknowledged that subrogation is an equitable doctrine and found that it was not inequitable to enforce the waiver of subrogation under the facts presented. Id. at 693 . It ruled that "a waiver **[*18]** of subrogation provision **such as the one in this case** is enforceable irrespective of whether the insurer seeking to avoid its enforcement was a party to the contract...." (emphasis added) Id. at 694 . That is markedly different from the present fact scenario, where the Release allegedly barring a subrogation claim by Braun was post-incident. In addition, the release agreement does not contain a "waiver of subrogation provision" and does not mention the word subrogation. The Court finds that the facts of *Universal* are so dissimilar that the opinion does not require a conclusion that Indian Harbor is barred by the language in the TruFood/Braun Release.4

Indian Harbor's Delay

Braun further maintains that any knowledge it may have had of the subrogation claim was "hypothetical, potential, future, unquantified" because Indian Harbor had made no payments to TruFood or KIND at the time Indian Harbor claims to have placed Braun on notice, specifically, the period between May 2014 and November 19, 2015. Braun Reply Br. p. 2 (ECF No. 40). Braun claims that this period of time is irrelevant to the Court's notice analysis, and that Pennsylvania law provides that a subrogee-insurer may only establish an entitlement to its subrogation rights on a claim if it has provided a third party such as Braun with proper notice after the insurer has paid the debt at issue. *Id.* at pp. 2-3. Indian Harbor had not paid the claim at the time it purported to give Braun notice. Id. at p. 3. Braun maintains that Indian Harbor has waived its claim since it delayed for a year to assert it against Braun after it settled with TruFood, and neither Indian Harbor or TruFood informed Braun of the details of the settlement. Id. at p. 7.

Braun cites *Valora v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 574 (2007)* and *Indep. Blue Cross v. W.C.A.B. (Frankford Hosp.)*, 820 A.2d 868 (Pa. Commw. Ct. 2003) to support its assertion that delays of ten or fourteen months in pursuing a subrogation claim constitute enough time for the insurer to forfeit its claim. Braun Reply Br. pp. 8-9 (ECF No. 40).5 However, the facts and rationale in those cases do not apply here. *Independence Blue Cross* involved a statutory provision which provided that "Subrogation arises if it 'is agreed to by the parties or is established at the time of hearing...." *Indep. Blue Cross* at p. 872 . The insurer did not provide convincing evidence that it established this right at the time of the hearing, and the court affirmed the Worker's Compensation Board's decision that the insurer waived its subrogation right based upon failure to adhere to statutory requirements, not because there was a 14-month delay. *Id* . Thus *Blue Cross* is inapplicable.

In *Valora*, the insurer asserted a claim against a medical malpractice settlement ten months after the settlement was made, and three years after the litigation began. The settlement fund was meant to provide future medical care for a child with severe birth injury. The Pennsylvania Supreme Court upheld the equitable ruling of the trial court that the delay in asserting its subrogation right by the insurer amounted to a waiver. As **[*19]** the court specifically stated, "[w]e do not pass upon the correctness of the lower court's finding that appellant's conduct amounted to a lack of reasonable diligence in asserting its rights. In short, we

are not reviewing the lower court's weighing of the equities. Rather, we hold only that there was no legal error in the lower court's finding that the subrogation claim was subject to defeat on equitable grounds." 595 Pa. at 591 fn.5.

Braun also cites *Daley-Sand v. W. Am. Ins. Co.*, 387 Pa. Super. 630 , 633 , 564 A.2d 965 (1989) for the proposition that a subrogee may only establish an entitlement to its rights on a claim if it has provided a third-party proper notice after the subrogee has paid the debt at issue.6 Braun Reply Br. pp. 2-3 (ECF No. 40). In *Daley-Sand*, the motor-vehicle insurer refused to allow its insured to settle with the tortfeasor's insurance company, saying that it was investigating whether it would be giving up its subrogation rights if it consented. *Daley-Sand* at 634 . The trial court balanced the equities and decided that the insurer could not take an extensive amount of time to investigate its subrogation claim, while keeping the insured, who had been seriously injured in a vehicle accident, in limbo by refusing to consent to the settlement as well as not paying for the additional cost of insured's injuries. Id. at 642-43 . The Superior Court affirmed. Just as in *Valora*, an injured person who needed financial assistance was involved, and the delay on the part of the insurance company in asserting its subrogation claim had harmful consequences to that person. None of these cases is applicable to the facts herein and therefore do not bar the assertion by Indian Harbor of its subrogation claim.

E. CONCLUSION

For these reasons, it is recommended that the Motion for Summary Judgment filed by Defendant (ECF No. 30) be denied.

In accordance with the Magistrate Judge's Act, 28 U.S.C. § 636(b)(1)(B) and (C) , and Local Rule of Court 72.D.2 , the parties are allowed fourteen (14) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.

Dated: August 19, 2019

/s/ Lisa Pupo Lenihan

Lisa Pupo Lenihan

United States Magistrate Judge

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fn 1

Braun has denied that the snack bars were contaminated with peanut protein. (ECF No. 9 ¶ 6.)

fn 2

Specifically, Young's email to Seigworth stated: "My client is willing to offer $335,000 to settle this matter. This covers 100% of Tru's out-of-pocket costs and lost profit, which I believe is reasonable. This would be with no indemnification by Tru and would constitute a release of all claims that Tru currently may have against J.F. Braun."

fn 3

Notably, many of these cases involving predecessor and successor corporations also involve the insurance companies' interests, and the insurance companies are treated by the courts as a separate entity and not a successor entity in its own right to the predecessor corporation.

fn 4

There were also contract interpretation issues in *Universal* that were waived due to a failure to properly preserve for review.

fn 5

Although *Valora* was mentioned in Braun's Brief in Support (ECF No. 33 p. 12) it was not cited for this argument until the Reply Brief.

fn 6

Again, raised for the first time in its Reply Brief.

General Information

Judge(s)	Lisa Pupo Lenihan
Related Docket(s)	2:17-cv-01325 (W.D. Pa.);
Topic(s)	Contracts; Torts; Insurance Law
Industries	Insurance
Parties	INDIAN HARBOR INSURANCE COMPANY, as Subrogee of TRUFOOD MANUFACTURING, INC., Plaintiff, vs J. F. BRAUN & SONS, INC., Defendant.
Court	United States District Court for the Western District of Pennsylvania