

Plaintiffs argue that they are relieved of any responsibility of proving actual liability arising from the landfills at the Orzinuovi plant because Defendants breached their duty to defend against the claims made by Italian authorities. Plaintiffs base their argument on a line of New York cases involving breach of the duty to defend in which courts have held that where an indemnitor declines to defend, the indemnitor will be bound by any reasonable settlement reached by the indemnitee. In making this argument, Plaintiffs principally rely upon the following passage in ELRAC, Inc v Cruz, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. Queens Co. 1999):

If, however, the indemnitor is given notice of the claim or proceeding against the indemnitee and declines to defend, then the indemnitor is conclusively bound by any reasonable good faith settlement the indemnitee may make or any litigated judgment that may be rendered against him. Under these circumstances, an indemnitee may recover based on its "potential liability", and need not demonstrate "actual liability" by providing the elements of the underlying claim against it. In other words, if sufficient notice was given, an [indemnitee] will have to show (1) only "potential liability, to wit that the indemnitee could have been found liable at the trial of the underlying action, and (2) that the underlying settlement was reasonable and made in good faith.

*Id.* at 649 (internal citations omitted)

In light of ELRAC, Plaintiffs maintain that they need establish only that "(i) they could have been found potentially liable to the Italian Authorities, and (ii) that the underlying settlement with the Italian Authorities was reasonable and made in good faith." Pls.' Br. at 10. But the ELRAC string of cases is inapposite. As Defendants point out, unlike in this case, each of those cases involved a situation in which a third party brought a suit against the indemnitee that plainly fell within the given indemnity provision's coverage, thereby triggering the indemnitor's duty to defend, whereas here no third party ever instituted a lawsuit triggering Defendants' defense obligations. Neither Plaintiffs' October 23, 1989 letter expressing the belief that the landfills might expose them to potential liability, nor the Mayor's January 23, 1993 order triggered any defense obligations under the indemnification provisions because neither situation presented Defendants with anything to defend. [FN7] Contrary to Plaintiffs' assertion, Defendants never declined to defend the claims of Italian authorities for the simple reason that there were no formal claims to defend against, or, at the very least, there was insufficient

notice of any such claim. [FN8] See Atlantic Richfield Co. v. Interstate Oil Transport Co., 784 F.2d 106, 113 (2d Cir. 1986) ("Notice sufficient to give the indemnitor a meaningful opportunity to defend is the indispensable element to be proven by the party seeking indemnity. Where notice--which includes a meaningful opportunity to assume the defense--is lacking, a demonstration of actual liability is required"), Carey Transp. v. Greyhound Co., 80 B.R. 646, 652-53 (Bankr. S.D.N.Y. 1987) ("Where an indemnitor is subject to an express duty to defend, and where the indemnitee fails to give adequate notice of the claim or makes a settlement without giving the indemnitor reasonable opportunity to participate, the indemnitee cannot recover indemnity for the settlement without proving actual liability.") This is illuminated by the fact that Plaintiffs point to no evidence indicating that they acted in Defendants' stead in pursuing a defense against any claim made by Italian authorities. Quite the contrary, evidence in this case indicates that Plaintiffs tried to create a "violation of law" to create indemnity claims by drafting the cleanup order ultimately issued by the Mayor of Orzinuovi and by failing to contest the order, despite Plaintiffs' knowledge of its invalidity.

[FN7] In the insurance-coverage context, courts have explained the duty to defend concept as follows: "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." Hugo Boss Fashions, Inc. v. Federal Insur., 252 F.3d 608, 627-28 (2d Cir. 2001) (quoting Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford, 64 N.Y.2d 419, 488 N.Y.S.2d 139, 477 N.E.2d 441, 444 (1985)).

[FN8] Plaintiffs' argument for an award of summary judgment in their favor is premised upon a failure to defend theory. But this theory utterly fails against defendant Whitman for the simple reason that the 1988 SPA, as amended, does not contain a duty to defend clause. For this reason alone, then, plaintiff Frendo is not entitled to summary judgment against Defendant Whitman.

\*6 Accordingly, the Court denies Plaintiffs' motion for summary judgment against Defendants.

III Defendants' Motion For Summary Judgment

Defendants brought a motion for summary judgment,