THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

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

In Re Liquidator Number:	2008-HICIL-35
Proof of Claim Number:	EMTL 705271-01
Claimant Name:	VIAD Corporation
Claimant Number:	Class II
Policy Numbers:	HEC 9557416
	HEC 9304783
	HEC 4344748
Insured Name	VIAD Corporation (successor to The Greyhound Corporation)

THE LIQUIDATOR'S REPLY TO VIAD CORP.'S MERITS BRIEF

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Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby responds as follows to VIAD Corp.'s Brief in Support of Insurance Coverage and Providing an Allowance for VIAD Corp's San Diego, California, Proof of Claim:

I. INTRODUCTION

The merits brief filed by VIAD Corp. ("VIAD") addresses a number of coverage issues but, for the most part, confronts these issues while avoiding a discussion of the actual language in the controlling provisions of the insurance policies issued by Home to VIAD's predecessor.[1] When the clear and unambiguous language of the Home policies is applied to the largely undisputed facts concerning VIAD's claim, it is clear that VIAD is not entitled to coverage under the Home policies with respect to the San Diego site.[2]

VIAD's merits brief confirms that the costs incurred by VIAD at the San Diego site were not the result of a court judgment, but of an *administrative* cleanup order issued by the California Regional Water Quality Control Board. California law is clear that policies with the language contained in the first and second Home policies *do not* provide coverage for expenses incurred in

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[1] VIAD also devotes the first half of its merits brief to a discussion of late notice, which relates to VIAD's failure to provide notice of the 1987 discovery of environmental contamination at the San Diego site, or of the 1989 administrative remediation order issued by the California Regional Water Quality Control Board, until VIAD filed a claim in the Home liquidation in 2004. However, in light of the Referee's interlocutory ruling that California law would apply to the Home policies for the San Diego site, the Liquidator did not raise late notice as a defense in his merits brief, instead focusing on the other coverage defenses available under California law. Thus, while the Liquidator has reserved the right to assert late notice as a defense if the Referee's application of California law were later overruled, the Referee need not address late notice at this time.

[2] As the Liquidator noted in his merits brief, a ruling that no coverage is available in this proceeding relates solely to the San Diego site. By agreement of the parties, the Liquidator will analyze VIAD's claims regarding sites other than the San Diego site separately and will issue separate notices of determination.

complying with administrative cleanup orders. While VIAD's merits brief addresses extensively whether the first and second Home policies provide coverage for voluntary expenses or settlements entered into without Home's consent, VIAD studiously avoids addressing the controlling language in the first and second Home policies on this subject, and also avoids citation to the multitude of California cases holding that such provisions are enforceable *and* that these provisions apply without a requirement of showing prejudice from the policyholder's non-compliance.

VIAD also fails to meet its burden of proving the existence of triggering events during the limited period in which the Home policies were in effect, and also fails to meet its burden of proving that any property damage at the site falls within the limited exception to the pollution exclusion in the third Home policy. Finally, VIAD's brief asserts that the "owned property" exclusion in the second and third Home policies does not apply because part of VIAD's costs involved remediating groundwater. However, VIAD fails to confront the second half of this provision, which imposes a $5 million self-insured retention for property damage to any property – such as groundwater within the boundaries of VIAD's property – that is in the policyholder's care, custody, or control. For all of these reasons, the Referee should affirm the Liquidator's determination that no coverage is available under the Home policies for costs incurred by VIAD at the San Diego site.

II. ANALYSIS

A. Costs Incurred in Complying With Administrative Cleanup Orders Are Not Covered Under the First and Second Home Policies

VIAD argues that the California Regional Water Quality Control Board's administrative cleanup order is a "final judgment" that Home is required to indemnify under the first and second Home policies. This contention is patently incorrect. As a factual matter, the administrative

cleanup order itself demonstrates that it was not "final" by any stretch. The cover letter accompanying the administrative cleanup order specifically explains that the order is not "final":

> You are hereby notified that you have the right to a public hearing before the Regional Board concerning Cleanup and Abatement Order No. 89-49. If you desire to have a public hearing at the Regional Board's next meeting . . . you must notify this office of your request in writing by June 20, 1989.

VIAD Ex. J at 1. Moreover, VIAD's counsel testified in her deposition that VIAD had the right to challenge the administrative cleanup order in court, but did not do so. Ex. 6 at 24-25. Thus, the administrative cleanup order was not "final" in any sense of the word; it was an administrative order that VIAD *elected* not to challenge, a decision made without notice to Home or Home's consent.

Ironically, after advocating the application of California law with respect to the San Diego site, VIAD cites a single *Maryland* intermediate appellate court decision for the proposition that an order such as the California Regional Water Quality Control Board's administrative cleanup order is a "final" order. VIAD Br. at 18. But there are California Supreme Court cases that directly control the relevant question, whether an administrative cleanup order issued by the California Regional Water Quality Control Board constitutes "damages" that are covered under policy language such as that in the first and second Home policies.

As the Liquidator noted in his merits brief, there are three California Supreme Court decisions addressing whether insurance coverage is available for costs incurred in complying with California Regional Water Quality Control Board administrative cleanup orders. In *Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94 (Cal. 2001) ("*Powerine I*"), and *County of San Diego v. ACE Property & Casualty Insurance Co.*, 118 P.3d 607 (Cal. 2005), the court held that the policies provided coverage for amounts the policyholder was legally

obligated to pay as "***damages***," and that the term "damages" required a court judgment and did not include costs incurred in complying with California Regional Water Quality Control Board administrative cleanup orders. *Powerine I*, 16 P.3d at 103; *County of San Diego*, 118 P.3d at 613-16. These courts found no coverage based on the following aspects of the relevant insurance policies:

- The policies' Insuring Agreements provided that the insurer would indemnify for amounts incurred "as damages."
- The policies' Insuring Agreements did not state that the insurer would indemnify for "expenses."
- The policies' Insuring Agreement did not reference or incorporate the policy's definition of "ultimate net loss."

Powerine I, 16 P.3d at 103; *County of San Diego*, 118 P.3d at 613-16.

In *Powerine Oil Co., Inc. v. Superior Court*, 118 P.3d 589 (Cal. 2005) ("*Powerine II*"), the court held that the excess policies at issue in that case *did* cover costs incurred in complying with administrative cleanup orders, and based that decision on the following language in the relevant policies:

- While the policies' Insuring Agreements provided that the insurer would indemnify for amounts incurred "as damages," the Insuring Agreements also stated that the insurer would indemnify the policyholder for "expenses."
- In addition to providing that the insurer would indemnify the policyholder for "expenses," the Insuring Agreement defined the term expenses by referring to and incorporating the policy's definition of "ultimate net loss."

Id. at 602.

Without citing to *Powerine I* and *County of San Diego*, VIAD asserts in its brief that the language of the Home policies is "nearly identical to that contained in the CGL policies at issue" in *Powerine II*. VIAD Merits Br. at 22. That statement is patently incorrect. VIAD claims that the first and second Home policies are "nearly identical" to the policies at issue in *Powerine II*

because the Home policies contain a definition of "ultimate net loss" and that the term "ultimate net loss" includes "expenses." But this was precisely the argument made by the policyholder in *County of San Diego* – decided the same day as *Powerine II* – and squarely rejected by the California Supreme Court.

The Supreme Court explained the different results in *County of San Diego* and *Powerine II* by explaining that the key distinction in the policies was the language in the ***Insuring Agreement***. In *Powerine II*, the Insuring Agreement obligated the insurer to indemnify not only for "damages," but also for "expenses," and further defined "expenses" by reference to the policy's definition of "ultimate net loss." *County of San Diego*, 118 P.3d at 615. By contrast, while the excess policies at issue in *County of San Diego*, like the first and second Home policies, contained an "ultimate net loss" definition, and the "ultimate net loss definition" included the concept of "expenses," the policies did not provide coverage for costs incurred pursuant to administrative cleanup orders because the ***Insuring Agreement*** obligated the insurer to indemnify only for "damages":

> First, the term "expenses" was expressly contained in the central insuring clause of the excess/umbrella policies at issue in *Powerine II*: "The Company hereby agrees . . . to indemnify the Insured for all sums which the Insured shall be legally obligated to pay by reason of the liability . . . imposed on 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 covered hereunder . . . ." In contrast, the term "expenses" is *not* found in the central insuring provision of the Ace policy – the obligation to indemnify extends only to "all sums which the insured is obligated to pay by reason of liability imposed by law or assumed under contract or agreement" for "damages" resulting from personal injuries or the destruction or loss of use of tangible property.

Id. (emphasis and omissions in original) (citation omitted). Thus, while VIAD asserts that the policy language of the first and second Home policies are "nearly identical" to the policy

language in *Powerine II*, VIAD steadfastly avoids citing to *Powerine I* or *County of San Diego*, two California Supreme Court decisions that make clear that the differences in language between the policies in *Powerine II* and the first and second Home policies are case dispositive because:

- Like the policies in *Powerine I* and *County of San Diego*, and unlike the policies in *Powerine II*, the first and second Home policies' Insuring Agreements provide that the insurer will indemnify only for amounts incurred "***as damages***."

- Like the policies in *Powerine I* and *County of San Diego*, and unlike the policies in *Powerine II*, the first and second Home policies' Insuring Agreements do not state that the insurer will indemnify for "expenses."

- Like the policies in *Powerine I* and *County of San Diego*, and unlike the policies in *Powerine II*, the first and second Home policies' Insuring Agreements do not reference or incorporate the policies' definition of "ultimate net loss."

Therefore, *Powerine I* and particularly *County of San Diego* control the result with respect to the first and second Home policies, and compel a ruling that VIAD is not entitled to coverage under those policies for costs incurred in connection with an administrative cleanup order.[3]

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[3] VIAD does not directly make the argument in its merits brief that Home is somehow estopped from refusing to indemnify under the first and second Home policies for costs incurred in connection with administrative cleanup orders. However, VIAD's constant refrain in its merits brief, when confronted with policy language that defeats its position, has been to claim estoppel, suggesting that VIAD might make this argument in its reply. The Liquidator explains in Section II.B of this reply why VIAD lacks facts sufficient to assert an estoppel claim with respect to any coverage defense under the Home policies. With respect to the lack of coverage under the first and second Home policies for costs that do not constitute court-ordered damages, the Liquidator notes that California law is clear that waiver and estoppel cannot apply to enlarge coverage beyond that provided by the terms of the first and second Home policies. *R&B Auto Ctr., Inc. v. Farmers Group, Inc.*, 44 Cal. Rptr. 3d 426, 447 (Cal. Ct. App. 2006) ("The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom . . . ."); *Manneck v. Lawyers Title Ins. Co.*, 33 Cal. Rptr. 2d 771, 777 (Cal. Ct. App. 1994) (same).

III. The Provisions in Home's First and Second Policies Barring Coverage for Voluntary Payments Made Without Home's Consent Are Fully Enforceable

A. The First and Second Home Policies Unambiguously Preclude Coverage for Voluntary Payments Made By VIAD

VIAD's merits brief quotes *five* different provisions from the first and second Home policies in arguing that VIAD is entitled to indemnification for remediation costs it incurred without either a final court judgment or consent from Home. Tellingly, however, VIAD never cites the provisions in the first and second Home policies that specifically preclude coverage for any voluntary payments or settlements made without Home's consent:

> It is further understood that the Insured shall not make settlement of any claim or group of claims (unless compelled to do so 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.
>
> * * *
>
> In the event of claim or claims which appear likely to exceed the Underlying limits no Costs shall be incurred by the Insured without the written consent of the Company.

Ex. 1 at 5 (Claims and Appeals provision), 7 (Incurring of Costs Condition); Ex. 2 at 4-5 (Claims and Appeals provision), 6 (Incurring of Costs Condition).

Indeed, while VIAD is constrained to concede that "California law allows enforcement of consent provisions," VIAD Br. at 23, VIAD cites a single California case on this issue and ignores the multitude of California decisions routinely enforcing policy provisions requiring consent prior to payments or settlements made in the absence of a final court judgment. *See, e.g.*, *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G.*, 476 P.2d 406, 416 (Cal. 1970); *Insua v. Scottsdale Ins. Co.*, 104 Cal. App. 4th 737, 743-44 (Cal. Ct. App. 2002); *Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal. App. 4th 966, 976-77 (Cal. Ct. App. 2000);

Jamestown Builders, Inc. v. Gen. Star Indem. Co., 77 Cal. App. 4th 341, 346 (Cal. Ct. App. 1999).

Under these consent provisions, VIAD must obtain Home's consent before incurring costs unless there is a final judgment from a court of competent jurisdiction compelling VIAD to incur such costs. Here, no court was ever involved. VIAD had an undisputed right to challenge the administrative cleanup order it received, both through a public hearing before the California Regional Water Quality Control Board and through court action. Ex. 6 at 23-25; VIAD Ex. J at 1. Given that the first and second Home policies unambiguously require, as a condition of coverage, that VIAD obtain Home's consent before incurring costs or reaching settlement in the absence of a final court order, VIAD had two choices if it wanted to pursue insurance coverage under the first and second Home policies for remediation costs at the San Diego site: (1) it could have challenged the administrative cleanup order in court, and complied with any final court order respecting the site; or (2) it could have conferred with Home and sought Home's consent to a voluntary resolution of the California Regional Water Quality Control Board's claim. VIAD, however, did neither. Instead, it decided to enter into a remediation agreement with the California Regional Water Quality Control Board and not only did not seek Home's consent, but did not even notify Home that these discussions were ongoing. This conduct specifically precludes coverage under the first and second Home policies, which by their terms require VIAD to obtain Home's consent before incurring insured costs not compelled by a final court adjudication.

The defense and investigation provisions in the first and second Home policies – which require VIAD to conduct the investigation and defense of any underlying claim – do not change the result, and merely reflect Home's status as an excess insurer. The first and second Home

policies allocate the policy responsibilities by requiring VIAD to investigate and defend claims asserted against it. Indeed, consistent with the parties' allocation of responsibility, the first and second policies do not preclude VIAD from making voluntary payments or entering into settlements *so long as those payments or settlements do not implicate Home's coverage* (as each policy is subject to a $750,000 self-insured retention).[4] However, the voluntary payments and consent provisions allow Home to protect its interests by requiring VIAD to obtain Home's consent for any voluntary payment or settlement if VIAD desires coverage from Home for some or all of the amount expended. VIAD admittedly did not comply with this obligation, so coverage is not available with respect to the San Diego site under the first and second Home policies.

B. The Liquidator Is Not Estopped From Enforcing the Consent Provisions in Home's First and Second Policies

VIAD advances two additional interrelated arguments for why the consent provisions in Home's first and second policies are supposedly unenforceable:

- Home's alleged denial of coverage for *different* claims under *different* policies voided the consent provisions in the first and second Home policies;
- Home's alleged denial of coverage for *different* claims under *different* policies should estop Home from asserting the consent provisions in the first and second Home policies; and
- Home's alleged denial of coverage for *different* claims under the first and Second Home policies should preclude Home from asserting the consent provisions in those policies with respect to the San Diego site.

All of these arguments are based on at least two assumptions: (1) Home's prior conduct in cases involving different claims and (in some cases) different policies is somehow relevant to this case,

[4] There are actually two retentions applicable to the second and third Home policies. There is a general $750,000 per occurrence retention. However, for claims involving damage to property used by VIAD, or under VIAD's care, custody, or control, there is a $5 million self-insured retention. *See* Section II.D, *infra*.

and (2) Home denied coverage on all previously-tendered claims. Both of these assumptions are baseless. Because these assumptions are baseless, VIAD's arguments must fail. Moreover, VIAD's argument regarding estoppel must also fail because VIAD cannot prove reliance.

Without citation to any authority, VIAD argues that Home's alleged denial of *different* claims, some of which were made under *different* policies, affects Home's right to enforce the consent provisions in the first and second Home policies. VIAD Merits Br. at 24; VIAD Ex. R. VIAD fails to explain how alleged denials of different claims, under different policies, based on different facts, could void the consent provisions in the first and second Home policies or support application of the doctrine of estoppel in this case. Determination of coverage necessarily turns on the facts of the case at hand as applied under the applicable policy provisions. That Home allegedly denied different claims, under different policies, based on different facts cannot estop Home from denying coverage based on VIAD's admitted failure to comply with the policies' consent provisions for the San Diego site under the policies at issue in this proceeding.

As an initial matter, VIAD's treatment of the facts in its merits brief is not consistent with the evidence, and the true facts cannot possibly support a finding of estoppel. First, *all* of the supposed denials of coverage by Home (many of which were not in fact denials of coverage), took place in 1999 or later. VIAD, however, voluntarily entered into a remediation agreement, and failed to challenge the California Regional Water Quality Control Board's administrative discharge order in court, in ***1989***, ten years before the correspondence from Home that supposedly supports VIAD's estoppel argument. VIAD Ex. U at ¶ 14 (and Exhibit E thereto). VIAD's entry into a legally binding remediation agreement in 1989, and its voluntary decision to forgo its right to a court challenge, both done without seeking Home's consent, cannot possibly have been motivated by events that did not happen until ten years after the fact. To prove

estoppel, VIAD must establish that it relied on Home's conduct to its detriment. *Strong v. County of Santa Cruz*, 543 P.2d 264, 266 (Cal. 1975). VIAD cannot assert reliance in 1989 on events that had not yet even happened, and would not happen, for another ten years.

Second, VIAD is simply incorrect in asserting that Home "denied" or "effectively denied" similar claims asserted by VIAD in 1999. Exhibit R to VIAD's merits brief is a 1999 letter to VIAD from Risk Enterprise Management, Ltd. ("REM"), which was then administering claims on Home's behalf. That letter concerns claims submitted by VIAD under policies issued to *Armour Corporation*, and not the policies at issue with respect to the San Diego site. The facts concerning this letter, which deal solely with policies issued to Armour Corporation, cannot possibly justify precluding Home from asserting its consent rights under the policies at issue in this proceeding. The letter attached as Exhibit R states Home's position with respect to two types of policies issued to Armour Corporation. First, VIAD Exhibit R notes that the parties had agreed that, with respect to two policies, the parties would cancel those policies and no claims would be asserted under those policies. VIAD Ex. R at 2. For the other Armour Company policies, Home *did not disclaim coverage*. Instead, Home specifically reserved all its rights and stated that its coverage review was continuing:

> As to the remaining policies at issue, presently Home is reserving all rights, as set forth in the remainder of this letter, as to all sites.[5] Our coverage evaluation is continuing.

VIAD Ex. R at 2-3. Thus, VIAD Exhibit R does not even involve a denial of coverage, except with respect to two Armour Corporation policies involving unique, policy-specific facts – the parties' mutual agreement to cancel the policies and for Armour to assert no claims under the policies.

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[5] VIAD Exhibit R addressed Home's coverage determination for six different sites for which it had been provided notice.

Similarly, VIAD bases its estoppel argument on Home's supposed "denial" in 1999 of claims, for sites other than the San Diego site, under the first and second Home policies. Again, however, the Home correspondence relied on by VIAD occurred ten years after VIAD entered into a remediation agreement for the San Diego site, without seeking or obtaining Home's consent, and the 1999 correspondence on behalf of Home *did not even deny coverage for these other sites*. On January 28, 1999, REM sent a letter to VIAD concerning VIAD's notice of claims not for the San Diego site, but for sites in Monterey Park, California, Buffalo, New York, and West Memphis, Arkansas. In that letter, REM asked VIAD to provide additional information, and specifically stated that Home was neither accepting nor denying VIAD's claims for those sites:

> Please be aware that this letter of acknowledgement is not an admission by Home that it has a duty to defend against the claim you described or to indemnify for any loss that may result from it. At this time, we are not in a position to make either determination and respectfully must reserve all of Home's rights to contest both. When we complete our policy review and investigation, we will notify you promptly of our coverage position.

VIAD Ex. U (letter contained in Exhibit G to VIAD Exhibit U).

On September 24, 2001, REM sent another letter to VIAD, noting that VIAD had not responded to the questions regarding the Monterey Park, Buffalo, and West Memphis sites contained in REM's January 28, 1999 letter, and asked VIAD to provide the requested information. VIAD Ex. V. REM sent two more letters to VIAD on March 28, 2002 and July 9, 2002, respectively, asking that VIAD provide the requested information for the Monterey Park, Buffalo, and West Memphis sites. *See* Exs. 8, 9. There is no record that VIAD responded to these requests for information.

When an insurer reserves its rights, an insurer "does not wrongfully deny coverage in violation of" its policies. *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. App. 4th

958, 984-85 (Cal. Ct. App. 2006). All Home did with respect to these other sites was reserve its rights and request additional information. This is not a denial of coverage. Therefore, even if Home's response to claims regarding other sites were relevant to the parties' obligations with respect to the San Diego site, and even if VIAD had not entered into a remediation agreement a decade before Home sent its 1999 correspondence regarding these other sites, VIAD's estoppel argument would lack merit because Home *did not deny coverage for these other sites.* Therefore, VIAD cannot reply on estoppel or a public policy argument to avoid the plain language of the first and second Home policies, both of which preclude coverage for costs incurred without a final court judgment or Home's written consent.

C. VIAD Cannot Show That an Occurrence or Property Damage, As The Case May Be, Occurred During the Home Policy Periods

As the Liquidator explained in his merits brief, the first and second Home policies specifically provide that coverage is potentially available only if an "occurrence" takes place during the policy period. Liquidator Merits Br. at 16-18.[6] The "occurrence" with respect to environmental contamination is the discharge of contaminants into the soil. *Id.* The most that VIAD can assert is that contamination occurred at the site "after 1953 and before 1974." VIAD Br. at 25. But the first and second Home policies were in effect, combined, less than six years of this twenty-one-year period. VIAD has admitted that it is unable to determine when, within this period, the leaks from underground pipes occurred, and is also unable to determine when any

[6] VIAD, relying on *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1993), asserts that the timing of the occurrence is largely irrelevant, as that all that matters is when the alleged "property damage" occurred. But *Montrose* explains that the term "trigger of coverage" refers to "that which, ***under the specific terms of the insurance policy***, must happen during the policy period in order for the *potential* of coverage to arise. *Id.* at 881 n.2 (second emphasis in original). Unlike the policies at issue in *Montrose*, which required the insurers to indemnify for *property damage* occurring during the policy period, the first and second Home policies indemnify only with respect to *occurrences* taking place during the policy period, which is the discharge of contaminants into the environment.

spills may have occurred at the site. Liquidator Br. at 18-20 (summarizing evidence concerning timing of discharges of contaminants at the site); *see also* Ex. 7 at 1 ("It is unknown when the unauthorized release occurred."). Moreover, evidence in this case indicates that contaminants were leaking at the site in 1987 and 1988, fifteen years *after* the second Home policy expired. Ex. 4 at 2. Because VIAD cannot show that any discharges of contaminants occurred at the San Diego site during the finite period in which the first and second Home policies were in effect, coverage would not be available under these policies *even if* VIAD had incurred court-ordered *damages* at the site and VIAD had not violated the policies' consent provisions.

With respect to the third Home policy, that policy potentially provides coverage only for "property damage" occurring during the policy period. This policy was in effect for only 81 days, from March 31, 1972 to June 19, 1972. Moreover, the third Home policy has a pollution exclusion that excludes coverage for property damage from environmental contamination unless the insured can prove that the property damage resulted from a discharge that was both sudden and accidental. Ex. 3 at 24. Therefore, VIAD's burden is to prove that a "sudden and accidental" discharge of pollutants caused covered property damage during the 81 days the third Home policy was in effect. Liquidator's Br. at 21-23.

VIAD contends in its merits brief that "the contamination arose either from leaking pipelines or from sudden and accidental spills on the site." VIAD Merits Br. at 26. By virtue of the pollution exclusion in the third Home policy, no coverage is available for property damage caused by leaks, as leaks are not "sudden" events. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 755 (Cal. Ct. App. 1993) (the term sudden "conveys the sense of an unexpected event that is abrupt or immediate in nature"); *ACL Technologies, Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal. App. 4th 1773, 1795 (Cal. Ct. App. 1993) (coverage excluded for

property damage resulting from corrosion and leaking of an underground storage tank because "[c]orrosion is, by definition, a gradual process"). However, VIAD concedes that it has no evidence of any particular spill of contaminants at the San Diego site, and specifically concedes that it has no evidence as to the timing of any spill of contaminants at the site. Ex. 5 at 19-21. Therefore, VIAD has no evidence of when any speculated spills may have occurred at the site, and therefore cannot establish when property damage would have occurred from any hypothetical sudden spills of contaminants.

It is VIAD's burden of proof to establish that either an occurrence took place during the first two Home policy periods, and that property damage from a sudden and accidental discharge of contaminants occurred during the third Home policy period. *Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619, 625 (Cal. 1995). VIAD can establish neither of these propositions, as it has no evidence concerning the timing of discharges at the site. That this issue is being confronted more than twenty years after VIAD's initial discovery of contaminants at the site is attributable only to VIAD's decision not to advise Home of VIAD's claim until 2004. For these reasons, VIAD cannot establish that any of the Home policies are "triggered" by VIAD's claim, and coverage is therefore unavailable.

D. VIAD's Merits Brief Ignores the Operative Language in the Second and Third Home Policies Regarding Property Used By or Under VIAD's Care, Custody, or Control

VIAD argues that the "owned property exclusion" in the second and third Home policies does not apply because, in California, the people own groundwater within the state. But VIAD fails to quote or discuss the actual terms of the relevant provision, which is not limited to "owned" property, nor does VIAD reference the California Court of Appeal decision that defeats VIAD's argument.

As noted at pages 27-29 of the Liquidator's merits brief, the second and third policies do not simply exclude coverage for property (such as soil) that is *owned* by VIAD. In addition, the policies impose a $5 million self-insured retention with respect to damage to "property leased, rented, occupied or used by or in the care, custody or control of the insured." Ex. 2 at 32; Ex. 3 at 17. In *Shell Oil Company*, 12 Cal. App. 4th at 759, the California Court of Appeal affirmed a trial court decision in favor of the insurer that excluded coverage not only for property owned by the insured but also property in the policyholder's care, custody, or control. *Id.* As VIAD claims here, the policyholder in *Shell Oil* asserted that the exclusion did not apply to remediation of groundwater because the people of California owned groundwater within the state. The California Court of Appeal rejected this argument. The court held that coverage was excluded for soil remediation because the policyholder owned the soil on its property, and the trial court properly entered judgment for the insurer regarding groundwater remediation because the groundwater within the policyholder's property lines was reasonably considered within its care, custody or control even if the policyholder did not own the groundwater. *Id.* VIAD simply ignores the language in the second and third Home policies creating a $5 million self-insured retention for damage to property, such as groundwater, used by VIAD or within VIAD's care, custody or control. That $5 million self-insured retention exceeds the amount of VIAD's total claim, meaning that no coverage would be available under the second and third Home policies even if none of Home's other coverage defenses applied.

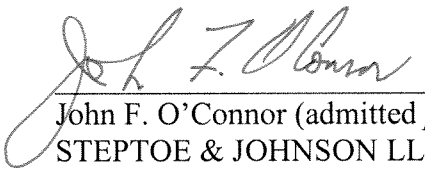
IV. CONCLUSION

For the foregoing reasons, the Referee should affirm the Liquidator's determination that VIAD's claim respecting the San Diego site should be denied.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

By his attorneys,



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January 29, 2009

CERTIFICATE OF SERVICE

I certify on this 29th day of January, 2009, I served a copy of the foregoing, along with all accompanying exhibits by overnight delivery and electronic delivery, on the following counsel of record:

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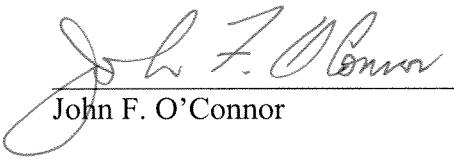

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Exhibit 8

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March 28, 2002

Mr. Steven J. Twist
VIAD Corporation
1850 North Central Avenue
Phoenix, AZ 85077

RE: REM'S Principal: The Home Insurance Companies (Home)

Claim Number: 087-520515-209
Insured Name: Greyhound Corporation

Dear Mr. Twist:

Please be advised that Risk Enterprise Management Limited (REM) has been appointed to manage the business of the Home Insurance Companies (Home), a run-off company under the supervision of the New Hampshire Department of Insurance.

By letter dated January 28, 1999, we acknowledged receipt of claims arising out of alleged environmental contamination at:

Operating Industries Superfund Site
Bern Metal
South 8th Street Superfund Site

In our acknowledgement letter, we requested that additional information about the claim be provided. Please provide us with answers to the specific questions posed in that letter, as well as additional information concerning the present status of the claims. Be specific about costs incurred to date, as well as estimates of future costs.

If it does not appear that Home's policies would be impacted, you need not respond to the questions posed in this letter.

Thank you for your assistance and cooperation.

Very truly yours,

Janis Severson
Litigation Analyst
Environmental & Toxic Tort Unit

CF-0046

Exhibit 9

R E M.

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July 9, 2002

Mr. Steven J. Twist
VIAD Corporation
1850 North Central Avenue
Phoenix, AZ 85077

RE: REM'S Principal: The Home Insurance Companies (Home)

Claim Number: 087-520515-209
Insured Name: Greyhound Corporation

Dear Mr. Twist:

Please be advised that Risk Enterprise Management Limited (REM) has been appointed to manage the business of the Home Insurance Companies (Home), a run-off company under the supervision of the New Hampshire Department of Insurance.

By letter dated January 28, 1999, we acknowledged receipt of claims arising out of alleged environmental contamination at:

Operating Industries Superfund Site 484
Bern Metal 205
South 8th Street Superfund Site

Please advise me whether to keep this file open.

Thank you for your assistance and cooperation.

Very truly yours,

Janis Severson
Litigation Analyst
Environmental & Toxic Tort Unit

CF-0045