DURABLA MANUFACTURING COMPANY, Plaintiff,

v.

GOODYEAR TIRE AND RUBBER COMPANY and Goodyear Canada, Inc. a/k/a Goodyear Tire & Rubber Company of Canada, Limited, Defendants.

No. 97 Civ. 6160 (JSR).

United States District Court, S.D. New York.

Feb. 3, 1998.

Distributor of sheet gasket materials containing asbestos brought indemnity and fraud claims against manufacturers, who brought motion for judgment on the pleadings. The District Court, Rakoff, J., held that: (1) allegations that distributor denied liability to claimants who alleged injuries caused by exposure to materials were not irreconcilably inconsistent with position that distributor bore reasonable risk of being found liable to claimants in settled actions; (2) distributor's strict liability was not akin to vicarious liability that would permit claim for common-law indemnification; (3) liability based on warranties was vicarious and supported claims for implied indemnification; and (4) distributor would be allowed to amend complaint to plead fraud claims with particularity.

Motion granted in part and denied in part.

**1. Federal Civil Procedure ⇐1041**

When reviewing motion for judgment on the pleadings, district court applies same standards as on motion to dismiss for failure to state claim. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

**2. Federal Civil Procedure ⇐1049.1**

Motion for judgment on the pleadings requires court to determine whether complaint itself is legally sufficient. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

**3. Federal Civil Procedure ⇐1053.1, 1055**

In determining whether complaint is legally sufficient for purposes of motion for judgment on pleadings, all factual allegations in complaint must be regarded as true, and all reasonable inferences must be drawn in favor of plaintiff. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

**4. Indemnity ⇐15(6)**

On indemnity claims under New York law by distributor of sheet gasket materials containing asbestos against manufacturers, allegations that distributor denied liability to claimants who alleged injuries caused by exposure to materials and that it denied that products were defective or causative of injury to claimants were not irreconcilably inconsistent with position that distributor, despite its protestations, bore reasonable risk of being found liable to claimants in settled actions and that settlement payments were therefore not gratuitous ones for which manufacturers should bear no responsibility.

**5. Indemnity ⇐13.5**

In indemnification action under New York law premised on indemnitee's payment of settlement, indemnitee must prove that it was liable to claimant in underlying action and that settlement payment was reasonable.

**6. Indemnity ⇐13.1(3)**

Strict liability of distributor of asbestos-containing materials was not "passive" liability akin to vicarious liability that would permit distributor's claim for common law indemnification against manufacturers under New York law; there was nothing passive about role of distributor of defective or hazardous product.

**7. Contribution ⇐9(5)**

**Indemnity ⇐15(6)**

In deciding whether distributor's claim against manufacturers was one for contribution or indemnity, distributor's own labeling of its claim was not determinative; rather, court had to look beneath surface of language in complaint to determine legal nature of claim.

8. **Contribution** ⇐5(1)
**Indemnity** ⇐13.2(2)

Party who has itself participated to some degree in wrongdoing cannot receive benefit of common law indemnity doctrine, but only of contribution.

9. **Contribution** ⇐5(1)
**Indemnity** ⇐13.1(1)

Contribution involves joint tort-feasors whereas indemnification involves vicarious liability.

10. **Indemnity** ⇐13.1(3)

Distributor of asbestos-containing materials could bring claims against manufacturers for implied indemnification based on warranties of suitability and merchantability, as liability was truly vicarious, that is, implied by operation of law; whereas strict liability of distributor was partly result of its own activity in purveying offending product to consumer, distributor played no role in manufacture of product and in warranties of merchantability and suitability that automatically arise from that process.

11. **Indemnity** ⇐15(6)

Distributor of asbestos-containing materials could bring claim against manufacturers for contractual indemnification arising out of product liability claims brought against distributor even though complaint did not identify any express contract, as distributor was not required to plead contract claim with particularity and could prove existence and legal force of contract at later stage of case.

12. **Limitation of Actions** ⇐178

Failure of distributor of asbestos-containing material to plead dates it paid settlements with product liability claimants was not fatal to distributor's indemnity claims against manufacturers for recovery of those payments based on New York's six-year limitations period, as distributor was not required to plead dates of those settlements, and discovery would be required to determine when settlements in underlying actions were effected. N.Y.McKinney's CPLR 213.

13. **Indemnity** ⇐15(5)

Claims under New York law for indemnification based on breach of warranties of suitability and of merchantability were not governed by four-year statute for breach of warranty claims, but by six-year statute for indemnification claims. N.Y.McKinney's CPLR 213.

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William F. Mueller, Clemente, Dickson & Mueller, New York City, for Plaintiff.

Diane F. Bosse, Volgenau & Bosse, Buffalo, NY, Bryan R. Williams, Coritsidis & Lambros, New York City, for Defendants.

*MEMORANDUM ORDER*

RAKOFF, District Judge.

Plaintiff alleges that from 1914 to 1973 it was a distributor of sheet gasket materials containing asbestos that were manufactured by defendants Goodyear and Goodyear Canada. *See* August 19, 1997 Complaint ¶ 8. Beginning in 1987, plaintiff was sued in New York by numerous claimants who alleged injuries caused by exposure to the gasket materials; according to plaintiff, defendants refused to defend, indemnify, or contribute to the defense of these claims. *See id.* ¶¶ 11–12. Many of these lawsuits were ended by plaintiff's payment of substantial settlements, *see id.* ¶ 14, and more suits may be brought against plaintiff in the future, *see id.* ¶ 56.

[1–3] Despite its decision not to join defendants in those lawsuits, plaintiff now contends that defendants must reimburse plaintiff for the payments it made and costs it incurred in those lawsuits, as well as other damages, premised on no fewer than seven causes of action: (1) common law indemnification; (2) indemnification based on express and/or implied contracts; (3) indemnification based on breach of warranties of suitability; (4) indemnification based on breach of warranties of merchantability; (5) fraud; (6) fraudulent misrepresentation; and (7) declaratory relief under New York C.P.L.R. § 3017(b) establishing "a percentage share of the fault for the product" for contribution purposes. In response, defendants have timely moved for dismissal of the first through sixth causes of action, pursuant to

Federal Rule of Civil Procedure 12(c).[1] Plaintiffs oppose and move in the alternative for leave to amend the Complaint. Upon consideration of the parties' written submissions and oral arguments, the Court telephonically advised the parties on December 11, 1997 that both motions would be granted in part and denied in part. This memorandum will serve to confirm those rulings and briefly state the reasons therefor.

[4, 5] (1) *Indemnification Claims.* With respect to the indemnification claims (the first through fourth causes of action), the initial question presented by defendants' motion is whether plaintiff even qualifies for indemnification, given certain allegations in the Complaint seemingly denying the underlying liability to the settled claimants. In an indemnification action premised on the indemnitee's payment of a settlement, New York law[2] requires, *inter alia*, that the indemnitee prove that it was liable to the claimant in the underlying action and that the settlement payment was reasonable. *See, e.g., Mount Vernon Fire Ins. Co. v. Trans World Maintenance Service, Inc.*, 169 A.D.2d 519, 564 N.Y.S.2d 375, 377 (1st Dep't 1991). Here, the Janus-like Complaint alleges, on the one hand, that the underlying actions were "viable claims under the laws of the State of New York," Complaint ¶ 13, and that the monies plaintiff has expended were "reasonable settlement[s]," *id.* ¶ 14, but, on the other hand, that plaintiff "has and continues to deny liability to the claimants," that it "has denied and continues to deny that the products sold by Durabla are or were in any way defective or causative of injury to claimants," that it settled because it faced "great financial risk of loss," and that "liability to the claimants is specifically denied," *see id.* ¶¶ 13, 14, 19.

While defendants argue that these latter allegations constitute a direct denial of the liability plaintiff must prove in order to be entitled to indemnification, what plaintiff is attempting to do, however inartfully, is to preserve its ability to contest the current claims still remaining against it. Read in the light most favorable to plaintiff, the allegations do not indicate that "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994) (citations and internal quotation marks omitted). The allegations may make plaintiff's ultimate attempt to win indemnification more difficult, but they are not irreconcilably inconsistent with the position that plaintiff, despite its protestations, bore a reasonable risk of being found liable to the claimants in the settled actions and that the settlement payments were therefore not gratuitous ones for which an indemnitor should bear no responsibility.

[6, 7] A second question, however, is whether plaintiff's cause of action, which purports to assert a claim for common law indemnification, is really an indemnification claim at all. Defendants argue that, instead, it is really a claim for contribution, and as such is subject to the provision of New York General Obligations Law § 15–108 that states that "a tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." N.Y.Gen.Oblig.L. § 15–108. In deciding this issue, plaintiff's own labeling of its claim is not determinative; rather, a court must look beneath the surface of the language in the Complaint to determine the legal nature of

1. "When reviewing a Rule 12(c) motion for judgment on the pleadings, the Court applies the same standards as on a Rule 12(b)(6) motion." *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 1997 WL 27059, at *6 (S.D.N.Y.1997). Accordingly, a motion under Rule 12(c) for judgment on the pleadings requires the court to determine "whether the complaint itself is legally sufficient." *Festa v. Local 3 Int'l Brotherhood of Elec. Workers*, 905 F.2d 35, 37 (2d Cir.1990). In making this determination, all of the factual allegations in the Complaint must be regarded as true, and all reasonable inferences must be drawn in favor of the plaintiff. *See Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.), *cert. denied*, 513 U.S. 816, 115 S.Ct. 73, 130 L.Ed.2d 28 (1994).

2. Although plaintiff vaguely suggests that there is some possibility that Pennsylvania law might apply, it does not allege that Pennsylvania law is in conflict with New York law in this area. Moreover, the Complaint itself not only alleges that plaintiff is a New York corporation but also that it has claims under the laws of New York. *See* Complaint ¶¶ 1, 55–56.

the claim. *See Glaser v. M. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 529 N.Y.S.2d 59, 61, 524 N.E.2d 413 (1988); *Rosado v. Proctor Schwartz*, 66 N.Y.2d 21, 494 N.Y.S.2d 851, 853, 484 N.E.2d 1354 (1985).

[8, 9] The basic distinction between common law indemnification and contribution, first articulated in New York law in the seminal Court of Appeals case of *Dole v. Dow Chemical Company*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972), and well-defined in numerous subsequent decisions, *see, e.g., Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 347 N.Y.S.2d 22, 300 N.E.2d 403 (1973); *D'Ambrosio v. City of New York*, 55 N.Y.2d 454, 450 N.Y.S.2d 149, 435 N.E.2d 366 (1982), is that "a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the [common law indemnity] doctrine," but only of contribution. *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 109 A.D.2d 449, 492 N.Y.S.2d 371, 375 (1st Dep't 1985). In other words, contribution involves joint tortfeasors whereas indemnification involves vicarious liability. *See, e.g., D'Ambrosio*, 450 N.Y.S.2d at 152–53, 435 N.E.2d 366.

Maintaining that the only exposure that led to its settlement of the underlying claims was strict liability, plaintiff contends that this "passive" liability is akin to vicarious liability and therefore permits a claim for common law indemnification. But there is nothing passive about the role of a distributor of a defective or hazardous product, and "any analogy" between strict liability and "instances in which liability is fixed on another without regard to any volitional act . . . is clearly flawed." *Rosado v. Proctor & Schwartz*, 66 N.Y.2d 21, 494 N.Y.S.2d 851, 854, 484 N.E.2d 1354 (1985); *see also Chandler v. Northwest Engineering Co.*, 111 Misc.2d 433, 444 N.Y.S.2d 398, 404–05 (Sup.Ct. 1981). Accordingly, the first cause of action must be dismissed.

[10] While defendants raise a similar objection to plaintiff's third and fourth causes of action, which state claims for implied indemnification based on warranties of suitability and merchantability, here the liability is truly vicarious, *i.e.* implied by operation of law, and therefore a claim for indemnification can properly be pled. *See Bellevue South Assocs. v. HRH Construction Corp.*, 78 N.Y.2d 282, 574 N.Y.S.2d 165, 579 N.E.2d 195 (1991). Put differently, whereas the strict liability of a distributor is partly the result of his own activity in purveying the offending product to the consumer, he plays no role in the manufacture of the product and in the warranties of merchantability and suitability that automatically arise from that process. While the distinction may be somewhat finespun, this Court, sitting in diversity, is bound by the holdings of *Bellevue* and, conversely, *Rosado*, that effectively make this distinction. Because defendants have not demonstrated that plaintiff will be unable to prove the elements of the implied warranty indemnity claim described in *Bellevue*, defendants' motion for judgment on the pleadings is denied with respect to plaintiff's third and fourth causes of action.

[11] As for the second cause of action, defendants argue that plaintiff's claim for contractual indemnification is improper because the Complaint does not identify any express contract. However, plaintiff is not required to plead a contract claim with particularity, and may be able to prove the existence and legal force of a contract at a later stage of this case. Defendants' motion is therefore also denied with respect to plaintiff's second cause of action.

[12, 13] Finally, with respect to all the indemnification claims, defendants argue that if plaintiff paid its settlements more than six years before the commencement of the instant action, the six-year statute of limitations for indemnification, which begins running on the date of payment, bars any claim for recovery of those payments. *See* N.Y. C.P.L.R. § 213. However, plaintiff is not required to plead the dates of those settlements, and defendants admit that "[d]iscovery will be required to determine when settlements in underlying actions were effected." Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 14. Judgment on the pleadings on this

ground is therefore unwarranted.[3]

(2) *Fraud Claims.* Unlike its indemnification claims, plaintiff's fraud claims (the fifth and sixth causes of action) must be pleaded with particularity. *See* Fed.R.Civ.P. 9(b). Because these claims fail to allege any of the requisite "who, what, when, where, and why," the fifth and sixth causes of action must be dismissed. *See, e.g., Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir.1993).

(3) *Leave to Amend.* With respect to the first, fifth, and sixth causes of action that the Court has dismissed, plaintiff moves for leave to amend its Complaint. *See* Fed.R.Civ.P. 15.[4] Since plaintiff's claim for common law indemnification is actually a claim for contribution barred under New York law, any amendment of plaintiff's first cause of action would be futile. *See generally Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir.1993). However, the Court grants plaintiff leave to replead its fifth and sixth causes of action.[5]

In sum, defendants' motion for judgment on the pleadings is granted with respect to the first, fifth, and sixth causes of action and denied with respect to the second, third, and fourth causes of action; and plaintiff's motion for leave to replead is denied with respect to the first cause of action and granted with respect to the fifth and sixth causes of action. The parties are reminded that they must appear for a final pretrial conference on March 27, 1998 at 8:30 a.m.

SO ORDERED.


3. While defendants further argue that the third and fourth causes of action are governed by the four-year statute for breach of warranty claims, they are, rather, governed by the six-year statute for indemnification claims. *See McDermott v. City of New York*, 50 N.Y.2d 211, 428 N.Y.S.2d 643, 646–47, 406 N.E.2d 460 (1980).

4. The Court declines to consider the deposition testimony submitted by defendants in opposition to plaintiff's motion for leave to amend the Complaint. *See* Fed.R.Civ.P. 12(c).

5. To the extent that plaintiff, in derogation of this Court's telephonic ruling of December 11, 1997, has already attempted to re-plead the first cause of action, that portion of the re-pleading is a nullity and plaintiff is directed to forthwith file an amended pleading excising the offending portion.

**Thomas F. CLIFFORD and Thomas Clifford, Inc., Plaintiffs,**

v.

**James R. HUGHSON, Jamie Lynn Enterprises, Inc., Arthur E. Kessler, First National Bank of Jeffersonville and Jeffersonville Bancorp., Defendants.**

**No. 94 Civ. 9066(WCC).**

United States District Court,
S.D. New York.

Feb. 4, 1998.

Tenants, who were allegedly used by commercial landlords as "credit dummies" to establish and run a restaurant and to prevent foreclosure of that business, brought action against landlords and banks for mail fraud, wire fraud, and conspiracy to defraud, in violation of Racketeer Influenced and Corrupt Organizations Act (RICO), and for common law fraud. Defendants moved to dismiss and for sanctions. The District Court, William C. Conner, Senior District Judge, held that: (1) tenants failed to allege that landlords participated in operation of "enterprise," as required for RICO claim; (2) tenants failed to state claim for wire fraud; (3) tenants failed to establish common law fraud claim against landlords, as required for successful mail fraud claim; (4) tenants failed to state at least two predicate acts of racketeering, as required for RICO conspiracy claim; and (5) Rule 11 sanctions were not warranted.

Motion granted in part and denied in part.

United States Court of Appeals,

Third Circuit.

DURABLA MANUFACTURING COMPANY, Appellant,

v.

GOODYEAR TIRE & RUBBER COMPANY; Goodyear Canada Inc., a/k/a Goodyear Tire & Rubber Company of Canada, Limited, Defendants/Third-Party Plaintiffs,

v.

Durabla Canada Ltd., Third-Party Defendant.

No. 04-1818.

Argued Jan. 26, 2005.

Decided March 2, 2005.

**Background:** During complex asbestos litigation, lawsuits were brought against insured, seeking contribution and indemnity. The United States District Court for the District of New Jersey, John C. Lifland, J., granted summary judgment on ground that insured was not the real party in interest, in light of fact that three insurers had paid all asbestos settlement and defense costs to date. Insured appealed.

**Holdings:** The Court of Appeals, Fisher, Circuit Judge, held that:
(1) real party in interest was not the insured, but was the three insurers, and
(2) federal district court abused its discretion by denying insured a reasonable time, following court's determination that insured was not a real party in interest, to obtain ratifications from its insurers that would permit insured to maintain the suit on its insurers behalf.

Affirmed in part, and vacated and remanded in part.

[1] Real party in interest in asbestos lawsuits in which contribution and indemnity were sought was not the insured, but was the three insurers that had paid all of the asbestos settlement and defense costs to date, even though insured argued that there was only partial subrogation given the continuing nature of the claims that would ultimately lead to the exhaustion of insurance coverage, where insurers had covered all defense and settlement costs incurred to date, so the claims were fully subrogated. Fed.Rules Civ.Proc.Rule 17(a), 28 U.S.C.A.

[2] Federal district court abused its discretion by denying insured a reasonable time, following court's determination that insured was not a real party in interest, to obtain ratifications from its insurers that would permit insured to maintain the suit on its insurers' behalf, where insured acted

in good faith by advancing its position that it was the real party in interest, given the complexity of the asbestos litigation it faced nationally. Fed.Rules Civ.Proc.Rule 17(a), 28 U.S.C.A.

*733 On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 98-cv-03221). District Judge: Honorable John C. Lifland.
William F. Mueller (Argued), Clemente, Mueller & Tobia, Morristown, NJ, for Appellant.
David J. Novack, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Short Hills, NJ, Robert C. Mitchell, Vorys, Sater, Seymour & Pease, Columbus, OH, Diane F. Bosse (Argued), Volgenau & Bosse, Buffalo, NY, for Appellees, Goodyear Tire & Rubber Company and Goodyear Canada Inc.
Jeffrey S. Lipkin, Drinker, Biddle & Reath, Florham Park, NJ, for Appellee, Durabla Canada Ltd.

Before SCIRICA, Chief Judge, RENDELL and FISHER, Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.
**1 [1] Appellant Durabla Manufacturing Company ("Durabla") appeals from the District Court's grant of summary judgment in favor of Appellees Goodyear Tire & Rubber Company and Goodyear Canada Inc. (collectively "Goodyear") and denial of Durabla's Motion for Reconsideration of the summary judgment order. The District Court granted summary judgment primarily on grounds that Durabla was not the real party in interest to the indemnity and contribution claims in this action. See Fed.R.Civ.P. 17(a). Rather, the District Court determined that Durabla's three insurance carriers who had paid all asbestos settlement and defense costs to date were the real parties in interest. Upon reconsideration, the District Court determined that Durabla had exceeded the reasonable time period after objection for the filing of its insurers' ratifications as provide for in Rule 17(a) and declined to accept the ratifications that would permit Durabla to maintain the suit on its insurers behalf.
Because we write only for the parties who are familiar with the factual and legal contentions, this opinion discusses only those issues related to the real party in interest analysis and Rule 17(a) ratification. We will remand for further proceedings because we determine that Durabla should have been permitted an opportunity to provide ratifications from its insurers upon the District Court's determination that Durabla was not a real party in interest for purposes of maintaining suit. [FN1] We have carefully considered and will affirm the District Court's conclusions as to all remaining claims including the *res judicata* effect of the New York Action as to Counts One, Seven, Eight and Nine; the *734 requirement of a "judgment" for purposes of maintaining a contribution claim under the New Jersey Joint Tortfeasors Contribution Act N.J.S.A. 2A:53A-1 through 29; and the finding that the declaratory judgment claim does not concern an actual controversy ripe for judicial determination.

FN1. Although our standard of review is plenary in relation to our review of summary judgment determinations, we apply an abuse of discretion standard in reviewing the denial of the motion for reconsideration to permit a reasonable time for ratification by the

insurers. See *Curley v. Klem,* 298 F.3d 271, 276-77 (3d Cir.2002); *ICON Group, Inc. v. Mahogany Run Development Corp.,* 829 F.2d 473 (3d Cir.1987); *Federal Kemper Ins. Co. v. Rauscher,* 807 F.2d 345, 348-49 (3d Cir.1986).

Rule 17(a) of the Federal Rules of Civil Procedure provides that
[e]very action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest....
Durabla challenges the District Court's determination that it was not the real party in interest pursuant to Rule 17(a) because its entire loss to date had been paid for by its insurers. Durabla argues that there was only partial subrogation given the continuing nature of the claims that would ultimately lead to the exhaustion of insurance coverage. But, Durabla admitted that its three insurance carriers covered all defense and settlement costs incurred to date. The proper analytical framework therefore is that of a fully-subrogated claim, where an insurer who pays the entire loss incurred is the only real party in interest. *United States v. Aetna Casualty & Surety Co.,* 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171 (1949). As the District Court correctly determined, Durabla is not a real party in interest to these fully-subrogated claims.
**2 [2] Durabla is correct in its assertion that under the circumstances presented here, the District Court should have provided an opportunity for Durabla to provide its insurers' ratifications within a reasonable time from the District Court's determination that Durabla was not a real party in interest. Rule 17(a) requires that no action be dismissed upon a finding that it was not brought by the real party in interest absent allowance of a reasonable period following objection for ratification by the real party in interest. Fed.R.Civ.P. 17(a).
After the District Court entered summary judgment, Durabla sought reconsideration of that order asserting *inter alia* that Durabla should have been given an opportunity to obtain ratification. In support of its argument, Durabla pointed to the fact that prior to the entry of summary judgment, Durabla had provided an informal ratification in the form of a letter from counsel indicating that the insurers would consent to maintenance of the action on their behalf. This "informal ratification" was insufficient as a matter of law given that it did not come from Durabla's insurers and failed to communicate an agreement to be bound by its result. *ICON Group v. Mahogany Run Development Corp.,* 829 F.2d 473, 478 (3d Cir.1987) (proper ratification under Rule 17(a) requires that the ratifying party (1) authorize continuation of the action and (2) agree to be bound by its result).
The District Court discounted Durabla's submission of ratifications from its insurance carriers in conjunction with its motion for reconsideration finding that they were provided beyond a reasonable time from Goodyear's real party in interest objection as provided for in Rule 17(a). While it is true that Durabla had ample opportunity *735 since the filing of Goodyear's objection in 2000 in which to file such ratifications, it also is apparent from the hotly-contested real party in interest issues before this Court that Durabla was pursuing other avenues, whether by necessity in order to obtain ratifications from its insurers or as part of its litigation strategy. Regardless of

the reason Durabla persisted in maintaining the suit on its own behalf, under the circumstances presented here, we find it was an abuse of discretion to deny Durabla a reasonable time from the determination that it was not a real party in interest to obtain ratifications from its insurers. See *ICON,* 829 F.2d at 477-78 (Court provided ICON repeated opportunities to ratify where prior ratifications were not effective, given complexity of litigation, and ICON's good faith attempt to comply with a prior district court order requiring ratification). However, we do not hold generally that an order of court is required to trigger the obligation to provide ratification. Rather, our holding is premised upon the facts presented in this case, which as in *ICON,* evidence Durabla's good faith in advancing its position given the complexity of the asbestos litigation it faces nationally.
**3 We have considered all of the arguments of the parties and conclude that no further discussion is necessary. We will affirm the judgment of the District Court granting summary judgment to Goodyear including the Orders of Court dated April 16, 1999 and December 31, 2002. We will reverse the District Court's August 6, 2003 Order denying Durabla's Motion for Reconsideration of the December 31, 2002 determination only to the extent that the District Court should have permitted Durabla an opportunity to provide ratifications from its insurers. We will remand the case to permit Durabla to proceed with the action pursuant to the ratifications previously provided to the District Court. Consequently, we vacate the final judgment entered March 2, 2004.
C.A.3 (N.J.),2005.
Durabla Mfg. Co. v. Goodyear Tire & Rubber Co.
124 Fed.Appx. 732, 2005 WL 478041 (3rd Cir.(N.J.))