BEFORE THE COURT-APPOINTED REFEREE
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidator Number	: 2008-HICIL-35
Proof of Claim Number	: EMTL 705271-01 (San Diego, Calif)
Claimant Name	: VIAD
Claimant Number	:
Policy or Contract Number	: HEC 9557416 HEC 9304783 HEC 4344748
Insured or Reinsured Name	: VIAD (predecessor, The Greyhound Corporation/ Transportation Leasing Company)
Date of Loss	: 1966-1972

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PRELIMINARY STATEMENT

The parties filed their initial briefs in this matter outlining their respective coverage positions. Reply briefs were due on January 27, 2009, and by mutual agreement, the time was extended to January 29, 2009. An evidentiary hearing is presently scheduled for February 4, 2009.

For purposes of this brief, all exhibits are referred to as appendices and abbreviated as "App.," deposition testimony is referred to as deposition transcript or abbreviated as "depo. T.," and affidavit testimony is abbreviated as "Aff."

STATEMENT OF FACTS AND OF THE CASE

The present dispute involves Viad's[1] claim for insurance coverage arising from environmental contamination at a bus maintenance operation located at 539 First Avenue, San Diego, California (hereinafter, "the Property"). Viad disagrees with the Liquidator's representation that the "facts" are undisputed, because Viad does dispute the facts as outlined in the Liquidator's Initial Brief. Viad reasserts the facts related to the historical operations at the Property as fully set forth in Viad's original brief and clarifying facts are set forth in this Response Brief.

Resolving the present coverage dispute requires a review of very limited and specific facts related to the timing of the occurrence(s) at issue, the nature of the contamination that was remediated, the reason for remediation, facts related to any alleged settlement between Viad and the California Regional Water Quality Control Board ("CRWQCB"), and Viad's understanding of its obligation under the policies at issue. The facts associated with these coverage issues are addressed in various expert reports and other documents, and the affidavits/depositions of Ms. Deborah DePaoli and Mr. Ken Ries.

First, as evidenced by App. H, I, J, K to Viad's original brief and K. Ries' testimony [depo. T. 24-25, 31, 34-35], there is no evidence that petroleum products were used on the site prior to 1954, and Viad sold its Greyhound bus line subsidiary in 1987. Indisputably, Viad's/Greyhound's operations, including any occurrences, must have taken place at the Property between 1954 and 1987, a time period that clearly implicates the Home policies insuring the Property from 1966 through 1972.

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[1] Viad, as referenced herein, includes its predecessor in interest for purposes of the insurance policies at issue, The Greyhound Corporation/Transportation Leasing Company.

Second, pursuant to Abatement Order 89-49 and its later amendments/addenda, the CRWQCB ordered Viad to undertake an assessment and remediation of the Property. It later directed Viad to conduct a full soil excavation. [Ries T. 39, 53-55; DePaoli T.(App. L) 18, 26, 41; D. DePaoli Aff. ¶16] In accordance with Viad's obligations and the clear dictates of the respective Home policies, Viad undertook the investigation and remediation of the Property as it was contractually required to do. Contrary to the Liquidator's assertion (Liq. Brief at 3), Viad did not enter into a remediation agreement with the CRWQCB.

Third, as provided for in the policies, Viad notified Home of this matter after Viad determined "in its judgment," that the remediation costs it was obligated to investigate and conduct, might implicate the Home policies presently at issue. [DePaoli T.26]. That notice occurred in 2004 after the remediation was finished, after Viad's application for reimbursement from the State of California's Underground Storage Tank Fund was completed but pending, and pursuant to the 2003 Liquidation Order mandating proof of claim filing by June 13, 2004. Until Viad's application was reviewed and reimbursement made, however, even in 2004 Viad could not know its total expenses as it did not receive any reimbursement from the State of California until October 24, 2006, when Viad received a $314,000.00 reimbursement, and on October 26, 2008, when Viad received a $1,426,801 reimbursement. [Ries depo. T. 45]

SUMMARY OF ARGUMENTS

For nearly four (4) years the Liquidator has advocated the position that Viad's allegedly delayed notice is the dispositive issue precluding coverage for the San Diego, California, claim. During that same time the Liquidator gave very little weight to any substantive coverage issues. As evidenced by the Liquidator's Initial Brief, however, the Liquidator has now taken an opposite position, claiming that substantive coverage defenses form the crux of its primary

argument against coverage, although the Liquidator still clings to its alleged right to address notice if the Liquidator successfully appeals the California choice of law ruling. The Liquidator's continued claim of lack of notice necessarily renders the Liquidator's substantive defenses waived.

The Liquidator's substantive coverage defenses have been waived, because the Liquidator cannot maintain mutually exclusive positions to the detriment of its insured. If it asserts substantive defenses the Liquidator must abandon its notice and no-voluntary-payments claims. If the Liquidator maintains these "condition" defenses/arguments, then the substantive defenses are necessarily waived.

Regarding "damages," contrary to the Liquidator's position, Viad's remediation expenses are losses or damages as contemplated by Home's insurance policies. As demonstrated by the holding in *Powerine v. Superior Court*, 118 P.3d 589 (Cal. 2005)(Powerine II), each policy must be interpreted according to its own unique and specific language. The specific policy language at issue includes the terms "damages" and "expenses," so when read as a whole, the policy language in each of the three Home policies is patently more similar to the policy language in *Powerine II* where the court required indemnity for damages and remediation expenses.

The Liquidator argues that the policies at issue required Home's consent to respond to an abatement order, to incur expenses to conduct remediation, and to enter into an agreement, but the policies do not require such consent. On the contrary, the policies required Viad to conduct all investigations at its own expense and bring matters to a conclusion before Home's liability for Viad's loss attaches. The policies do not prohibit Viad from entering into an agreement with potentially responsible parties, and Viad did not enter into any agreement with the California Regional Water Quality Control Board as the Liquidator has alleged.

The policies do not define "Incurring Costs" thus rendering it ambiguous. By relying upon substantive defenses the Liquidator, as a matter of law, waived any right to assert non-compliance with this condition. Moreover, because "Costs" is capitalized it is deemed to have specific legal meaning, e.g., costs incurred in defending an action in court, and pursuant to the "Honorable Undertaking" condition, the term Costs must be liberally construed in favor of coverage.

Expert testimony and records demonstrate that the occurrences took place between 1954 and 1973, as a result of accidental spills and overflows, and some line leakage that occurred during the last few years in the period. Home cannot refute the sole evidence presented on this issue.

The pollution exclusion in the third Home policy provides coverage for occurrences that are sudden and accidental, and which unexpectedly and unintentionally result in property damage. The facts and sole evidence show that the contamination was likely the result of accidental spills or tank overfills, and/or from leaks from small corrosion holes later found in buried fuel lines, and the Liquidator has presented no evidence to the contrary.

The owned property exclusion in the second and third policies does not apply to the groundwater that is owned by the people of the State of California and as such, the $5 million self insured retention is inapplicable. The Liquidator's reliance on *Shell* (1993) is misplaced and it is in conflict with other later appellate decisions.

ARGUMENT

I. ALL OF HOME'S SUBSTANTIVE COVERAGE DEFENSES ARE WAIVED BECAUSE HOME CONTINUED TO ASSERT LACK OF NOTICE BY VIAD.

The relationship between an insurer and its insured is one of a fiduciary. *Major v. Western Home Ins. Co.*, 2009 WL 26744, *5 (Cal. App. 4 Dist. 2009)("Insurers hold themselves

out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust"). Also firmly rooted in California jurisprudence is the fact that underlying every insurance contract and between every insurer and its insured, is a duty of good faith and fair dealing, which "encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary." *Id.* For nearly four (4) years the Liquidator has consistently informed Viad, both in writing and verbally to counsel, that it believed Viad's delayed notice of claim barred coverage as a condition precedent, and as such, under New York law, notice was dispositive of the coverage Viad seeks.

As noted in Viad's Initial Brief, Home cannot simultaneously rely upon both notice and substantive defenses as they are mutually exclusive. By continuing to assert lack of notice as a defense, Home has waived any substantive When an insurer pursues a course of conduct that does not comport with the standard of "good faith and fair dealing" required under the subject insurance contract, the insurer has no standing to assert coverage defenses. *See, e.g., Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co.,* 129 F.2d 621 (10th Cir. 1942).

immediately denied, and Viad should be awarded an allowance in the amount of $2,291,739.00.

Once Home breached its duty of good faith and fair dealing, however, Viad was under no obligation to continue to comply with the policy terms and conditions. An insurer cannot deny liability while at the same time demand compliance with policy conditions or provisions. "It is a well-recognized rule . . . that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its [own] benefit." *Grant v. Sun Indemnity Co. of New York,* 11 Cal. 2d 438, 80 P.2d 996 (1938). Home's insistence

that Viad comply with notice or consent conditions when Home itself has not performed as required, is inherently unfair and a breach of Home's fiduciary obligation.

II. VIAD'S REMEDIATION EXPENSES ARE DAMAGES AS CONTEMPLATED BY THE INSURANCE POLICIES; VIAD DID NOT VIOLATE THE INSURANCE CONTRACT'S SETTLEMENT OR VOLUNTARY PAYMENTS PROVISION; AND, INDISPUTABLY VIAD HAS DEMONSTRATED THAT ANY OCCURRENCES TOOK PLACE DURING THE POLICY PERIODS.

A. Viad's Remediation Expenses Constitute Damages or Losses.

California law requires that all insurance contracts be interpreted according to the individual language of each policy. *Powerine v. Sup. Court*, 118 P.3d 589 (2005). Thus, despite case law that may interpret general or standard policy provisions, the language of each insurance policy must be viewed individually against the backdrop of any decided cases to assess the intentions of the parties and/or their understanding of the protections afforded by the chosen policy language. "To yield their meaning, the provisions of a policy must be considered in their full context…Where it is clear, the language must be read accordingly...Where it it's not, it must be read in conformity with what the insurer believed the insured understood thereby at the time of formation…and, if it remains problematic, [then the policy is construed] in the sense that satisfies the insured's objectively reasonable expectations…." *Certain Underwriters at Lloyd's v. Superior Court,* 24 Cal. 4th 945, 957, 16 P.3d 94 (Cal. 2001)(Powerine I).

At issue here is whether the terms "damages" and "expenses" in the instant Home policies provide coverage for Viad's remediation expenses. The California Supreme Court has issued no less than three (3) opinions on this issue and they are outlined as follows:

1. *Certain Underwriters at Lloyd's v. Superior Court*_16 P.3d 94 (Cal. 2001) (Powerine I), also referred to as *Powerine*_I, involved the court interpreting the word "damages" as used in the following standard CGL policy central insuring language: "Insurer to pay all sums

that the Insured becomes legally obligated to pay as *damages.*" (emphasis added) Powerine sought coverage for damages incurred in responding to an abatement order issued by the CRWQCB. The court held that the term "damages," which was not modified or further defined elsewhere in the policy, standing alone, referred only to monetary sums ordered by a court. Powerine was thus denied indemnity for its remediation costs.

2. *County of San Diego v. Ace Property & Cas.*, 118 P.3d 607 (Cal. 2005), involved the County of San Diego seeking insurance coverage from "non-standard" third party liability policies for costs incurred responding to an abatement order and for costs incurred settling claims outside of lawsuits. The central insuring language required the insurer to indemnify 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." Despite the County's argument that the definition of ultimate net loss expanded the definition of damages, the court disagreed and held, citing Powerine I, that because the term "damages" did not expressly or intentionally incorporate the ultimate net loss definition, "damages" were limited to sums ordered by a court.

3. *Powerine v. Superior Court,* 118 P.3d 589 (Cal. 2005)(Powerine II). Powerine appealed the court's ruling in Powerine I and argued that distinctly different "damages" language in several policies issued by Central National Insurance required a finding *for* coverage. Upon review, the California supreme court agreed, recognizing that the uniquely different central insuring language broadened the definition of "damages" so as to include remediation expenses. The Central National policies contained the following language:

> 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 ore 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)

Ultimate Net Loss was defined as:

> The total sum which the Insured or any company as his insurer, or both, become obligated to pay by reason of … **property damage** … **either through adjudication or compromise, and shall also include** hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges, and **law costs**, premiums on attachment or appeal bonds, interest, **expense for doctors, lawyers, nurses and investigators** and other persons and **for litigation, settlement, adjustment and investigation of claims and suits** which are paid as a consequent of any occurrence covered thereunder…. (emphasis added)

In finding coverage for the remediation expenses, the Powerine II, court found significant the fact that the term damages was further defined by "ultimate net loss" as incorporated by the central insuring provision, the use of the term expenses, and the expansive risks entailed by the term "expenses." The court surmised that this broader coverage might have been accounted for in higher premiums or other concessions, but the policy language was clearly not intended to be limited to merely monetary sums awarded by a court as was the case in Powerine I and ACE Property.

The case law clearly focuses on determining whether the term "damages" should be narrowly construed to mean only those monetary sums ordered by a court of law, or whether the term should be more broadly construed to include remediation expenses such as those requested by Viad in the instant case. The import of these specific distinctions is clear: where damages are more broadly defined the intention of the parties will be interpreted to include coverage for remediation expenses. Unquestionably, the first two Home policies at issue here, as further explained below, include expanded definitions of the word "damages," and the third policy includes, among other things, the use of the term "expense" in the central insuring provision. Pursuant to the holding in Powerine II, the Home policies must be similarly interpreted and Viad must be afforded coverage for its remediation expenses.

The central insuring language of the first two Home polices states in relevant part:

> 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)

Since the policies contain no specific definition of the term "excess loss," the only other policy provision that gives meaning to the central insuring agreement, is the term "Ultimate Net Loss," which is defined as follows:

> The "Ultimate Net Loss" as used in this Contract ***shall be deemed to mean the actual sum or sums paid or payable to any person or person as*** special, punitive or general ***damages***, or any or all (as determined by settlement or adjustment of claim or claims s herein provided, or by final judgment), ***plus expense incurred by the Insured*** in providing such immediate medical or surgical relief as is imperative at the time of the occurrence covered hereby, because of bodily injury or injuries, death or deaths, arising out of or because of an occurrence covered hereby. ***Fees and expenses*** (including taxed court costs and interest accruing after entry of judgment) ***paid by the Insured … in investigating, defending and settling occurrences, claims and suits covered hereunder*** … shall be pro-rated between the Insured and the company in proportion to their respective interests in the amount of Ultimate Net Loss paid. (emphasis added)

The term "damages" as used in the first two policies clearly and expressly incorporates by reference the definition of Ultimate Net Loss by providing indemnity for "excess loss as hereinafter defined." Because the term "excess loss" is not separately defined, the only possible term this phrase could be referencing is "Ultimate Net Loss" which clearly includes "fees" and "expenses" of all kinds, including investigating, defending and settling "occurrences, claims and suits." Like the language in Powerine II, the first two Home policies clearly and expressly incorporate a more broad definition of the term damages and therefore, the first two Home policies should be construed to provide Viad coverage for its remediation expenses.

Even more compelling is the central insuring language of the third Home policy which is virtually indistinguishable from the policies in Powerine II. It states in relevant part:

> 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 or assumed under contract or agreement … **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)
>
> . . . .
>
> The term "Ultimate Net Loss" shall mean the total sum which the insured become [sic] obligated to pay by **reason of … property damage … either through adjudication or compromise and shall also include … fees, charges and law costs**, premiums on attachment or appeal bonds, interest, **expenses for … investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of an occurrence covered hereunder …"** (emphasis added)

As identified by the highlighted language, this third policy is virtually indistinguishable from the Powerine II policies. The central insuring provision's use of the term "expense" and its further defining the term "damages" by incorporating a litany of covered expenses from the definition of Ultimate Net Loss, clearly demonstrates that the parties intended coverage to extend beyond mere monetary damages awarded by a court. Just as the court found coverage in Powerine II, so too, here does the exact same policy language compel coverage for Viad's remediation expenses.

B. The Abatement Order and Subsequent Remediation Agreement Were Not Settlements as Contemplated By the Insurance Policies. As Such, Viad did not Need Home's Consent.

Viad's expenses incurred in conducting remediation ordered by a governmental agency with authority to enforce compliance through the courts were not voluntary. "The majority of courts addressing this issue have held that costs incurred when an insured engages voluntarily in cleanup activities in advance of litigation, are covered under comprehensive general liability policies." Maryland Casualty Co. v. Wausau Chemcial Corp, 809 F. Supp 680, 696 (W.D. WI

1992). The Wausau court also noted that "[a]lthough Wausau Chemical did appear to have a choice of engaging in negotiations with EPA or holding back and refusing to comply until forced, this choice was superficial at best." Likewise, Viad's expenses to undertake remediation after being ordered to do so by the CRWQCB cannot be deemed voluntary. See also Governmental Interinsurance Exchange v. City of Angola, 8 F.Supp. 2d 1120 (N.D. Ind. 1998)(stating that if cooperation with state or federal agencies is enough to invoke a "voluntary payments provision" and bar coverage, an insured would be left with no choice but to defy the governmental entity at least long enough to attempt to ensure that any loss would be a covered loss.)

Viad also argued in its Initial Merits Brief that there was no settlement to which Viad was a party. The Liquidator is wholly incorrect in its assertion that Viad entered into any sort of agreement with the CRWQCB-it did not. A settlement, as defined by its ordinary meaning, involves two parties that voluntarily give and take to reach a contractual compromise and resolve a dispute between them. That did not happen in the present case. [DePaoli T.39]. Rather, Viad received an order from a governing authority demanding remediation of contaminated groundwater, and Viad complied with that order.

Viad's agreement with other similarly situated potentially responsible parties as an expense-cutting measure likewise was not a settlement, and it can hardly constitute a settlement when the CRWQCB was not even a party to that agreement. Even if the remediation agreement had included the CRWQCB (which it did not), by agreement, the first two Home policies must be liberally interpreted to include Viad's remediation expenses. A narrow or technical construction of the policy provisions is prohibited.[2] Here, Home seeks a liberal construction of

[2] Section VIII (D) of the first two policies states: HONORABLE UNDERTAKING. "The contract shall be considered an honorable undertaking the purposes of which are not to be defeated by a narrow or technical

Viad's obligations, which is to incur all expenses necessary to investigate, defend, and resolve all claims before receiving indemnity from Home, while at the same time Home seeks a strict or technical construction of its indemnity obligation to avoid compensating Viad for its expenses.

So even if Viad's conduct with respect to the CRWQCB's abatement order was an out of court settlement (which it was not), a liberal construction of the policy terms, as dictated by the Honorable Undertaking provision, requires Home to indemnify Viad for all expenses incurred in carrying out its obligation under the policies. There can be no liberal construction of the policy obligation for one party, and a strict construction for the other. Requiring Viad to get approval to do the very thing the policy required it to do-investigate claims-is thus wholly inconsistent with the expectations outlined in the policy and, in fact, such approval was inherently not necessary where the parties acted in good faith and in fair dealing. Accordingly, a clear reading of the policy demonstrates that Viad was allowed and in fact, was required, to conduct at its own expense, all investigations and defense of claims made against it, and Viad was required to do so until in Viad's judgment (a subjective standard since the word "reasonable" is not present to modify 'judgment') [DePaoli T.35], a settlement was appropriate. Viad's compliance demands the same in return from Home, and that is to provide coverage.

C. The Consent Clause is Restricted to the Term "Costs," which is Limited to Court Costs.

California law follows the general rule that ambiguities or inconsistent provisions in insurance contracts shall be construed against the insurer. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 828-9, 12 Cal. App. 4th 715, 737 (Cal. 1st Dist. Ct. App. 1993) (holding that policy ambiguities are construed against the insurer and construction should not be

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construction of its provisions, but shall be subject tot a liberal interpretation for the purpose of giving he effect to the real intention of the parties hereto."

based on strained interpretations).[3] The policy provisions relied upon by Home to deny Viad's claim based on an alleged failure to secure Home's consent to incur remediation are:

> Section VIII. CLAIMS AND APPEALS
> . . . It is further understood that the Insured shall not make *settlement* of any claim or group of claims (unless compelled to so do by final judgment of any court of competent jurisdiction) for an amount involving the interest of the Company under this contract, without the consent of the Company thereto.
>
> . . . .
>
> Section VIII. CONDITIONS
>
> . . . .
>
> B. INCURRING OF COSTS
> In the event of claim or claims arising *which appear likely to exceed the Underlying limits* no ***Costs*** shall be incurred by the Insured without the written consent of the Company.

The first provision clearly relates to settlements only, and as has already been argued, Viad did not enter into any agreement whatsoever with the CRWQCB, regardless of how Home tries to define the term "settlement." The ordinary meaning of the word invokes a two-sided proposition, whereas compliance with an order is a one-sided proposition that bears no indicia of a settlement. Accordingly, Home's reliance on the "settlement provision" to complain that Viad expended money for remediation is completely misplaced and entirely indefensible.

Likewise, the "Incurring Costs" condition provides Home no sanctuary to avoid its indemnity obligation. First, the capitalized term "Costs," is not defined in the Home policies, it is referenced nowhere else in the policies, and Black's Law Dictionary identifies and defines dozens of "costs," so the term "Costs" could mean a multitude of different things.[4] As an initial

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[3] *See also Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 42 Cal.Rptr.2d 324 (Cal. 1995)(ambiguous provisions will be construed against the insurer and will be interpreted so as to protect the objectively reasonable expectations of the insured).

[4] The only other reference to the term "costs" (uncapitalized) is found in a parenthetical in the definition of Ultimate Net Loss: "... Fees and expenses (including taxed *court costs* and interest accruing after entry of judgment), paid by the Insured..." In this context, the term "costs" was clearly defined and understood to mean "court costs...accruing after entry of judgment. . . ." As such, "costs" cannot reasonably mean that Viad was required to obtain Home's consent to incur expenses to remediate the Property when the term clearly refers to judicially imposed costs.

matter, then, the undefined term "Costs" is ambiguous and must be construed against the drafter, Home. If Home wanted to ensure compliance with this term it could and should have defined it. Viad cannot be held to comply with a provision that has no clearly defined meaning, particularly when Viad's very obligation included *incurring expenses* to investigate claims.

Second, Home's denial of coverage on substantive grounds, as argued in Viad's Initial Merits Brief, constitutes a waiver of any unmet policy condition, such as notice of claim. The reason is simple: if there is a substantive basis for claim denial then it does not matter whether any policy conditions, such as notice, have been met. Likewise, the "Incurring Costs" provision in the Home policies is listed as a "condition," so the same argument holds true: Home has waived its right to assert a failure to comply with a condition requiring consent to "Incurring Costs." *See Select Ins.Co. v. Superior Ct.,* 226 Cal. App. 3d 631, 276 Cal. Rptr. 598 (1990)(holding "an insured is not allowed to rely on an insured's failure to perform a condition of a policy when the insure has denied coverage, because denying coverage demonstrate[s that] performance of the condition would not have altered its response to the claim").

Third, and most significantly, capitalized words in contracts are deemed to have a specific meaning-that is the sole reason they are capitalized. Here, because the term "Costs" is capitalized, it must have a specific intended legal meaning otherwise Home would not have created a separate provision for it. Indeed, the capitalized term Costs is defined in Black's Law Dictionary as "Costs (litigation). A pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action." *Black's Law Dictionary* (6th ed.). No doubt, this definition includes only costs associated with a court action. Here, with nothing further in the policy to define the capitalized term, the only reasonable conclusion is that the definition

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afforded by Blacks Law Dictionary has merit, and that "Costs" as referred to in the Home policies includes only those costs "incurred in litigation," and not costs "incurred to conduct an environmental remediation."

The same conclusion is reached by reviewing the "Incurring Costs" provision in light of the reasoning in *Powerine I*,[5] wherein the court held that the term "damages," with no other definition provided in the policy, included only those monetary sums imposed by a court as a result of judicial action and nothing more. In *Powerine I* the court found significant the fact that damages was a term of art, e.g., that "damages" typically existed inside of a courtroom, and that the parties had the ability to define the term more broadly had they so chosen. So too, here, the term "Costs" is a legal term of art that Home chose not to more fully define. As provided in *Powerine II, supra,* 37 Cal. 4th at pp. 390-391, 33 Cal.Rptr.3d 562, 118 P.3d 589 (internal quotation marks and citations omitted):

> A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. The fact that a term is not defined in the policies does not make it ambiguous. Nor does [d]isagreement concerning the meaning of a phrase, or the fact that a word or phrase isolated from its context is susceptible of more than one meaning. [L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract. If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage.

The definition of the term Costs as used in the Home policies must either be interpreted from the context in which it and the policies were written, or determined to be ambiguous and then construed against the Home to protect Viad's reasonable expectation of coverage. Either way, Costs cannot be construed as being anything other than court costs, because expanding the

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[5] Certain Underwriters at Lloyd's v. Superior Court (Powerine I), 16 P.3d 94 (Cal. 2001).

definition to include "all expenses of any kind" as Home suggests, creates an inherent conflict with Viad's obligatory investigation of claims. Home cannot require Viad to investigate claims at its own expense and then deny recovery of those expenses by calling them Costs for which Viad should have sought approval despite the fact that Costs were not defined. The intrinsic inconsistency in that argument is obvious and is nothing short of Home seeking to have its cake and eat it too.

The more reasonable and reasoned approach, is that because Viad was on its own to investigate, defend, and resolve claims made against it, and the only time that Home even wanted to be bothered with matters was if there was a settlement or lawsuit "*which appear[ed] likely to exceed the Underlying limits,...*" the term Costs must include only those expenses associated with settlements and/or lawsuits. Viad clearly had express authority to settle matters that did not exceed or did not appear likely to exceed (in Viad's judgment) the underlying limits, and it had express, indeed, mandated authority to incur expenses to investigate and defend claims.

Since Home was only interested in claims that resulted in settlements or lawsuits, the term Incurring Costs can only reasonably mean that Home's involvement was limited to consenting only to those costs incurred as payment in settlement or during actual litigation of a lawsuit. A more expansive definition of the term Costs is neither warranted nor appropriate under the circumstances. When viewed in light of the policy language, taking into account the reasoning in Powerine I, and considering the ambiguity created by the lack of a firm definition, the term Costs can only reasonably be construed against Home and in favor of coverage.

D. Viad's Claim Unquestionably Arises From an Occurrence that Took Place During Home's Policy Periods, and As Such, Home Must Provide Coverage to the Full Extent of its Coverage

Viad has fully set forth its position on this issue in Viad's Initial Merits Brief but responds to the Liquidator's Original Brief here solely for purposes of clarifying the facts as

argued by the Liquidator. No doubt, Viad bears the burden of establishing that its claim(s) occurred during the policy periods at issue, but once Viad has met its burden of bringing the claim within the basic scope of coverage, "[t]he burden then shifts to the insurer to prove the claim falls within an exclusion." *Merced Mut. Ins. Co. v. Mendez,* (213 Cal.App.3d 41, 47, (1989). Home cannot prove the claim falls within an exclusion.

Under California law, injury or damage that is continuous or progressively deteriorating over successive policy periods is covered by all policies in effect during those policy periods. *Montrose Chemical Corp. v. Admiral Ins. Co.,* 913 P.2d 878, 10 Cal. 4th 645, 673-674 (Cal. 1995). This "trigger of coverage" applied to liability policies are referred to as the continuous injury or multiple trigger theory. *Id.* Under this theory, **the timing of an occurrence is:**

> **largely immaterial to establishing coverage; it can occur before or during the policy period.** Neither is the date of discovery of the damage or injury controlling: it might or might not be contemporaneous with the causal event. **It is only the effect - the occurrence of bodily injury or property damage during the policy period,** resulting from a sudden accidental event or the "continuous or repeated exposure to conditions" that triggers potential liability coverage. *Id.* (emphasis added)

As demonstrated by Ken Ries' testimony, the predominant contaminants found on the Property, leaded gasoline and #1 diesel fuel, were only used on the Property between 1954 and 1973 (policy periods are 1966 to 1972).[6] So the only time Viad/Greyhound's operations *could have* caused any contamination, either by accidental overspills or by leaking underground lines, was between 1954 and 1973. [Ries T. 19, 45-46, 55-59; Aff. P. 6, ¶14] Mr. Ries also testified that any leaks in the lines would have occurred during the latter part of the 1954-1973 time period, because the small corrosion holes found in the excavated lines would not have occurred

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6 See also the California Water Control Board Abatement Order, #89-49, various correspondence, environmental reports, and staff reports, etc., which are attached to Viad's Initial Merits Brief as App. I, J, ¶ 11.

in the earlier years when the lines were brand new. Significantly, this encompasses the Home policy period from 1966 to 1972.

Although the Liquidator makes much about Mr. Ries' statement that he had no evidence of when any specific overfills or leaks actually occurred, an exact occurrence date is not required under the continuous trigger theory. All that must be shown is that the occurrence took place during a time in which Home's policies provided coverage, and then each and every policy insuring the risk during that time period is implicated. Montrose, supra at 10 Cal. 4th at 675. *See also Firemen's Fund Ins. Co. v. Maryland Cas. Co.*, 77 Cal. Rptr.2d 296, 306, 65 Cal. App. 4th 1279, 1297 (1998)(holding that each insurer covering a loss has an independent obligation to indemnify the insured to the full extent of the policy).

Furthermore, as previously argued, Viad's experts established and Ries testified that when the three USTs were removed there were no leaks, the tanks' structural integrity was good, and they were in good shape given the period of time they had been in the ground. [Ries T. 59] App. I. This can only mean that the contamination arose either from leaking pipelines[7] or from sudden and accidental spills on the Property. Logically, those occurrences could only have taken place during the time in which those particular fuels were present on the Property, which was 1954-1973.

III. THE THIRD HOME POLICY PROVIDES COVERAGE FOR SUDDEN AND ACCIDENTAL DISCHARGE, DISPERSAL, RELEASE OR ESCAPE OF CONTAMINANTS, AND THE SOLE EVIDENCE OF IT IS UNREFUTED.

As more fully set forth in Viad's Original Brief, by its own language the exclusion in the third policy expressly does not apply to contamination caused by sudden and accidental events or occurrences. App. P. Specifically, the policy states that the exclusion **does not** apply where a

[7] ERC found evidence of contamination below corroded pipelines that had previously carried the gasoline and diesel fuel, but could not conclude that the contamination resulted from these lines, as there was evidence of

discharge, dispersal, release or escape is "sudden and accidental." The insurer bears the burden of proving that an exclusion applies, and exclusionary language must be plain, clear, and conspicuous. *ML Direct, Inc. v. TIG Specialty Insurance Co.*, 79 Cal. 4th 137, 141-142, 93 Cal. Rptr. 2d 846, 850 (2d Dist. 2000).[8] Exceptions to a coverage provision are construed broadly in favor of the insured, and in light of the insured's objectively reasonable expectations. See *Montrose Chemical Corp., supra.* at *667.*[9] In the context of pollution exclusions, while courts vary in their interpretations of the meaning of the terms "sudden and accidental," an accidental event is considered an event that is unexpected and unintended. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. 4th 715, 15 Cal. Rptr. 2d 815.[10] An event is considered "unexpected" if the insured did not know or believe the event was substantially certain or highly likely to occur. *A-H Plating,* 57 Cal. 4th App. at 436.

The term "sudden" and accidental was previously addressed in Viad's Initial Merits Brief. There, Viad pointed out that "sudden and accidental discharge of a dangerous pollutant could continue unabated for some period because of a negligent failure to discover it, technical problems or a lack of resources that delay curtailment, or some other circumstance,..." and still constitute "sudden and accidental. *Shell Oil, supra, at 756.* The evidence already provided demonstrates that the contamination at the San Diego site in large part arose from sudden and accidental events and that Greyhound's business practices established that there were no leaking lines on a regular basis (Ries T. 28-29, lines 3-25, lines 1-8). As such, the exclusion does not apply. Further, Home produced no evidence that the releases occurred in any other fashion such

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migration that may have begun at the fuel ports during an accidental spill, and then traveled along the pipeline as a conduit.

[8] *See also Intel Corp.*, 952 F. 2d at 1561-62 (affirming summary judgment in favor of the insured and holding that the insurer made no showing that the contamination fell within the exclusion in its policy).

[9] See also *National Union Fire Ins. Co. v. Lynette C.*, 228 Cal. App. 3d 1073, 1082, 279 Cal. Rptr. 394 (Calif. 1991).

that the sudden and accidental exclusion does not apply. *See Intel Corp.*, 952 F. 2d at 1561 (granting summary judgment in favor of insured where insurer provided no evidence showing that pollution claim fell within terms of a pollution exclusion). As such, the sudden and accidental character of the events is not diminished nor is Home's liability for contamination caused by those occurrences.

IV. THE OWNED PROPERTY EXCLUSION DOES NOT APPLY BECAUSE THE CONTAMINATED GROUNDWATER IS OWNED BY THE PEOPLE OF THE STATE OF CALIFORNIA.

Remediation expenses to restore groundwater are covered third party damages despite any policy provision limiting or excluding property owned by the insured or in the insured's care, custody or control. *See A-H Plating, Inc. v. American National Fire Ins. Co.*, 57 Cal. App. 4th 427 (Cal. 2d Dist. Ct. App. 1997); *AIU Ins. Co.,* 51 Cal. 3d 807, 817, 799 P.2d 1253 (Calif. 1990).[11] Damage to the groundwater constitutes damages to third party property because the groundwater is owned the State of California. *California Water Code*, § 102; *A-H Plating, Inc.* 57 Cal. App. 4th at 442; *see also AIU Ins. Co.,* 51 Cal. 3d at 818; *Intel Corp.*, 952 F.2d at 1565.

The Liquidator does not dispute that the groundwater is not owned by a property owner, and that thus the "owned property" exclusion does not apply. Rather, the Liquidator relies only on the policy provision applying a $ 5 million self-insured retention for property "leased, rented, occupied or used by or in the care, custody or control of the insured," and claims that language in the *Shell*[12] case supports application of this limitation. The Liquidator's argument and reliance upon *Shell* is misplaced for several reasons.

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[10] *See also A-H Plating, Inc. v. American Nat'l Fire Ins. Co.*, 57 Cal. 4th 427, Cal. Rptr. 2d (2d. App. 1997); *Intel* Corp. v. Hartford Accident & Indemnity Co., 952 F. 2d 1551, 1561-62 (9th Cir. 1991).

[11] *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F. 2d 1551, 1565 (9th Cir. 1991).

[12] *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 763 (Cal. 1 Dist. Ct. App. 1993)

First, *Shell* does not control the issue in the present case and the facts are distinguishable. *Shell* involved approximately 800 policies and a large span of time in which the various policies provided coverage, including up to the time the declaratory action for coverage was filed. Additionally, the property encompassed about 28 square miles directly within Shell's control, it included three contaminated lakes, and the contaminating activity and releases appear to have continued until the underlying action began. *Id.* at 732-33. During the remediation and the coverage action Shell continued to lease and control the property. In response to Shell's claim of improper jury instructions regarding CERCLA response costs, the appellate court noted that "expenses *solely* for the cleanup of first party property were not covered unless they were necessary to prevent imminent damage to third party property." *Shell Oil Co.*, 12 Cal. 4th at 758 (emphasis added). The court noted that the state law limitation of private ownership of water does not necessarily mean that lake water or groundwater *could not* be in Shell's care, but any number of facts that may have lead the court to this comment are not present in the instant case. Notably, it appears from the opinion that Shell still leased and maintained custody and control of the property at the time of the clean up, which was potentially during the time of some of the policies provided coverage. *Id.* at 730-35.

Quite unlike the facts of Shell on this issue, Greyhound owned the Property *at the time of the releases* at issue for which Viad makes a claim for coverage, not at the time the remediation was undertaken. Where Shell continued to lease and control the property up to and through the trial and clean-up of the property, Viad no longer had an interest in the San Diego site after 1987. (See DePaoli Affidavit, at ¶5) Further, unlike *Shell* with its three contaminated lakes, there were no lakes or ponds on the Property here. While the *Shell* court does not explain all of the various facts that may support a finding that some of the water damages could have fallen

within the "care, custody, or control" of Shell, it is clear that there were a number of unique facts in *Shell* that do not apply in the present case. Additionally, when the *Shell* court commented about the water possibly being in Shell's care, custody or control, it was said in the context of considering the propriety of jury instructions including the "care, custody or control" language. *Shell*, therefore, merely states that it cannot be presumed that Shell did not have care, custody, or control of the water, and that a trier of fact must make that determination. *Shell* does not hold presumptively that lake or groundwater is always in the "care, custody or control" of a property owner. The Liquidator's reliance on this language, therefore, is totally misplaced, particularly given that the facts in *Shell* are distinguishable from those in the instant case in that Shell still leased and controlled the property, whereas here, Viad's property ownership ended in 1987 but remediation began in 1989.

Second, the Liquidator's attempt to apply *Shell* as a bright line rule in all cases must fail because the court's speculation as to what a juror might find under the circumstances in *Shell* is not relevant here. In fact, taken to its logical conclusion, if the Liquidator's position regarding the *Shell* court's dicta were applied in the instant case it would produce an absurd result because it would require applying a policy exclusion, which was limited to the 1969 to 1972 policy period, to the remediation events that occurred between 1989 and 2001. Since Home's policies at issue are occurrence based policies, the ***only*** relevant time periods are those at issue in Home's policies, not a time period some 17 years later. *See, e.g., 4th Street Investors, LLC v. Dowdell*, 2008 WL 163052 * 4 (W.D. Pa. 2008). If the Liquidator claims that there was some custody or control of the property during the course of remediation, that time period is years ***after*** Home's policy periods, and is inapplicable to whether the owned property (and property in the insured's care, custody or control) exclusion applied in 1972. Viad has shown that the only

evidence and testimony in this matter demonstrate that releases causing the contamination of the site occurred during the policy period. It is the insurer's burden to prove an exclusion applies. *See Shell Oil*, 12 Cal. App. 4th at 759; *see also Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 879 587 P.2d 1098 (1978). Even if the law regarding the state's ownership of the groundwater did not apply to the "care, custody, or control" provision of the policies (although it does), the Liquidator has not only failed to prove that Greyhound had care, custody or control of the groundwater at the time of the loss(es), it has pointed to NO evidence that supports such a claim.

Finally, the Liquidator's argument ignores the fact that other courts clearly recognize that when remediation is undertaken to remedy or prevent further contamination to groundwater, such clean-up is covered third-party property damage under liability policies, despite any exclusion for property in the insured's care, custody or control. *See A-H Plating v. American Nat'l Fire Ins. Co.*, 57 Cal. App. 4th 427, 441-42; *see also United Technologies Corp. v. Liberty Mutual Ins. Co.*, 1993 WL 818913, * 10-11 (Mass. Super. 1993) ("the owned-property exclusion will not bar coverage of cleanup costs undertaken on plaintiff's property where there is actual or threatened damage to third party property, including groundwater beneath the insured's property.")[13]; *Township of Gloucester v. Maryland Cas. Co.*, 668 F. Supp. 394 (D. N.J. 1987) (holding that the owned property exclusion does not apply to expenditures for clean up in complying with the DEP).

The evidence Viad produced demonstrated that the root of all damages at the San Diego site was the groundwater, and all clean-up and/or remediation was ultimately to restore the groundwater and to protect the public. Further, it was impossible to clean-up or prohibit further

[13] While courts often refer to the exclusion as the "owned property" exclusion, the typical language in the exclusion in most liability policies, and the language included in the United Technologies case includes owned property **and** property occupied by or rented to the insured or property in the care, custody or control of the insured." *Id.* at 10; *A-*

contamination of the groundwater without removing and treating the contaminated soil. See Ries Affidavit, Page 4, Para. 8. *See also Gloucester*, 668 F. Supp. at 400 (finding clean-up costs covered even when expenditures include repairs to insured's property where the clean-up costs were inextricably linked to damage claims to a third party); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 754 F. Supp 358, 366 (D. Vermont 1990)(finding that if remedial work to an insured's property was necessary to stop injury to others, such expenses are not excluded by the owned property exclusion). In fact, Viad spent over $1.8 million just in groundwater remediation before Viad was required to conduct a full soil excavation of the Property. See App. X. Since the damages were to third party property, the owned property exclusion (or "care, custody or control" exclusion) on which the Liquidator relies does not bar coverage for any of the damages which Viad as required by the State of California.

CONCLUSION

For the foregoing reasons, Viad requests that an order recognizing that the Liquidator has NOT waived notice as condition that allegedly precludes coverage. Further, since failure to waive notice means Home has effectively waived its substantive defense (Home is not entitled to both), Viad requests entry of an order awarding Viad coverage in the amount of $2,291,739.00.

H Plating v. American Nat'l, 57 Cal. App. 4th at 441-42 (policy at issue excluded coverage for "damage to property owned, occupied, or rented by the insured, used by the insured, or in the care, custody, or control of the insured").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided by U.S. Mail on January 29, 2009, to: Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator of the Home Insurance Company c/o J. David Leslie, Esquire and Eric A. Smith, Esquire, Rackemann, Sawyer & Brewster, P.C., 160 Federal Street, Boston, MA, 02110-1700; Liquidation Clerk, The Home Insurance Company in Liquidation, c/o Merrimack Superior Court, 163 N. Main Street, Concord, NH 03302-2880; and John O'Connor, Esq., Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, DC, 20036-1795.

Respectfully submitted,

VIAD CORP

By its attorneys,

Dated: January 29, 2009

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