THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-106

IN THE MATTER OF THE LIQUIDATION
OF THE HOME INSURANCE COMPANY

VIAD REPLY MEMORANDUM TO THE LIQUIDATOR'S OBJECTION TO VIAD CORP'S MOTION TO RECOMMIT

I. Response to the Liquidator's Facts

Viad accurately outlined the pertinent facts surrounding the claim at issue in its Motion to Recommit. Based upon the Liquidator's erroneous statement of the certain facts and legal authority in its Response[1], however, this clarification is warranted. For example, while certain statements by the Liquidator may be accurate in and of themselves, they are inaccurate when all of the facts are considered.

The Liquidator inaccurately asserts that "the timing of environmental contamination at the site is unknown." To support this statement the Liquidator cites to the Closure Report by the San Diego Regional Water Quality Control Board, which does in fact state that according to the RWQCB it is unknown when the release, which was discovered in 1989, occurred.

Importantly, however, the Liquidator completely ignored and omitted that additional evidence proves without a doubt that the *time period* in which the releases and contamination had to have occurred is fully known and determined. For example, as outlined in Viad's Motion, Dr. Kenneth Ries testified that most likely spills of No. 1 diesel fuel and gasoline occurred at the Site from 1954 through 1973, based on the years that the products were stored and used on the site. Depo. of Dr. Ries, p. 18, lines 23-24; p. 20, lines 21-24. Further, Dr. Ries stated that it is his opinion a significant portion of the releases took place during August 1966 to June 1972. Suppl. Affidavit of Dr. Ries, p.3, ¶ 8. Accordingly, evidence was presented that the "timing" of the contamination is in fact conclusively known. As set forth in Viad's Motion and addressed herein, this timing is sufficient for the appropriate standard of proof for the type of claim at issue. Thus, the Liquidator's statement that the timing is unknown is false when all of the evidence is considered.

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[1] The Liquidator's Objection to Viad Corp's Motion to Recommit and Objections to Order Entered by Referee on April 13, 2009, will be referred to herein as the Liquidator's "Response."

The Liquidator also erroneously states that all of the remediation of soil and groundwater at issue took place within the boundaries of the maintenance facility owned by Viad. Viad's predecessor owned the Site from 1954 to 1987. After 1987 Viad (or Greyhound) had no interest in the Site. At the time of the remediation, Viad had no ownership interest, use, custody, or control of the Site (Supplemental Affidavit of Dr. Ries, p. 2, ¶ 6). Thus, while the remediation (which was ultimately for the contamination of the groundwater) was within the property lines of the site formerly owned by Greyhound, Viad did not own the property at any time during the remediation.

II. Standard of Review

The Liquidator asserts that the Referee ruled upon at least two questions of fact, and as such, those findings are reviewed under the reasonable person standard. The Liquidator claims that these findings of fact are: 1) whether Viad met its burden of proof showing an occurrence or property damage during the policy period, and 2) whether Viad met its burden of proof that the sudden and accidental exception to the pollution exclusion applies for the third Home policy at issue. While Referee Gehris ruled on these issues, there was no dispute about what the evidence was. The only dispute was whether the undisputed evidence (as presented by Viad) legally met the burden of proof necessary for an insured to obtain coverage. This is clearly a matter of law, not a matter of disputed fact. Thus, the proper standard of review for this Court is a de novo review.

III. The Liquidator's Erroneously Asserts that Home's Policy Language was "Indistinguishable" from the *County of San Diego* Case in Trying to Support its Argument for a Restrictive Interpretation of "Damages" Under Home's First and Second Policies.

The Liquidator's argument that Home's first and second policies only cover "damages" which should be limited so as to exclude clean-up costs in response to an abatement order is

incorrect and misleading. First, Viad in no way asserts that Referee Rogers erred in deciding the choice of law issue, as the Liquidator suggests. The simple fact that California law applies does not mean that no other case law from any other jurisdiction can be considered on the same issues. In fact, California courts (like other courts) often look to other jurisdictions when considering an issue.

What is clear by a review of California cases addressing what constitutes "damages" for liability policies, however, is that the courts (and in particular the California Supreme Court) have altered their interpretations of damages,[2] and a trial court must look to the specific language at issue. While the *Powerine* line of cases do address the issue of what constitutes damages in environmental clean-up claims, it is recognized by the California courts that each case must be decided based on the specific policy language at issue. *Powerine v. Superior Court*, 118 P. 3d 589 (Cal. 2005) ("*Powerine II*") (each insurance policy must be interpreted based on its specific terms and provisions). As such, a consideration of all of California case law as well as relevant cases from other jurisdictions is appropriate when considering the unique policy language in Home's policies. It therefore is critical to look at the actual and specific language of the first two Home Policies in order to determine whether they are similar or identical to the language in the *Powerine* and *County of San Diego* cases.

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[2] *See e.g., AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1267-69 (applying the "ordinary and popular" definition of "damages" for interpreting CGL policies, and holding, "[t]o the extent that policy language is ambiguous in light of the way environmental statutes authorize relief, our goal remains to protect the objectively reasonable expectations of the insured."); *Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.2d 94 (Cal. 2001) ("*Powerine I*"); (applying *Foster-Gardner*'s ruling that the definition of "suit" is limited to mean only a legal action before a court to indemnification and finding that "damages" means only sums ordered by a court, but not overruling *AIU*); *Powerine Oil Co., Inc. v. Superior Court*, 118 P.3d 589 (Cal. 2005) ("*Powerine II*") (finding that the restrictive definition of "damages" in *Powerine I* did not apply under the policy language at issue); *County of San Diego v. Ace Property & Cas. Ins. Co.*, 118 P. 3d 607 (Cal. 2005) (holding that the restrictive interpretation of *Powerine I* applied limiting coverage only to sums ordered by a court based upon the policy language).

Importantly, the Liquidator inaccurately asserts that the policy language at issue is "indistinguishable" from the policy at issue in *County of San Diego*. This assertion is belied by a review of the policy language of both Home's Policies and the policy at issue in *County of San Diego*.

For purposes of this issue for which the Liquidator denies coverage, the Liquidator's argument, and the argument the Referee adopted, applies with regard to the first and second Home Policies only. The Liquidator has agreed that on this issue the Third Policy is literally identical with *Powerine II* and therefore that policy provides coverage for Viad's claim.

The first and second Home Policies provide coverage as follows[3]:

> The Company hereby agrees to indemnify the Insured against ***excess loss as hereinafter defined, ... which the Insured may sustain by reason of the liability*** imposed upon the insured by law or assumed by the Insured under contract or agreement ... **for damages because of injury to or destruction of property ... caused by or growing out of each occurrence** and arising out of or due wholly or in part to the business operations of the Insured..." (emphasis added).

In contrast, the central insuring agreement in *County of San Diego* provided coverage to the insured for:

> **all sums which the insured is obligated to pay by reason of liability** imposed by law or assumed under contract or agreement **'arising from damages'** caused by personal injuries or the destruction or loss of use of tangible property.
> *County of San Diego*, 118 P. 3d at 609.

It is simply inaccurate to suggest that this language is "indistinguishable." The two are obviously distinguishable, especially when the *County of San Diego* court based its application of the *Powerine I* narrow construction of "damages" in part on the fact that the central insuring agreement made no reference to the ultimate net loss or any other terms that may include other provisions of the policy. The *County of San Diego* court held that the insuring language referred

only to sums the insured was liable to pay as "damages," and thus damages were limited to money judgments. *County of San Diego*, 118 P.3d at 613-14. In contrast, Home's policy agrees to indemnify Viad against "excess loss **as hereinafter defined** . . .," clearly making specific reference to another term or provision under the policy.[4] (Emphasis added).

Following the California Supreme Court's logic of *Powerine II* and *County of San Diego*, and the clear differences noted in the language of the two insuring agreements at issue, *Powerine II* applies in the present case. In *County of San Diego* the court applied the restrictive definition of "damages" from *Powerine I* because the central insuring agreement did not include expenses, made no reference to nor incorporated the ultimate net loss, and because the policy contained a "no action clause" that made the policy similar to policies that include a duty to defend. *Id.* at 615-16 (finding that the insuring language did "not purport to further define the scope of indemnity coverage set forth in the insuring provision . . ."). In *Powerine II*, however, the court held that "damages" should not be construed as limited only to sums ordered by a court, because the central insuring agreement provided that:

> The Company hereby agrees... to indemnify the Insured for **all sums which the Insured shall be obligated to pay by reason of the liability** ... imposed upon the Insured by law ... ***for damages, direct or consequential and expenses, all as more fully defined by the term 'ultimate net loss'*** on account of ... property damage ... caused by or arising out of each occurrence happening anywhere in the world." (emphasis added)
> *Powerine II*, 118 P. 3d at 602.

"As more fully defined by the term 'ultimate net loss'" serves the same purpose as "excess loss as hereinafter defined," included in Home's policy. Since coverage for the loss is further defined in the policy, it should not be limited to sums required by a court to be paid, and include

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[3] As referenced in Viad's Motion and the Liquidator's Response, this provision is often referred to by the courts as the "central insuring agreement."

[4] Obviously the "ultimate net loss," the only other definition of "loss" provided, which also further defines "damages" to include "claims," and specifically references expenses.

remediation expenses required by an abatement order. Even more compelling, the definition of "ultimate net loss" in Home's policy qualifies and further specifically defines the term "damages" to be determined by settlement or adjustment of a **claim**, or a final judgment.

The *Powerine I* case specifically says that "claims" include governmental administrative orders, so that they are covered under such a policy. To adopt the Liquidator's analysis compels that the damages in the definition of "ultimate net loss" is different than damages in the central insuring clause, when the central insuring clause says the loss (and thus damages) are "hereinafter defined." So, according to the Liquidator there are two definitions of "damages" in the Home Policies.

All of these terms in Home's policies must be given meaning. *See Mirpad, LLC v. California Ins. Guarantee Assn.* 132 Cal.App.4th 1058, 107, 334 Cal.Rptr.3d 136, 147 (Cal. App. 2 Dist. 2005) (holding that it violates the rules of contract construction to render words redundant or superfluous). As such, the court's reasoning in *Powerine II* should apply, that the policy language was clearly not intended to be limited to merely monetary sums awarded by a court, and remediation expenses are covered.

IV. Viad Presented Ample and Undisputed Evidence that the Contamination Must Have After 1954 and Must Have Ceased by 1973, and that the Contamination Probably Occurred During the Home Policy Periods. This Undisputed Evidence Shifted the Burden of Proof to the Liquidator, Who Failed to Present any Proof to the Contrary.

In proving an occurrence in order to trigger coverage for environmental contamination, the initial burden on the insured is to show that the injury more likely than not occurred during a period of coverage. *Armstrong World Industries, Inc., v. Aetna Cas. & Surety Co.*, 45 Cal. App. 4th 1, 46-47 (Cal. 1st App. 1996). The insured may meet this burden by simply showing "when the contamination began and when it ended or was discovered..." At that point, the trial court **must** presume that property damage was "continuous from its initiation until the time of clean-up

or discovery." (emphasis added) *Domtar, Inc., v. Niagara Fire Ins. Co.*, 563 N.W. 2d (Minn. 1997). The Referee ignored this clear standard of proof as set forth by the California courts and the Minnesota Supreme Court that, as explained below, follows the "continuous trigger" theory, just like California. Instead, the Referee imposed a highly unrealistic burden of proof and required Viad to show that an occurrence "in fact" occurred during Home's policy periods.

To rebut Viad's argument the Liquidator criticizes Viad's citation of relevant case law from other jurisdictions. While *Domtar* is a decision from the Minnesota Supreme Court, it is from a jurisdiction that follows the same "trigger of coverage" rule adopted by California, the "continuous trigger theory,"[5] and as remains good law. In fact, the Liquidator cites to a New York case (*Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 749 N.Y.S. 2d 488, 494 (N.Y. App. Div. 2002)) and a Massachusetts case (*A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund*, 838 N.E. 2d 1237, 1250-51 (Mass 2005)), in support of its position, after criticizing Viad's citation of case law form other states. Neither of these decisions, however, applies the continuous trigger theory set forth in *Montrose*.

Viad need only show with reasonably reliable evidence that the spills or leaks more likely than not occurred during the period of Home's policy.[6] Viad met this standard by undisputed evidence.

V. The Liquidator Fails to Assert any Valid Arguments for the Application of the Owned Property Exclusion, a Burden the Insurer Bears in Proving.

The Liquidator erroneously asserts that the owned property exclusion (or property in the insured's care, custody or control) applies in the present case. First, the Liquidator has the burden of proving that this exclusion applies, a burden the Referee failed to apply. Secondly, the Liquidator simply ignores the uncontroverted evidence that Viad did not have care, custody, or

[5] *See Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1993).

control of the property. Thirdly, the Liquidator cannot overcome the evidence that the remediation was done to remedy damage and avoid the threat of damage to third-party property outside the scope of the site formerly owned by Greyhound.

The sole evidence presented is that Viad did not have any ownership, possession, custody, or control of the groundwater. See Supplemental Affidavit of Dr. Ries, p.2, ¶ 6. The Referee ignored these facts and the only evidence presented. In its Response the Liquidator likewise ignores the evidence, and overemphasizes the fact that the remediation done was within the lines of the property Viad formerly owned, a fact that does nothing to support its burden of proof regarding the exclusion. The simple fact is the Liquidator did nothing to meet its burden of proof other than state that the cleanup took place within the boundaries of the property Greyhound formerly owned. As such, the exclusion cannot be enforced where the insurer failed to proof its application. *See ML Direct, Inc. v. TIG Specialty Ins. Co.*, 79 Cal. 4th 137, 141-42; s*ee also Intel Corp. v. Hartford Accident & Indemnity Co.*, 952 F.2d 1551, 1561-62 (9th Cir. 1991) (affirming summary judgment in favor of the insured and holding that the insurer made no showing that the contamination fell within the exclusion of its policy).

The Liquidator claims that Viad had care, custody, or control over the soil and the groundwater at the site, and that is why its exclusion applies. Such a conclusion is simply untrue, and is wholly contradicted by the evidence presented. As explained above, the sole evidence presented is that Viad did not have any care, custody, or control of the groundwater. See Supplemental Affidavit of Dr. Ries, p.2, ¶ 6. Further, the *Shell* decision (by one California court) simply does not support the proposition the Liquidator asserts. Importantly, the Shell case was not fully cited by the Liquidator; instead the **Liquidator fails to include** the critical last sentence of the quoted paragraph:

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[6] *See Armstrong World Indust.*, 45 Cal. App. 4th at 46-47.

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> Whether Shell's coverage claims fell within the scope of the exclusion was an issue for the trier of fact.
> *Shell Oil*, 12 Cal. App. 4th at 759.

The one selected excerpt from *Shell* that the Liquidator focuses on, and which the Referee erroneously relied upon, does not support a finding that the groundwater in the present matter was in Viad's care, custody, or control at any time, nor does it overcome the character of groundwater as non-owned property. The portion of opinion containing the selected quote used by the Liquidator found that a jury *may have* determined that Shell had control over the groundwater when intercepting and removing it for remediation, at which time Shell was the party with ownership (or as a lessor) and control of the property. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 752 (Cal. App. 1993). To the contrary, in the present case, Viad had no ownership or possessor interest in the property at any during remediation activities.

Even ignoring this distinction between *Shell* and the present case, however, other important aspects of the *Shell* decision are ignored and omitted by the Liquidator (and obviously by Referee Gehris). The "owned property" issue was before the court on Shell's challenge to a jury instruction that asked jurors to categorize the property remediated, one category which resulted in application of the insurers' owned property exclusion. *Id.* at 756-58. That instruction, however, was subject to a second instruction that would take the property *outside* the scope of the exclusion where remedial measures were taken on owned property "to prevent imminent damage to others or third party property." *Id.* at 756. As such, even if a juror found that property should initially fall in the category of "owned, leased or in the care, custody or control" of Shell, such property was excepted if the remediation was to prevent imminent damage to third party property (and thus the owned property/care, custody, control exclusion would not apply). *Id.*

The evidence in the present matter clearly shows that the City of San Diego claimed and demanded clean-up based upon alleged contamination and threat of future contamination to property of others and of the public.[7] Accordingly, *Shell* simply does not stand for the proposition asserted by the Liquidator, that remediation of soil and groundwater solely within an insured's property lines is excluded under the "care, custody or control" portion of an owned property exclusion. Even if it did, however, Viad did not own or control the property at the time of the remediation, nor had Viad or Greyhound ever owned or controlled the groundwater when Greyhound owned the property, and the fact that remediation was done to prevent imminent damage to others or third-party property would render the exclusion inapplicable.

VI. Conclusion

The Liquidator has failed to assert any viable arguments that overcome Viad's objections to Referee Gehris' April 13, 2009, Order. Based upon the Referee's failure to recognize or address evidence presented and her legal errors in finding no coverage under Home's policies at issue, Viad respectfully requests that this Court consider its Motion to Recommit and Objections to Order Entered By Referee on April 13, 2009, and grant a hearing before the Court on this matter.

Respectfully submitted,

VIAD CORP

By its attorneys,

Dated: May 18, 2009

By: _____

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[7] See App. A to Viad's Motion, Deposition of Dr. Ries, p. 15, lines 4-14; App. D to Viad's Motion, p. 4.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by U.S. Mail and electronic mail to: John F. O'Connor, Equire, Steptoe & Johnson, LLP, 1330 Connecticut Ave, N.W., Washington, D.C. 20035; and J. Christopher Marshall, Assistant Attorney General, Civil Bureau, New Hampshire Office of the Attorney General, 233 Capitol Street, Concord, New Hampshire, 03301, this 18th day of May, 2009.

Peter G. Callaghan