IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STEADFAST INSURANCE COMPANY,	)	
Plaintiff,	)	
v.	)	**C.A. No.: N18C-03-291 PRW CCLD**
DBI SERVICES, LLC,	)	
Defendant.	)	

Submitted: March 7, 2019
Decided: June 24, 2019

Upon Defendant DBi Services, LLC.'s
Partial Motion for Summary Judgment,
GRANTED.

Upon Plaintiff Steadfast Insurance Company's
Cross-Motion for Summary Judgment,
DENIED.

MEMORANDUM OPINION AND ORDER

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WALLACE, J.

I. INTRODUCTION

The issue before the Court is whether Plaintiff Steadfast Insurance Company has a duty to defend and/or indemnify Defendant DBi Services, L.L.C.,[1] under a Contractor's Protective Professional Indemnity and Liability Insurance Policy (the "Policy").

The Policy between Steadfast and DBi insured DBi's business operations from November 1, 2016 to November 1, 2017.[2] During that period, DBi was fulfilling its duties under an asset maintenance contract with the Florida Department of Transportation (the "FDOT Contract").[3] Under the terms of the FDOT Contract, DBi was to maintain lane delineators along the Interstate 95 corridor in Miami-Dade County.[4]

Flexstake, Inc., and Orafol Americas, Inc., filed separate lawsuits in the Southern District of Florida against DBi (collectively, "Underlying Actions") alleging, among other things, that DBi installed "counterfeit" delineator posts when performing its services for FDOT and passed those delineators off as Flexstake

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[1] DBi is a corporation that provides highway operations and maintenance services to public entities. *See Flexstake, Inc. v. DBI Servs., LLC*, 2018 WL 6270972, at *1 (S.D. Fla. Nov. 30, 2018).

[2] *See* Ex. 1 of Ferguson Aff. in Support of Def.'s Mot. for Summ. J. at 2 [hereinafter, "Ferguson Aff."].

[3] *See* Ex. A of Ferguson Aff.

[4] *See Orafol Americas, Inc. v. We Source It, LLC*, 2018 WL 6807321, at *2 (S.D. Fla. Oct. 5, 2018).

delineators.[5] In pursuit of defense and indemnity, DBi tendered the Underlying Actions to Steadfast who subsequently denied both submissions.[6] DBi then sent Steadfast a letter explaining why the Policy was indeed triggered by the Underlying Actions.[7] In response, Steadfast filed this action against DBi seeking a declaratory judgment that Steadfast has no obligation under the Policy to defend or indemnify DBi in the Underlying Actions.[8] DBi has moved for partial summary judgment as to Steadfast's duty to defend,[9] and Steadfast has moved for summary judgment as to the duty to defend and to indemnify.[10]

Both parties have moved for summary judgment, asking the Court to declare the extent of Steadfast's obligation to defend the Underlying Actions. Steadfast argues that it has no obligation to defend or indemnify because: (1) the factual allegations of the complaints in the Underlying Actions do not come within the insuring agreement of the Policy; and (2) the Policy "clearly excludes any claims

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5 *See generally* Flexstake Am. Compl.; Orafol Am. Compl.

6 *See* Ex. 6 of Ferguson Aff. at 1 (DBi Response Letter).

7 *Id.*

8 Pl.'s Compl. (Mar. 29, 2018) (D.I. 1).

9 Def.'s Opening Br. in Support of its Mot. for Summ. J. at 25 (July 20, 2018) (D.I. 15) [hereinafter, "Def.'s Op. Br."].

10 Pl.'s Answering Br. in Opp'n to Def.'s Mot. for Summ. J. and Opening Br. in Support of its Cross-Motion for Summ. J. at 23-24 (Aug. 23, 2018) (D.I. 28) [hereinafter, "Pl.'s Op. Br."].

arising out of the design or manufacture of any goods or products which are sold or supplied by DBi."[11] DBi contends that the Underlying Actions trigger Steadfast's duty to defend because they relate to DBi's Professional Services and "do not fall solely and entirely within a policy exclusion."[12]

II. FACTUAL AND PROCEDURAL BACKGROUND[13]

A. DBi's Steadfast Insurance Policy

The Policy contains a section stating, in relevant part, that Steadfast has, "the right and duty to defend . . . any 'Professional Liability Claim' seeking 'Damages' to which Coverage Part A of this insurance applies."[14] A "Professional Liability Claim" includes "any demand received by [DBi] seeking 'Damages' for 'Professional Services' and alleging liability or responsibility on [DBi's] part or on the part of any entity for whom [DBi] is legally responsible."[15] "Damages" is defined as "the monetary amounts for which [DBi] may be held legally liable, including sums paid as

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[11] Pl.'s Op. Br. at 9.

[12] Def.'s Op. Br. at 14-23.

[13] The Court takes the following facts from the parties' motions, declarations, and the exhibits attached thereto. The Court also cites the complaints in the Underlying Actions, which have been attached as exhibits and the contents of which are not disputed by either party.

[14] *See* Ex. 1 § I. B of Ferguson Aff. ("Contractor's Protective Professional Indemnity And Liability Insurance Policy Jacket") (hereinafter, "Policy"). "Coverage Part A" refers to a subsection of the "Insuring Agreement" portion within the Policy titled, "Coverage Part A – Contractor's Professional Liability Coverage" which details the kinds of claims eligible for policy coverage.

[15] *Id.* at § II. M.

judgments, awards, or settlements, and related 'Professional Liability Claim Expenses' . . . ."[16]

Of particular interest to the parties' motions is the interpretation of three Policy provisions. One of the provisions in dispute defines which services performed by DBi meet the definition of "Professional Services" and thus are covered by the Policy. The Policy defines "Professional Services" as "those services that [DBi] . . . is qualified to perform for others in [its] capacity as an architect, engineer, landscape architect, inspector, land surveyor or planner, [or] construction manager. . . ."[17] The other two disputed terms are listed under "Exclusions" within the Policy. The specific language of these sections provides:

> This insurance does not apply to "Damages" or "Losses" based upon or arising out of:
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> > the *design or manufacture* of any goods or products which are *sold or supplied by [DBi]* . . . or others under license from [DBi];
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> > any *dishonest, fraudulent, criminal, intentional or malicious act, error or omission or those of a knowingly wrongful nature*, except that this exclusion shall not apply to an 'Insured' who *did not commit, participate in, or have knowledge of such conduct* . . . .[18]

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[16] *Id.* at § II. D. Subsections 1 and 2 of this provision provide the following are not included as "Damages" for purposes of Policy coverage:

> 1. [T]he restitution, return, withdrawal or reduction of fees, profits, or charges for services rendered or offered or any other consideration or expenses paid to [DBi] or by [DBi] for services or products; or
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> 2. Judgments or awards deemed uninsurable by law.

[17] *Id.* at § II. O.

[18] *Id.* at § III. I, L (emphasis added).

B. THE UNDERLYING FLORIDA SUITS AGAINST DBI

Under the FDOT Contract, DBi was required to maintain all assets—including the service or replacement of damaged or missing delineators—within FDOT's right-of-way in Miami-Dade County along I-95.[19] The particular delineator relevant to this action is manufactured by Flexstake and consists of a base, a vertical plastic post affixed with retroreflective sheeting material manufactured by Orafol ("Flexstake Post"), and a hinge to connect the post to the base (collectively, "Flexstake Delineator").[20] Flexstake Delineators were installed on I-95 at the start of the FDOT Contract.[21] But they regularly failed shortly after installation and required frequent replacement.[22] Due to the significant expense and hazard occasioned by these frequent replacements, FDOT began to look for more appropriate delineators for use

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19 *See* Ex. 6 of Ferguson Aff. at Ex. A [the FDOT Contract].

20 Ex. 2 of Ferguson Aff. ¶ 7 [hereinafter, "Flexstake Am. Compl."].

21 *See Flexstake, Inc. v. DBI Servs., LLC*, 2018 WL 6270972, at *1 (S.D. Fla. Nov. 30, 2018) ("The [Flexstake] Delineators and accompanying Flexstake replacement parts were consistently purchased for use on I-95 in Miami-Dade County from 2009 to October 2014.").

22 Pl.'s Op. Br. at 1. On August 22, 2017, the FDOT Office of Inspector General ("OIG") released a memorandum addressing reports of DBi's alleged use of "counterfeit delineators that were substantially inferior in performance . . . unsafe, and not produced by Flexstake." Ex. 6 of Ferguson Aff. at Ex. C [hereinafter, "OIG Memo"]. The OIG reported, in pertinent part: "[The State Product Evaluation Administrator] could not confirm whether the replacement delineators were products of Flexstake or another company; however, the department noted the expense and flawed product from Flexstake and began researching improved replacements." *Id.*

in the I-95 express lane.[23] Through research and testing, FDOT identified new durability specifications for a delineator to qualify for its Approved Product List ("APL").[24] As a result, Flexstake Delineators were no longer on FDOT's APL as they did not meet the new FDOT specifications.[25]

In August of 2016, the new specifications were incorporated into a supplement to the FDOT Contract with DBi ("FDOT Supplement").[26] While the FDOT Supplement provided a more detailed explanation of what replacement delineators should be used, neither the FDOT Contract nor the FDOT Supplement named a

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23 OIG Memo at 2.

24 *Flexstake, Inc. v. DBI Servs., LLC*, 2018 WL 6270972, at *2 n.2 (S.D. Fla. Nov. 30, 2018).

25 On November 30, 2018, the United States District Court for the Southern District of Florida granted DBi's motion for summary judgment and dismissed the action brought by Flexstake. The Florida federal court noted the following as to whether DBi submitted the Flexstake Delineators or the Generic Delineators for the research and testing FDOT used to adopt the aforementioned durability specifications:

> These specifications were promulgated based on a technical memorandum created by the Texas A&M Transportation Institute ("TTI"), which in turn was based on tests of certain Delineators sent to it by DBI. The parties dispute whether DBI sent Flexstake Posts or Generic Posts. That issue, however, is not material to the Court's decision and, in any event, Flexstake has not proffered any evidence, let alone a "scintilla" of evidence, that DBI actually sent Generic Posts to TTI, with the exception of the unqualified and improper expert opinion of Flexstake's president.

Flexstake, Inc. v. DBI Servs., LLC, 2018 WL 6270972, at *1 n.2 (S.D. Fla. Nov. 30, 2018).

26 OIG Memo at 2.

specific manufacturer to provide a particular delineator.[27] Seeing as the Flexstake Delineators were unavailable for further use on I-95, DBi replaced the failed Flexstake Posts with posts manufactured by a third party ("Generic Posts").[28] The Underlying Actions allege that the Generic Posts contained features designed to replicate Flexstake Posts and Orafol Sheeting and that DBi installed the Generic Posts onto existing Flexstake Delineator bases and hinges.[29] The Underlying Actions seek damages against DBi for producing and installing the allegedly counterfeit Flexstake Delineators with the aid of a supply chain.[30]

i. The Flexstake Action

Flexstake manufacturers highway safety products; the Flexstake Delineator is one of its products.[31] In its complaint, Flexstake asserted three separate causes of action against DBi ("*Flexstake* Complaint"). The *Flexstake* Complaint contended that "DBI began producing counterfeit posts, with some containing counterfeit sheeting, and having them installed as part of scheduled replacements of the high performance

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27 *Id.* ("[T]he initial contract allowed for [DBi] to replace the delineators with products they felt met [FDOT's] expectations, and it did not specify what product should be used to replace damaged delineators").

28 Def.'s Op. Br. at 2.

29 Flexstake Am. Compl. ¶ 14.

30 *See generally id.*; Orafol Am. Compl.

31 Flexstake Am. Compl. ¶ 1.

delineators required under the [FDOT Contract]."[32] The *Flexstake* Complaint asserted that DBi provided a Flexstake Post as a model to a third-party manufacturer that produced the Generic Posts. DBi then purchased and installed those Generic Posts to meet its duties under the FDOT Contract.[33] The *Flexstake* Complaint further alleged that these "counterfeit posts" were "falsely billed to the State of Florida under guise of being [Flexstake Posts] when they were not" and were subsequently used for the testing that led to FDOT's updated delineator specifications.[34] Flexstake contended that this misrepresentation of Flexstake Posts resulted in the State of Florida disqualifying the Flexstake Posts for use on Florida express lane highway projects, and that the Generic Posts are a misappropriation of Flexstake's intellectual property.[35] Flexstake claimed to have suffered damages that "include, but are not limited to, loss of future business/contracts from the State of Florida, dilution and/or diminution of the value of its trademark and patented materials, loss in reputation, and business income."[36]

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32 *Id.* ¶ 12.

33 *Id.* ¶¶ 14-16.

34 *Id.* ¶¶ 13, 20-22.

35 Flexstake Am. Compl. ¶¶ 28-41; *see id.* ¶ 14 ("Although its contract with the State of Florida required DBI to replace the entire unit including the hinge and the post, DBI instead inserted its counterfeit posts into the [Flexstake Base]. In doing so, it misused Flexstake's trademark, and created the false impression that the source of the replacement delineator was Flexstake.").

36 *Id.* ¶¶ 36, 41.

In November 2018, the Flexstake Actions after the federal court granted DBi's motion for summary judgment.

ii. The Orafol Action

Orafol manufactures graphic products, reflective materials and adhesive tape systems for use in various traffic projects throughout the country.[37] One of its products is Orafol Sheeting, a proprietary retroreflective material placed on flexible delineator posts commonly used in highway maintenance projects.[38]

Orafol asserted nine separate causes of action against DBi and four other defendants; all are largely based on the same set of facts recited in the *Flexstake* Complaint. The *Orafol* Complaint alleged that DBi provided a sample Flexstake Post affixed with Orafol Sheeting to a third party. Supposedly , that manufacturer then, along with other named entities, produced "counterfeit delineators" with "counterfeit" Orafol Sheeting. And DBi purchased and began installing those counterfeits on I-95.[39] The *Orafol* Complaint claimed that these acts violated federal and state trademark laws associated with the procurement, distribution, and sale of counterfeit versions of a proprietary reflective sheeting product.[40]

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37 Ex. 4 of Ferguson Aff. ¶¶ 13-16 [hereinafter, "Orafol Am. Compl."].

38 *Id.* ¶¶ 18-21.

39 *Id.* ¶¶ 32-35.

40 *Id.*

Orafol believed that "DBi as the procuring party and installer knew or should have known of the product's status as a knock-off and of the infringement of ORAFOL's intellectual property."[41] Orafol requested relief including: "the costs of appropriate corrective advertising"; "the amount of actual, consequential and/or compensatory damages proved by [Orafol]"; "statutory damages"; and "augmented and exemplary damages."[42] All claims against DBi by Orafol were settled in August 2018.[43]

III. STANDARD OF REVIEW

Summary judgment is warranted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[44] Where cross-motions for summary judgment are filed on a particular issue and neither party argues the existence of a genuine issue of material fact thereon, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[45] So "upon cross motions for summary judgment [on that issue], this Court will grant summary judgment to one of

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41 *Id.* ¶ 28.

42 *Id.* § V.

43 *See Orafol Americas, Inc. v. We Source It, LLC*, 2018 WL 6807321 (S.D. Fla. Oct. 5, 2018).

44 Del. Super. Ct. Civ. R. 56(c).

45 Del. Super. Ct. Civ. R. 56(h).

the moving parties."[46] And on that issue, "the questions before this Court are questions of law not of fact, and the parties by filing cross motions for summary judgement have in effect stipulated that the issue[] raised by the motions [is] ripe for a decision on the merits."[47]

Not so on a unilateral summary judgment motion. There, on the issue raised, the burden is on the moving party to demonstrate its prayer for summary judgment is supported by undisputed facts or an otherwise adequate factual record to support a legal judgment.[48] "If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[49]

The Court may grant a motion for summary judgment when: "(1) the record establishes that, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact, and (2) in light of the relevant law and those facts, the moving party is legally entitled to judgment."[50] The Court cannot grant a

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[46] *Health Corp. v. Clarendon Nat. Ins. Co,* 2009 WL 2215126, *11 (Del. Super. Ct. July 15, 2009).

[47] *Id.*

[48] *See CNH Indus. Am. LLC v. Am. Cas. Co. of Reading*, 2015 WL 3863225, at *1 (Del. Super. Ct. June 8, 2015).

[49] *Id.*

[50] *Haft v. Haft*, 671 A.2d 413, 414–15 (Del. Ch. 1995) (citing *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991)). *See also Brooke v. Elihu-Evans*, 1996 WL 659491, at *2 (Del. 1996) ("If the Court finds that no genuine issues of material fact exist, and the moving party has demonstrated his entitlement to judgment as a matter of law, then summary judgment is appropriate.").

motion for summary judgment "[i]f . . . the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record . . . ."[51] But, at bottom, a claim "should be disposed of by summary judgment whenever an issue of law is involved and a trial is unnecessary."[52]

Steadfast and DBi agree that New York law governs their relationship due to the Policy's choice-of-law clause.[53] Under New York law, the duty to defend is determined at the outset of an action and is conditioned on potential coverage under an insurance policy, while the duty to indemnify is determined at the conclusion of the action and is conditioned on legal liability.[54] In determining whether the duty to defend exists, the allegations of the complaint are compared against the provisions of

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[51] *CNH Indus. Am. LLC*, 2015 WL 3863225, at *1.

[52] *Jeffries v. Kent Cty. Vocational Tech. Sch. Dist. Bd. of Educ.*, 743 A.2d 675, 677 (Del. Super. Ct. 1999).

[53] *See* Def.'s Op. Br. at 12 n.3; Pl.'s Op. Br. at 9 n.2; Policy § VII.G. *See also J.S. Alberici Const. Co., Inc. v. Mid-W. Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000) ("Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction.").

[54] *See Servidone Constr. Corp. v. Sec. Ins. Co.*, 477 N.E.2d 441, 444 (N.Y. 1985) ("The duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insure's liability to a third person"); *see also Cohen v. Employers Reinsurance Corp.*, 503 N.Y.S.2d 33, 34 (N.Y. App. Div. 1986) ("With respect to the obligation to defend, the question is whether the plaintiff can state facts which bring the insured within the coverage of the policy. The obligation to pay depends upon the outcome of the action.").

the insured's policy.[55] The duty to defend is conditioned on the possibility of recovery by the policy – not on the probability of recovery.[56] If the insurer has a duty to defend with regard to any aspect of the lawsuit, it has a duty to defend every aspect of the lawsuit.[57] When the allegations in the complaint are ambiguous and do not clearly state a claim that is within the coverage of the policy, all doubts are resolved in favor of the insured resulting in the insurer having a duty to defend.[58] In construing insurance policy provisions, courts will resolve any ambiguities in policy wording in favor of the insured.[59]

IV. DISCUSSION

A. THE UNDERLYING ACTIONS CONTAIN CLAIMS THAT POTENTIALLY BRING THE COMPLAINT WITHIN THE PROTECTION OF THE POLICY.

An insurer's duty to defend arises "when it has actual knowledge of facts

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55 *Tartaglia v. Home Ins. Co.*, 568 N.Y.S.2d 388, 390 (N.Y. App. Div. 1997) ("It is well settled that in determining whether an insurance carrier has a duty to defend under a professional liability policy, the court must compare the complaint against the insured with the language of the policy") (citing *Cohen*, 503 N.Y.S.2d at 34).

56 *See George Muhlstock & Co. v. Am. Home Assurance Co.*, 502 N.Y.S.2d 174, 178 (N.Y. App. Div. 1986) ("The duty to defend arises not from the probability of recovery but from its possibility, no matter how remote.").

57 *See Fitzpatrick v. Am. Honda Motor Co.*, 575 N.E.2d 90, 92 (N.Y. 1991).

58 *See id.* at 95; *George Muhlstock & Co.*, 502 N.Y.S.2d at 178 ("Any doubt as to whether the allegations state a claim covered by the policy must be resolved in favor of the insured as against the insurer.").

59 *George Muhlstock & Co.*, 502 N.Y.S.2d at 178.

establishing a reasonable possibility of coverage."[60] And so, the Court must compare the language of the complaints in the Underlying Actions and the language of the policy.[61]

If any of the claims against the insured arguably arise from covered occurrences or activities, the insurer is required to defend the entire action.[62] "An insurer is relieved of the duty to defend only if 'there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy.'"[63]

The Policy provides for a duty to defend only where a claimant seeks damages from DBi for a "Professional Liability Claim" that arises out of an actual or alleged negligent act, error or omission with respect to DBi's rendering or failure to render "Professional Services," which is defined to include services that DBi is "qualified to perform for others in [its] capacity as an architect, engineer, landscape architect,

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60 *Fitzpatrick*, 575 N.E.2d at 92.

61 *Id.* at 93 (While the allegations in the complaint may provide the significant and usual touchstone for determining whether the insurer is contractually bound to provide a defense, the contract itself must always remain a primary point of reference.").

62 *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 690 N.E.2d 866, 869 (N.Y. 1997) ("If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action.").

63 *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 115 (2d Cir. 2005) (quoting *Servidone*, 477 N.E.2d at 444)); *Ruder & Finn, Inc. v Seaboard Sur. Co.*, 422 N.E.2d 518, 521 (N.Y. 1981) ("If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be")..

inspector, land surveyor or planner, [or] construction manager . . . ."[64] Thus, to trigger the duty to defend under the Policy, DBi must first establish that the claims within the Underlying Actions relate to DBi's "Professional Services."

The *Flexstake* Complaint described DBi as "a company that provides highway operations and maintenance management worldwide" and alleged DBi's wrongful acts were engaged when carrying out DBi's duty to "maintain the highway delineator posts, and replace as necessary" under the FDOT Contract.[65] The *Flexstake* Complaint, in relevant part, contained the following:

- [A]t some point, DBI began producing counterfeit posts, with some containing counterfeit [Orafol] sheeting, and having them *installed as part of scheduled replacements of the high performance delineators required under the [FDOT Contract]*.

- The counterfeit posts were *manufactured by at least two different sources*.

- These counterfeit posts were *falsely billed to the State of Florida* under guise of being [Flexstake Posts] when they were not.

- DBi has falsely represented . . . that the counterfeit posts that it *installed in connection with the [FDOT Contract]* met FDOT specifications.

- [T]he sale and installation of the counterfeit post has created confusion in the minds of consumers as to the manufacturer of the posts . . . .[66]

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64 Policy at § II. O.

65 Flexstake Am. Compl. ¶¶ 2, 11.

66 *Id.* ¶ 12-15, 24-25 (emphasis supplied).

The *Orafol* Complaint's allegations were drawn in much the same way.[67] It stated that Orafol "initiated this action when it discovered that DBi, aided by a supply chain that included the other Defendants, had been selling to the State of Florida and installing on the public highways, delineation posts with counterfeit [Orafol Sheeting] that reproduces and infringes upon ORAFOL trademarks."[68] Orafol's Complaint recognized that under the FDOT Contract, "DBi is responsible for overall highway maintenance including installing and, as necessary, replacing these delineators."[69] And the *Orafol* Complaint accused the several defendants "worked, in some instances in active concert, to procure, distribute, and sell knock-offs of [Orafol Sheeting]" and specifically alleged that DBi "provided a sample post or posts and commissioned the process of producing lower-cost posts and sheeting" which "ultimately resulted in the production of the counterfeit [Orafol Sheeting]."[70]

The "Scope of Services" stated within the FDOT Contract details the following:

> This performance-based contract requires the inspection, management and performance of the maintenance of all components of the transportation facility as identified herein. . . . Rather than [FDOT] directing specific work as in most traditional maintenance contracts, this performance-based contact requires [DBi] to continually produce a

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67 Orafol Am. Compl ¶¶ 17-20.

68 *Id.* ¶ 17.

69 *Id.* ¶ 20.

70 *Id.* ¶ 1, 27.

> quality product. . . . [FDOT] is entrusting [DBi] to care for and maintain select roadways, structures, and facilities of Florida's state roads . . . .[71]

The scope of DBi's particular duties under the FDOT Contract included, in relevant part:

> *Management* of all assets w/in [FDOT's] Right-of-Way . . . .
>
> *Inspect, manage and maintain* all assets within the project limits . . . .
>
> *Inspect, manage and maintain* the roadways, structures, and facilities as identified in the Scope . . . .
>
> Continually monitor all [FDOT] policies, procedures, specifications, and other Contract Documents for changes and updates [and] [b]e prepared to comply with any revisions . . . .
>
> *Manage the maintenance* of all assets identified in this scope. Tasks include *work needs assessment*; resource *management*; work activity *planning and execution*; and *quality control* performance to ensure work complies with contractual requirements. *Develop an annual work plan* to ensure the designed maintenance is performed.
>
> *Manage and coordinate* existing [FDOT] contracts within the limits of this contract until expiration of the [FDOT] contracts.[72]

DBi contends that Underlying Actions relate to its professional services as an inspector and construction manager under the FDOT Contract.[73] Steadfast argues that it has no duty to defend because the Underlying Actions' factual allegations involve

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[71] FDOT Contract at 1.

[72] *Id.* at 1-3 (emphasis supplied).

[73] Def.'s Op. Br. at 18 ("DBi's sole burden with respect to Steadfast's duty to defend is to establish that the Underlying Actions create the potential for coverage under the Policy").

installation activity and routine, periodic maintenance and that those do not qualify as "Professional Services"—that is, in Steadfast's view, those are not duties of an inspector or construction manager.[74] So, Steadfast says, because "the claim does not arise out of the Professional Services, no coverage arises under the policy."[75] But the authority Steadfast invokes to cabin the professional services definition here aren't of much assistance.[76]

For example, in *Burkhart, Wexler & Hirschberg, LLP v. Liberty Ins. Underwriters*, a New York appellate court affirmed a lower court's holding that defendant insurer was not obligated to defend and indemnify plaintiffs, a law firm, against an action alleging, *inter alia*, breach of fiduciary duty for misappropriating confidential information and trade secrets.[77] In *Burkhart*, plaintiffs sought defense and indemnity from their insurer in an underlying action alleging plaintiffs pursued interests in competition with a client using information gathered from the client.[78] The

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[74] Pl.'s Op. Br. at 9-14.

[75] *Id.* at 10.

[76] Pl.'s Op. Br. at 11.

[77] 875 N.Y.S.2d 590 (N.Y. App. Div. 2009), *aff'g*, 2008 WL 866644 (N.Y. Sup. Ct. Mar. 14, 2008).

[78] 2008 WL 866644, at *4 ("[Claimant in the underlying action] has alleged that it provided [plaintiff] attorneys with confidential and proprietary information about its corporation, including but not limited to its business model, membership structure, pricing formulas for membership fees, marketing strategies, names of its members and prospective members, company financing and business research and that beginning in approximately early 2005, [plaintiff] attorneys embarked on

coverage provision of the insurance policy limited that coverage to claims caused by "any actual or alleged act, error, omission or personal injury which arises out of the rendering or failure to render professional legal services."[79] In its reasoning, the *Burkhart* trial court explained:

> A self-dealing complaint against a lawyer based on the lawyer's alleged scheme to assist a business affiliated with the law firm in setting up a competing business against the client in order to further the lawyer's own business interests hardly constitutes "professional" negligence. Rather, such a breach of fiduciary duty claim is based on a conflict of interest that does not involve professional negligence and does not state a claim sounding in legal malpractice. . . . Inasmuch as there is no allegation of negligence or malpractice arising out of the Burkhart Firm's performance, or failure to perform, legal services, the claim in the underlying action does not fall within the ambit of the policy.[80]

That *Burkhart* holding suggests merely that a breach-of-fiduciary-duty claim based on a conflict of interest arising not in the firm's rendering of legal services to the wronged client but instead in the firm's acts furthering its own affiliated business interests is not an act of professional negligence as defined in the insurance contract.

Steadfast also cites *George Muhlstock & Co. v. Am. Home Assurance Co.*[81] In *George Muhlstock & Co.*, an insurer refused to defend an insured accounting firm

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a scheme to copy [claimant's] business model and to convert [claimant's] members and prospective members to a newly formed competing business entity").

[79] 875 N.Y.S.2d at 592.

[80] 2008 WL 866644, at *6 (internal citations omitted).

[81] 502 N.Y.S.2d 174 (N.Y. App. Div. 1986).

under a profession liability policy when the subject suit was brought against the firm in its capacity as a broker.[82] The *George Muhlstock & Co.* court dismissed the insured's claim against the insurer, observing that the insured's legal duties and liabilities arose from selling securities and not from performing professional accounting services. So, the court held, those acts fell entirely outside of the scope of the insurance policy which "plainly covered only liability for breach of duty as an accountant."[83]

An insurance agreement is subject to principles of contract interpretation, and general contract interpretation requires that unambiguous provisions of an insurance contract must be given their plain and ordinary meaning.[84] The threshold determination of ambiguity and the interpretation of contact provisions—ambiguous or not—are questions of law for the Court.[85] A provision is ambiguous when it is

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82 *Id.*

83 *Id.* at 179 ("Plaintiff, in acting as a securities finder or broker and recording its securities sales commissions in a separate investment partnership, was not engaged in the activity of public accounting. Its activity cannot be construed as being within its professional accounting capacity and within the compass of the risk covered by the accountant's professional liability insurance policy it had purchased.").

84 *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477, 481 (N.Y. 2017).

85 *Concordia General Contracting, Co., Inc. v. Preferred Mut. Ins. Co.*, 46 N.Y.3d 146, 148 (N.Y. App. Div. 2017) ("The threshold question whether a provision in an insurance policy is ambiguous is [ ] for the court to determine as a matter of law."); *id.* ("As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.")(internal quotations omitted); *City of New York v. Evanston Ins., Co.*, 830 N.Y.2d 299, 302 (N.Y. App. Div. 2007) (So

subject to more than one reasonable interpretation.[86] "Professional services" is defined in the Policy. And that definition in this specific context is ambiguous as there are varied reasonable constructions of the definition regarding the scope and type of activities that might comprise DBi's performance as an "architect, engineer, inspector, land surveyor or planner, [or] construction manager" through which DBi was to "inspect, manage and maintain all assets" of the transportation facility.[87] When faced with ambiguous provisions of an insurance policy "any doubt as to the existence of coverage must be resolved in favor of the insured and against the insurer, as drafter of the agreement."[88]

Both the *Flexstake* Complaint and the *Orafol* Complaint allege that DBi's inspection/planning/construction management activities that brought about the installation of the delineators resulted in the purported violations described in the underlying complaints. From this, one could here easily view DBi's "legal duties and liabilities" described in the *Flexstake* and *Orafol* Complaints as arising from its professional services rendered under the FDOT Contract. As recounted by Flexstake

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too where the language of a policy of insurance is ambiguous; "the question [of 'ascertaining its intended meaning'] is one of law for the court to determine.").

86 *Universal American Cort. v. National Union Fire Ins. Co. of Pitsburgh, Pa.*, 37 N.E.2d 78, 80 (N.Y. 2015).

87 Policy § II. O; FDOT Contract at 1-2.

88 *Broad St., LLC v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 4 (N.Y. App. Div. 2006).

and Orafol, the complained-of activities, if nothing else, derived from DBi's professional duties to oversee the selection and installation of the materials used for to maintain the I-95 corridor. In turn, there is a reasonable possibility that those allegations set forth in the Underlying Actions relate to DBi's professional services as, at very least, inspector or construction manager under the FDOT Contract.[89]

B. THE UNDERLYING ACTIONS' CLAIMS DO NOT FALL WITHIN ANY POLICY EXCLUSION

But even if so, Steadfast argues, it has no duty to defend or indemnify DBi against the Underlying Actions because the allegations in each of those underlying complaints fall entirely within one or more Policy exclusions.[90] DBi says they do not.[91]

i. Exclusion I

Exclusion I of the Policy precludes "'damages' or 'losses' based upon or arising out of . . . the design or manufacture of any goods or products which are sold or supplied by [DBi] . . . or by others under license from [DBi] . . . ."[92] When an

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89 *Technicon Electronics Corp. v American Home Assur. Co.*, 542 N.E.2d 1048, 1050 (N.Y. App. Div. 1989) ("If the complaint contains any facts or allegations which bring the claim even potentially within the protection [of the policy], the insurer is obligated to defend.").

90 Pl.'s Op. Br. at 14-22.

91 Def.'s Op. Br. at 19-23.

92 Policy § III.I.

exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage.[93]

Steadfast argues that the Underlying Actions are precluded by Exclusion I because the claims "allege that DBi either designed, manufactured, sold or supplied" the imitation delineators.[94] So then, Steadfast contends, the nine causes of action in the *Orafol* Complaint and the three causes of action in the *Flexstake* Complaint cast actions "squarely within" this exclusion.[95] But DBi reads Exclusion I to apply only to products liability-type claims.[96] Under this construction, DBi says, the Underlying Actions do not fall "wholly within the exclusion."[97]

The Court first notes that many of the cases cited by the parties, because of their significant factual dissimilarities, are not particularly persuasive here.[98]

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93 *Technicon*, 542 N.E.2d at 1049 (quoting *International Paper Co. v Continental Cas. Co.*, 320 N.E.2d 619, 621 (N.Y. 1974)) ("Moreover, when an exclusion clause is relied upon to deny coverage, the insurer has the burden of demonstrating that the 'allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation.'").

94 Pl.'s Op. Br. at 16.

95 *Id.*

96 Def.'s Reply Br. at 16.

97 *Id.*

98 *See, e.g.*, Pl.'s Op. Br. at 15 (citing *Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 668 N.E.2d 404 (N.Y. 1996) (holding that "the phrases 'based on' and 'arising out of,' when used in insurance policy exclusion clauses, are unambiguous and legally indistinguishable, and that when a

The *Flexstake* Complaint contended that the imitation posts were manufactured by at least two different sources.[99] Orafol initiated legal action after Orafol "discovered that DBi, *aided by a supply chain* that included the other Defendants [named in that action], had been selling to the State of Florida and installing on the public highway, delineation posts with counterfeit [Orafol] sheeting."[100] The *Orafol* Complaint alleged that DBi "provided a sample post or posts and commissioned the process" that ultimately resulted in the imitation delineators.[101] It further referred to DBi as "the procuring party and installer . . ."[102]

Under New York law, "whenever an insurer wishes to exclude certain coverage

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third party perpetrates an assault, the basis of the victim's claim for negligent failure to maintain safe premises against the insured is assault)). *See, e.g.,* Def.'s Reply Br. at 10 (citing *Harris Thermal Transfer Products v. James River Ins. Co.,* 2010 WL 2942611, at *2 (D. Or. July 19, 2010) (finding no duty to defend where the policy provided an exclusion for "any claims directly or indirectly arising out of or resulting from 'the design or manufacture of any goods or products which are sold or supplied by [the insured]'" and the underlying complaint against the insured alleged damages arising out of manufacturing defects)).

[99] Flexstake Am Compl. ¶ 15 ("A certain number of the counterfeit posts were *purchased* from Safety Systems Barricades, Inc. ('SSB') . . . . [A]t the behest of DBI, SSB furnished samples of the [Flexstake] post . . . to a Chinese company known as OT TID, *who performed the actual manufacturing/counterfeiting of the product*, and *shipped* the product through the instruments of interstate commerce to DBI. . . . In addition, DBI furnished a sample of the [Flexstake Post] to Melt Point Plastics International, Inc., who manufactured a [counterfeit post].").

[100] Ex. 4 of Ferguson Aff. ¶ 17.

[101] *Id.* ¶ 27.

[102] *Id.* ¶ 28.

from its policy language, it must do so in clear and unmistakable language."[103] It is fundamental that ambiguities in an insurance policy be construed against the insurer, particularly where ambiguities are found in an exclusionary clause.[104] Given the setting in which the Policy was written—*i.e.*, for professional *services* liability—it is hard to imagine that an ordinary construction company insurer would agree to anything but exclusion of damages or losses arising out of DBi's or others' design or manufacture defects in goods sold or supplied by DBi when carrying out its maintenance obligation to FDOT. It is equally hard to imagine an ordinary construction contractor when reading the exclusion's language would not have thought itself covered precisely against claims arising from the *use* (or oversight of the use) of goods in carrying out its duties while understanding it would not be covered for the goods' manufacturer's design flaws or manufacturing defects. The very nature of a construction management company requires, at a minimum, it to use others' manufactured goods and certainly that company's insurer would insist on not shouldering the potential products liability of those others when it was insuring profession services liabilities of its client. That is the most natural read of Exclusion I and if Steadfast suggests otherwise, it introduced an intolerable ambiguity to the

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[103] *Seaboard Sur. Co. v Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984) (internal quotation marks omitted).

[104] *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 314 N.E.2d 37, 39 (N.Y. 1974).

exclusion that works to its disadvantage here.[105] As such, the Court finds that Steadfast has failed to satisfy its heavy burden of establishing that the allegations of the Underlying Actions fall entirely within Policy Exclusion I.[106]

ii. EXCLUSION L

Steadfast contends that Exclusion L also relieves any possible duty to defend DBi.[107] Exclusion L precludes coverage for "any dishonest, fraudulent, criminal, intentional or malicious act, error or omission or those of a knowingly wrongful nature, except that this exclusion shall not apply to an 'Insured' who did not commit, participate in, or have knowledge of such conduct."[108] Exclusion L applies, Steadfast posits, because the Underlying Actions allege DBi's conduct "to be dishonest and fraudulent and, absent such conduct, there would be no cause of action against DBi."[109]

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105 *George Muhlstock*, 502 N.Y.S.2d at 178-79 ("Where the insurer relies upon the exclusionary clause in a policy, it must be established that the insurer's interpretation of the policy is the only construction that can fairly be placed upon the language.").

106 *Frontier Insulation,* 690 N.E.2d at 868-69 (An insurer who seeks to be relieved of the duty to defend based on a policy exclusion "bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision.").

107 Pl.'s Op. Br. at 19.

108 Policy § III.L.

109 Pl.'s Op. Br. at 20.

An insurer may not retreat to underlying pleadings to narrow the scope of its duty to defend when that insurer knows of underlying facts comprising a covered event.[110] Attached to DBi's letter in response to Steadfast's coverage denials was a Memorandum produced by the FDOT Office of Inspector General ("OIG") following its independent investigation of the Flexstake and Orafol claims.[111] The investigation found "no evidence to support the allegation that DBi replaced Flexstake delineators with 'counterfeit' delineators."[112] In addition, DBi's Regional Manager for the projects assigned under the Contract, Alex DeMarco, submitted a sworn statement that was also provided to Steadfast.[113] DeMarco declared that at no time has DBi "knowingly or intentionally purchased or installed any delineator posts . . . that it knew to have 'counterfeit' or 'knock off'" Orafol sheeting.[114] He declared further that at no time had DBi "knowingly or intentionally attempted to deceive FDOT or any other entity or person with respect to the manufacture or origin of any delineator post installed . . ."[115]

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110 *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993) ("An insurer must defend whenever the four corners of the [underlying] complaint suggest—or the insurer has actual knowledge of facts establishing—a reasonable possibility of coverage.").

111 *See* DBi Resp. Letter; *see id.* n.20.

112 *Id.*

113 Aff., Ex. 6, *Declaration of Alex DeMarco*. D.I. 17.

114 *Id.*

115 *Id.*

Again, an insurance company's duty to defend is distinct from and broader than its duty to indemnify.[116] An insurer must provide a defense if the allegations of the pleadings suggest, or when the insurer has knowledge of facts establishing, a reasonable possibility of coverage.[117] Policy exclusions "are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction."[118] In this case, Steadfast has knowledge of facts that establish a reasonable possibility of coverage: the OIG Memo and DeMarco's declaration. "Where, as here, the insurer has knowledge of facts which potentially bring the claim within coverage of the policy it has a duty to defend even though the allegations of the complaint fail sufficiently to allege all of the facts requisite to do so."[119] Here DBI's potential liability to Flexstake and Orafol in the Underlying Actions could devolve not from DBi's own "dishonest, fraudulent, criminal, intentional or malicious act, error or omission" but from its also-alleged failure to detect the wrongful acts of

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116 *Cont'l Cas. Co.*, 609 N.E.2d at 509 (Noting that an insurer's duty to defend is "exceedingly broad" and no doubt "broader than the insurer's obligation to indemnify."); *International Paper Co.*, 320 N.E.2d at 621 ("An insurer's obligation to furnish its insured with a defense is heavy indeed, and, of course, broader than its duty to pay.").

117 *Id.*

118 *Seaboard,* 476 N.E.2d at 275.

119 *Commercial Pipe & Supply Corp. v. Allstate Ins. Co.*, 321 N.Y.S.2d 219, 221-22 (N.Y. App. Div. 1971), *aff'd,* 282 N.E.2d 128 (N.Y. 1972).

the other defendants to those suits.[120] And if DBi "did not commit, participate in, or have knowledge of" the delineator counterfeiting the exclusion was inapplicable.[121]

It is well-settled that "if the insurer is to be relieved of [its] duty to defend it is obligated to demonstrate that the allegations of the complaint cast that pleading *solely* and *entirely* within the policy exclusions, and, further, that the allegations, *in toto,* are subject to no other interpretation."[122] Steadfast, has not met it obligation to demonstrate that Flexstake and Orafol's claims fell "solely and entirely" within the Policy's Exclusion L given the other reasonable interpreations of those claims.

C. STEADFAST'S DUTY TO INDEMNIFY DBI IN THE UNDERLYING ACTIONS

DBi asserts that any declaration regarding Steadfast's duty to indemnify is premature because New York law "is clear that Steadfast's duty to indemnify DBi depends on the outcome of the Underlying Actions, i.e., the actual basis, if any, for DBi's liability to Flexstake or Orafol."[123] Steadfast contends that were the Court to grant its motion on the duty to defend, there could be no duty to indemnify.[124] That,

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120 Policy § III.L.

121 *Id.*

122 *International Paper,* 320 N.E.2d at 620-21 (emphasis supplied); *Seaboard,* 476 N.E.2d at 275-76.

123 Def.'s Reply Br. at 20.

124 Pls. Reply Br. at 12-13.

as explained above, hasn't happened here. So there may still may be a duty to indemnify.

Because, the duty to indemnify is distinct from the duty to defend. While the latter is measured against the allegations within the pleadings, the former is measured by the actual basis for the insured's liability to a third person.[125] "[A]n insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage."[126]

The Underlying Actions have now concluded.

About six months ago, DBi's Motion for Summary Judgment was granted on all three Flexstake claims and that matter was dismissed.[127] The federal district court observed that DBi "is a corporation that provides highway operations and maintenance services to public entities," and that, under the FDOT Contract, DBi was to "maintain all assets within FDOT's right of way in Miami-Dade County, including the service or replacement of damaged or missing delineators on I-95."[128] And, the court found,

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[125] *Servidone*, 477 N.E.2d at 444 ("The duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's liability to a third person.).

[126] *Fitzpatrick*, 575 N.E.2d at 92.

[127] *See* D.I. 45; *see also Flexstake, Inc. v. DBI Servs., LLC*, 2018 WL 6270972, at *1 (S.D. Fla. Nov. 30, 2018).

[128] *Flexstake, Inc. v. DBI Servs., LLC*, 2018 WL 6270972, at *1 (S.D. Fla. Nov. 30, 2018).

DBi "merely used unmarked Generic Posts to maintain a previously purchased Flexstake Delineator."[129] The court ultimately held that DBi was not liable under the relevant section of the Lanham Act because, *inter alia*, in their best light Flexstake alleged and could prove that DBi used the generic posts to "simply service and maintain an existing product."[130]

Flexstake appealed, but in January 2019 the parties settled.[131] That settlement resolved both Flextake's appeal and DBi's requests for attorney's fees and costs. Thereunder, DBi withdrew its attorney's fees and costs request; while Flexstake took nothing for its claims, fully released DBi, withdrew its appeal, and paid DBi. $360,000.[132] In light of the district court's findings and the terms of the Flexstake/DBi settlement, Steadfast's duty to indemnigy DBi in that matter appears to be moot.

DBi and Orafol reached a settlement in August 2018.[133]

The Policy is titled "Contractor's Protective Professional Indemnity and

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129 *Id.*

130 *Id.* at *5-6.

131 *See* Ex. B of Def.'s Suppl. Memo. (Feb. 26, 2019) (D.I. 56); *see also* Def.'s Suppl. Memo at 1 ("[T]o resolve both Flexstake's appeal and DBi's requests for attorneys' fees and costs, Flexstake and DBi entered into a settlement agreement.).

132 *See* Def.'s Suppl. Memo at 1.

133 *See Orafol Americas, Inc. v. We Source It, LLC*, 2018 WL 6807321, at *2 (S.D. Fla. Oct. 5, 2018).

Liability Insurance."[134] The FDOT Contract identifies DBi as the "Contractor" and requires that the Contractor "[i]nspect, manage and maintain all assets within the project limits," including "car[ing] for and maintain[ing]" the selected "roadways, structures and facilities of Florida's state roads."[135] No doubt when DBi purchased the Policy, it intended to purchase and obtain protection for comprehensive claims arising out of its work and services in the performance of the FDOT Contract, including claims arising from its adherence to FDOT specifications.[136]

The confidential settlement reached in the Orafol case has now ended that matter. The duty to indemnify here must be determined by the actual basis for liability DBi agreed it had to Orafol.[137] And under New York law any duty to indemnify a loss

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134 *See generally* Policy.

135 FDOT Contract at 1-2.

136 The "General Requirements" of the FDOT Contract required that DBi "[p]erform all work to current Department Standards and Specifications throughout the contract duration, as may be updated throughout the life of the contract." *See id.* Moreover, as explained in the Flexstake decision:

> In 2016, FDOT adopted a specification for the performance of lane delineators used on I-95, which required any lane delineator used on Florida highways to be tested by a recognized testing facility that is accredited to crash test roadway safety devises. The [Flexstake] Delineator did not meet the new FDOT specifications and was never tested by an accredited facility, and therefore was precluded from continued use by DBI on I-95.

Flexstake, Inc. v. DBI Servs., LLC, 2018 WL 6270972, at *1 (S.D. Fla. Nov. 30, 2018).

137 *Servidone*, 477 N.E.2d at 444 ("The duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's liability to a third person.).

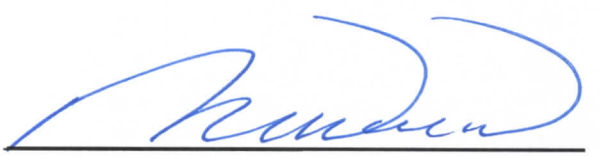
compromised by DBi is determined from the actual facts that led to its liability.[138] The Court will now confer with the parties as to how that factual determination is to be made. But no doubt, it will remain Steadfast's burden to demonstrate that the loss compromised by DBi the insured was not within policy coverage.[139]

At this point, Steadfast's motion for summary judgment on its to duty to indemnify—which was largely premised on its belief that it had no duty defend and, therefore, could have no duty to indemnify—must be denied.[140]

V. CONCLUSION

For the reasons discussed above, DBi's Motion for Partial Summary Judgment is **GRANTED** against Steadfast on the duty to defend. Steadfast's Cross-Motion for Summary Judgement on both the duties to defend and to indemnify is **DENIED**.

IT IS SO ORDERED.



Paul R. Wallace, Judge

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138 *Id.* at 445.

139 *Id.*

140 When faced with a summary judgment motion this Court must identify disputed factual issues whose resolution is necessary to decide the case, but not to decide those issues. *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992). And when there is no agreement on or lack of necessary factual predicate for the legal principles the parties advance, summary judgment is not warranted. *Id.*