File

THE HOME INSURANCE COMPANY IN LIQUIDATION
P.O. Box 1720
Manchester, New Hampshire 03105-1720
Tel: (800) 347-0014

Date: 1/25/2008 Class: II

Viad Corporation C/O David H.Simmons
DeBeaubien,Knight,Simmons
Post Office Box 87
Orlando, FL 32802-0087

RE: NOTICE OF DETERMINATION
Proof of Claim No.: EMTL705271-01

Determination Summary

Gross Amount of Claim	: $ 28,570,814.00
Amount Allowed by Liquidation	: $ 0

Explanation: Viad's claim with respect to environmental remediation costs incurred at its San Diego site is disallowed for the reasons set forth in the attached June 7, 2007 letter from John F. O'Connor to David H. Simmons. These reasons include, generally: (1) Viad's failure to provide timely notice of an occurrence and of a claim against it; (2) Viad's voluntary payment of remediation expenses without Home's consent; (3) an absence of evidence of an occurrence during the Home policy periods; (4) with respect to Home policy HEC 4344748, in addition to the other reasons noted herein, coverage is excluded by the policy's pollution exclusion; (5) an absence of evidence of exhaustion of applicable self-insured retentions; and (6) application of the owned property exclusion. Future Notices of Determination will address Viad's claims for remediation costs related to other sites.

Dear Claimant :

The purpose of this letter is to provide you with a determination set forth above of claims you have presented to The Home Insurance Company in Liquidation ("The Home"), under the Proof(s) of Claim specified above. The Home expects to present notice of this determination to the Superior Court for Merrimack County, New Hampshire (the "Court") for approval in accordance with New Hampshire Revised Statute, RSA 402-C:45. Read this Notice of Determination carefully as it sets forth your rights and obligations in detail.

The Home has now made a Determination on the claims as set forth above in accordance with The Home Claim Procedures (the "Procedures")* approved by the Court. If the claim has been allowed, in whole or in part, it has been assigned a Class II priority as a "policy related claim" pursuant to the Order of Distribution set forth in RSA 402-C:44 and will be placed in line for payment as directed by the Court from the assets of The Home. The first $50 of the amount allowed on each claim in this class shall be deducted from the amount distributed as specified in RSA 402-C:44.

You may have other claims against The Home for which you may receive other Notices of Determination. You will have a separate right to dispute each Notice of Determination. If your claim has been allowed in whole or in part, this Notice of Determination does not mean that your claim will immediately be paid, or that it will be paid in full or at all. Pursuant to order of the Court, The Home may make distributions of its assets as a percentage of all allowed claims in a particular priority class in The Home estate as approved by the Court. The amount of the final payment for allowed claims will be determined by the final ratio of assets to liabilities and the applicable priority. Please be advised that the final percentage of payment you receive from The Home, at the time The Home estate is finally closed, is the total payment amount that you will be entitled to for this claim.

The Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II.

Any and all distributions of assets may be affected and/or reduced by any payments you have received on this claim from any other sources not listed on the Notice of Distribution. Any such distributions by The Home are based on The Home's knowledge and/or understanding of the amounts you have received in settlement and/or reimbursement of this claim from all other sources at the time of the allowance or thereafter. Should The Home subsequently become aware of prior recoveries from other sources The Home has the right to reduce its future distribution payments to you to the extent of such other recoveries or to seek and obtain repayment from you with respect to any previous distributions that were made to you.

Further, if you seek or receive any future payment from any other source on this claim after you receive a distribution payment from The Home you must notify The Home at the address below and The Home has the right to recover from you the distribution payments in whole or in part, to the extent of any such other future recoveries.

As a condition to receipt of any distributions, The Home shall be entitled to any rights to subrogation you may have against any third party and you shall be deemed to have assigned to The Home such rights upon receipt of any distributions. You shall also be obliged to reimburse The Home for any legal fees or other costs associated with The Home recovering from you any distribution payments to which you are not entitled.

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*A copy of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation may be obtained from the website of the Office of the Liquidation Clerk for The Home Insurance Company in Liquidation and US International Reinsurance Company in Liquidation, www.hicilclerk.org

The following instructions apply to this Notice of Determination:

Claim Allowed

1. If this claim has been allowed in whole or in part and you agree with the determination, sign and date the enclosed Acknowledgment of Receipt of the Notice of Determination and mail the completed Acknowledgment to The Home.

Claim Disallowed

2. A. If all or part of your claim has been disallowed or you wish to dispute the determination or creditor classification for any reason, you may file a Request for Review with the Liquidator. The Request for Review is the first of two steps in the process of disputing a claim determination. The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination.

   REQUEST FOR REVIEW FILING REQUIREMENTS:

   (a) Sign and return the attached Acknowledgment of Receipt form.

   (b) On a separate page, state specifically the reasons(s) you believe that the determination is in error and how it should be modified. Please note the Proof of Claim number on that page and sign the page.

   (c) Mail the Request for Review to:
   The Home Insurance Company in Liquidation
   P.O. Box 1720
   Manchester, NH 03105-1720

   You should keep a copy of this Notice of Determination, Acknowledgment of Receipt and Request for Review, then mail the Original Request for Review to us by U.S. Certified Mail.

   (d) The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination. The Request for Review must be in writing.

   (e) The Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination.

IF A REQUEST FOR REVIEW IS NOT FILED WITH THE HOME WITHIN THE THIRTY (30) DAY PERIOD, YOU MAY NONETHELESS DIRECTLY FILE AN OBJECTION WITH THE COURT WITHIN SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE. You do not have to file the Request for Review as a prerequisite to dispute the Notice of Determination. Please see Section 2B (below) for the Objections to Denial of Claims.

B. If your claim is disallowed in whole or in part, you may file an Objection with the Court at

Office of the Clerk, Merrimack County Superior Court
163 N. Main Street, P.O. Box 2880
Concord, New Hampshire 03301-2880
Attention: The Home Docket No. 03-E-0106

within sixty (60) days from the mailing of the Notice of Determination and bypass the Request for Review procedures as noted in Section 2A (above). If the Request for Review is timely filed, as outlined in Section 2A, the Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination. If the redetermination is to disallow the claim, you may still file an Objection with the Court. You have sixty (60) days from the mailing of the Notice of Redetermination to file your Objection. Please also sign and return the Acknowledgment of Receipt form and mail a copy of the Objection to the Liquidator.

IF YOU DO NOT FILE AN OBJECTION WITH THE COURT WITHIN EITHER SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE OF DETERMINATION OR SIXTY (60) DAYS FROM THE MAILING OF ANY NOTICE OF REDETERMINATION, YOU MAY NOT FURTHER OBJECT TO THE DETERMINATION.

A timely filed Objection will be treated as a Disputed Claim and will be referred to the Liquidation Clerk's Office for adjudication by a Referee in accordance with the Procedures.

3. You must notify The Home of any changes in your mailing address. This will ensure your participation in future distributions, as applicable. For purposes of keeping The Home informed of your current address, please notify us at the address given on the letterhead above.

Sincerely yours,

Peter Bengelsdorf, Special Deputy Liquidator
For Roger A. Sevigny, Liquidator
of The Home Insurance Company in Liquidation

If you wish to speak to someone regarding this Notice of Determination, please contact:

Ron Barta
Senior Manager
Home Insurance Company in Liquidation
Phone : 212-530-4054

THE HOME INSURANCE COMPANY IN LIQUIDATION
P.O. Box 1720
Manchester, New Hampshire 03105-1720
Tel: (800) 347-0014

POC #: EMTL705271-01 Amount Allowed: $ 0

Viad Corporation C/O David H.Simmons
DeBeaubien,Knight,Simmons
Post Office Box 87
Orlando, FL 32802-0087

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of the Notice of Determination as a Class II Creditor claim and confirm that I understand the content thereof. I further acknowledge and confirm that I understand the Instructions regarding the Notice of Determination of my Claim against The Home Insurance Company in Liquidation and in that regard advise as follows:

(Check off all applicable items.)
_____ I agree to the determination.

_____ I reject the determination and want to file a Request for Review (specific reasons must be included along with return of the signed Acknowledgment).

_____ I reject the determination and intend to file a separate Objection with the Court, without filing a Request for Review.

_____ I have not assigned any part of this claim.

_____ I have not made any other recoveries with respect to this claim.

_____ I have not sought and do not intend to seek any other recoveries with respect to this claim.

_____ I have made recovery from others with respect to this claim (full details must be included with this Acknowledgement).

_____ I have sought or intend to seek recovery from others with respect to this claim (full details must be included with this Acknowledgement).

I request that The Home mail further correspondence to:

_____ Same name as above.
New name _____

_____ Same address as above
New address _____
_____

This Acknowledgment of Receipt must be completed, signed and returned to The Home in order to be eligible for distributions from The Home estate as directed by the Court.

Signature: _____

Printed Name: _____

Title: _____

Date: _____

STEPTOE & JOHNSON LLP
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Tel 202.429.3000
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steptoe.com

June 7, 2007

Via U.S. MAIL

David H. Simmons, Esq.
de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP
P.O. Box 87
332 North Magnolia Avenue
Orlando, Florida 32802-0087

Re: **Viad Corporation: San Diego Maintenance Facility Site**
Claim No. 0870522721

Dear David:

We have been retained to represent The Home Insurance Company in Liquidation ("Home") in connection with the claim submitted by VIAD Corporation ("VIAD") in Home's liquidation proceedings with respect to environmental remediation costs at the Greyhound bus maintenance facility in San Diego, California (the "San Diego site"). At Home's request, we are sending this letter to state Home's preliminary conclusions with respect to VIAD's claim. For the reasons stated below, Home's preliminary conclusion is that VIAD's claim should be disallowed by the Liquidator.

Pursuant to New Hampshire Revised Statute § 402-C:38(II) and Section 5(d) of the Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation, dated December 19, 2003, we are requesting that VIAD furnish our office with any additional information that could have a bearing on the analysis and conclusions set forth in this letter within thirty (30) days of the date of this letter. If VIAD does not provide any additional information within the time allotted, the Liquidator may issue a Notice of Determination with respect to VIAD's claim based upon the information then available to him.

THE HOME POLICIES

Home issued three excess general liability policies to VIAD's predecessor, Greyhound Corporation. The policy numbers, effective dates, and per occurrence limits are set forth below:

Policy No.	Effective Dates	Applicable Limits
HEC 9557416	8/31/66 – 1/1/69	$4,250,000 xs SIR
HEC 9304783	1/1/69 – 3/31/72	$4,250,000 xs SIR
HEC 4344748	3/31/72 – 6/19/72	$500,000 xs SIR

The first two policies were issued by Home from its offices in New York to Greyhound in New York, and a New York broker was used with respect to each of these policies. The third policy appears to have been issued by Home from its offices in New York to Greyhound in Arizona. It appears that Greyhound used a broker in Chicago, Illinois to procure the third Home policy. The first two Home policies use a manuscript form. It is our understanding that the third Home policy was intended to use the same Insuring Agreement as the general liability Insuring Agreement that was used for the first Home policy.

VIAD'S CLAIM FOR THE SAN DIEGO SITE

VIAD seeks coverage from Home for environmental remediation costs incurred with respect to a bus maintenance facility owned and operated in San Diego, California by a Greyhound subsidiary. It appears that Greyhound's subsidiary operated the maintenance facility from 1954 to 1986 and that environmental contamination apparently emanating from underground storage tanks on the premises was discovered in 1986. On May 19, 1989, the California Regional Quality Control Board issued a clean up and abatement order to Greyhound. In response to this order, Greyhound/VIAD claims to have incurred approximately $3,015,271 in clean up costs and estimates up to $1 million in future costs. Despite its 1986 notice of contamination in connection with the San Diego site, and the 1989 clean up order that it received, VIAD did not place Home on notice of its potential liability at the site until VIAD filed its proof of claim in Home's liquidation proceedings on June 11, 2004.

ANALYSIS OF VIAD'S CLAIM

I. CHOICE OF LAW

Because Home's liquidation proceedings are pending in New Hampshire, and VIAD submitted its claim in those New Hampshire proceedings, we believe that New Hampshire's choice of law rules will determine the state law that will apply to the three Home policies. Under New Hampshire choice of law rules, an insurance contract

> is to be governed, both as to validity and performance, by the law of the state with which the contract has its most significant relationship . . . . The principal location of the insured risk is the contact that is given the greatest weight in determining the state whose local law is to govern . . . the rights created thereby.

Cecere v. Aetna Ins. Co., 766 A.2d 696, 698 (N.H. 2001) (citations omitted); *see also K.J. Quinn & Co. v. Continental Casualty*, 806 F. Supp. 1037, 1041 (D.N.H. 1992) (applying the law of the state where policy negotiation and issuance took place where the policyholder had nationwide operations, even though the parties' dispute concerned environmental contamination solely in New Hampshire); *Glowski v. Allstate Ins. Co.*, 589 A.2d 593, 595 (N.H. 1991) (applying New York law to determine an uninsured motorist claim by a New York resident for an accident that occurred in New Hampshire). The New Hampshire Supreme Court has observed that applying the law of the state that is the principal location of the insured risk furthers the "fundamental contract policy of giving effect to the intention of the parties and their reasonably justified expectations, and promotes predictability of results which is of foremost concern in contract cases." *Cecere*, 766 A.2d at 698 (citations omitted).

Under these circumstances, it appears likely that New York law will govern the construction and performance of the first two Home policies. At the time these policies were issued, Greyhound's headquarters were in New York, and likely would be viewed as the principal location of Greyhound's insured risk. This is particularly true given that the first two Home policies were issued by an insurer in New York to a policyholder headquartered in New York and procured through a New York broker. Indeed, given that the underlying rationale of New Hampshire choice of law jurisprudence is to provide predictability to the contracting parties and to fulfill their reasonable expectations, it is difficult, on the facts we have before us, to conceive of another jurisdiction that the contracting parties reasonably might have believed would supply the law under which the first two Home policies would be construed.

As for the third Home policy, that policy was issued by Home from its New York office, delivered to Greyhound at its then-headquarters in Arizona, and an Illinois broker assisted Greyhound in procuring the policy. This policy was in effect for only three months, and there is no indication that the parties intended to change the applicable law from that of the first two policies. Given these facts, it appears likely that either New York law or Arizona law will govern construction of the third Home policy. As indicated below, however, it does not appear that the result would change based on which state's law applies to the third Home policy.

II. LATE NOTICE

VIAD had notice of the discovery of the environmental contamination at the San Diego site eighteen years before it provided notice to Home, and had received an administrative order to remediate the contaminated property fifteen years before VIAD provided notice to Home. Virtually all of the costs incurred by VIAD with respect to remediation of the site occurred before VIAD provided Home with

notice of the occurrence or claim involved. Under these circumstances, VIAD's notice to Home is untimely, and Home's preliminary conclusion is that VIAD's claim should be disallowed on that basis.

The Home policies contain the following notice provisions:

> The Insured shall give prompt notice to the Company of any event or development which, in the judgment of the Insured, might result in a claim upon the Company hereunder. Inadvertent failure to so notify shall, however, not affect the liability of the Company, but the Insured agrees to use its best efforts to comply with the foregoing stipulations with a view to affording the Company every possible opportunity of safeguarding their interest in any claim in which they may be involved. The Insured shall forward promptly to the Company a copy of each claim, report, document, paper or pleading in connection with such case which may be required by the Company as adjustment proceeds.

Under New York law, compliance with policy provisions requiring the insured to provide timely notice of an occurrence, claim, or suit "is a condition precedent to an insurer's liability under the policy." *Olin Corp. v. INA*, 966 F.2d 718, 723 (2d Cir. 1992). As a result, an insured's failure to provide timely notice of a claim or occurrence generally is a complete defense to coverage, and extinguishes any obligation of the insurer to defend or indemnify the insured. *See, e.g., Olin*, 966 F.2d at 723; *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 628 (W.D.N.Y. 2001); *In re Allcity Ins. Co. & Jiminez*, 576 N.Y.S.2d 87, 88 (N.Y. 1991). The insurer's right to prompt notice is so fundamental that an insurer is not required to show prejudice resulting from late notice in order to be relieved of its obligations under the contract. *See, e.g., Olin*, 966 F.2d at 723; *Burt Rigid Box*, 126 F. Supp. 2d at 628; *American Home Assur. Co. v. International Ins. Co.*, 90 N.Y.2d 433, 440 (1997).

"The test for determining whether notice provision has been triggered is whether the circumstances known to the insured at that time would have suggested to a reasonable person the possibility of a claim." *Olin*, 966 F.2d at 723. With respect to the reasonableness of any delay in providing notice of an occurrence, "the court should decide the issue if the facts concerning the delay are not disputed and the insured has not offered a valid excuse" for the delay. *City of Utica v. Genesee Mgmt., Inc.*, 934 F. Supp. 510, 520 (N.D.N.Y. 1996); *see also Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39, 43 (2d Cir. 1991). The insured bears the burden of showing the reasonableness of a delay. *American Ins. Co. v. Fairchild Indus., Inc.*, 56 F.3d 435, 438 (2d Cir. 1995).

Greyhound/VIAD unreasonably and inexplicably failed to provide Home with timely notice of its discovery of environmental contamination at the San Diego site. Moreover, Greyhound/VIAD failed to advise Home that a claim had been made against it by the California Regional Quality Control Board. Indeed, Greyhound/VIAD agreed to remediate and expended virtually all of the funds involved in its claim many years before providing Home notice of the claim. Under these circumstances, New York

law precludes coverage for VIAD's claim with respect to the first two Home policies, and with respect to the third Home policy to the extent that it is governed by New York law.

In the event that Arizona law were to apply to the third Home policy, the result would be the same. Under Arizona law, an insurer that has received late notice of an occurrence or claim is relieved of any obligation to provide coverage for the claim if the insured has been prejudiced by the late notice. *Liberty Mutual Fire Ins. Co. v. Mandile*, 963 P.2d 295, 301-03 (Ariz. Ct. App. 1997). With respect to VIAD's claim, Greyhound/VIAD had made virtually all of the payments for which it seeks coverage before even notifying Home of this claim. This delay necessarily deprived Home of the ability to determine whether the state's demand for remediation should be contested, or to have input on whether the remediation could occur in a more cost-effective manner. Thus, Home has been prejudiced by VIAD's failure to provide timely notice and our preliminary conclusion is that VIAD's claim should be disallowed under the third policy regardless of whether New York or Arizona law applies to the policy.

We note that the notice provision in the VIAD policies contains two separate notice obligations, an obligation on VIAD's part to provide Home with notice of "any event or development" that might result in a claim, and a separate duty on VIAD's part to "forward promptly to the Company a copy of each claim, report, document, paper or pleading in connection with such case which may be required by the Company as adjustment proceeds." The notice provision provides that, in certain circumstances, VIAD's failure to provide notice of an event or development that might result in a claim may be excused if the omission was inadvertent and VIAD used its best efforts to provide timely notice of such an event or development. We have received no information or facts that would explain VIAD's fifteen-year failure to provide notice of the claim to Home..

In any event, however, the provision relating to inadvertent failure to provide notice applies only to VIAD's failure to provide timely notice of an event or development that could result in a claim, and does not apply to VIAD's failure to provide notice of a claim once it is received. Therefore, even if VIAD's failure to provide notice of an event or development were inadvertent, and excusable, VIAD's claim would appear to be barred based on VIAD's failure to provide prompt notice of the claim against it once it was received. Moreover, for the reasons set forth in Section III, below, VIAD's claim would be disallowed for the additional reason that VIAD made voluntary payments to resolve the claims against it without even notifying Home that a claim had been asserted.

III. PAYMENTS MADE WITHOUT HOME'S CONSENT

The Home policies provide as follows:

> 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.

Condition B to the Home policies similarly provides, without qualification, that "[i]n 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." Given that VIAD did not give Home notice of any type with respect to the San Diego site until it had incurred virtually all of the expenses that it seeks to recover from Home, it appears that VIAD did not comply with these provisions in the Home policies.

Provisions requiring the insurer's consent to payments that may implicate the insurer's coverage are designed to allow the insurer an opportunity to protect its interests with respect to a claim. *Augat, Inc. v. Liberty Mut. Ins. Co.*, 571 N.E.2d 357, 361 (Mass. 1991). As one court has explained:

> An insurer's right to participate in the settlement process is an essential prerequisite to its obligation to pay a settlement. When, as in this case, the insurer is not consulted about the settlement, the settlement is not tendered to it and the insurer has no opportunity to participate in or consent to the ultimate settlement decision, we conclude that the insurer is prejudiced as a matter of law.

Motiva Enters., LLC v. St. Paul Fire & Marine Ins. Co., 445 F.3d 381, 385 (5th Cir. 2006).

An insurer is entitled to rely on a voluntary payments provision so long as the insurer had not wrongfully refused to defend the insured against the claim. *Id.*; *see also Sargent v. Johnson*, 551 F.2d 221, 232 (8th Cir. 1977); *County of San Diego v. ACE Prop. & Cas. Ins. Co.*, 118 P.3d 607, 617 (Cal. 2005). While many cases applying "voluntary payment" provisions in general liability policies involve situations where the insurer was in fact on notice of the claim against its policyholder, and the policyholder settled the claim over the insurer's objection, VIAD's breach of these policy conditions is even more severe, as VIAD did not even provide Home with notice of the existence of the claims against it that it voluntarily settled. As a result, Home was denied the opportunity to involve itself in any negotiations with California state officials in order to protect its interests with respect to the San Diego site. Under these circumstances, VIAD has breached the voluntary payments conditions of the Home policies, and our preliminary conclusion is that VIAD's claim should be disallowed on that basis.

IV. TRIGGER OF COVERAGE/TIMING OF OCCURRENCE

The materials we have been provided indicate that Greyhound's subsidiary used six underground storage tanks at the site at various periods between 1954 and 1989, and that contaminants leaked from these tanks at undetermined times during that period.

The provisions of the Home policies require that the occurrence must take place during the policy period in order for there to be a potential for coverage. The Insuring Agreements of the Home policies provide as follows:

> The Company hereby agrees to indemnify the Insured against excess loss . . . for damages because of injury to or destruction of property . . . caused by or growing out of each occurrence . . . .

Thus, the first requirement for coverage under the Insuring Agreement is that the policyholder suffer damages because of injury to property that is caused by an occurrence. The term "occurrence" is defined as "any one happening or series of happenings, arising out of or due to one event or disaster."

As for temporal requirements, two provisions in the Home policies require that the *occurrence* be the event that must take place during the policy period. First, the Limit of Liability provision provides that the policies have "no limit to the number of occurrences for which claims can be made hereunder *provided such occurrences occur during the policy period.*" Second, the "Contract Period, Territory" provision in the first two Home policies provides that "[t]his contract applies only to events occurring during the continuation of this contract, and happening anywhere in the world except Cuba."[1] When all of the above-quoted provisions are read together, coverage is available only for the policyholder's liability for property damage when that property damage is caused by an occurrence (that is, a happening or series of happenings arising out of one event or disaster) that takes place during the policy period.

In *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 749 N.Y.S.2d 488, 494 (N.Y. App. Div. 2002), the court applied similar language and held that coverage could be triggered only by an occurrence taking place during the policy period. In addition, the court held that the continued migration of contaminants released into the environment prior to the policy's inception did not trigger coverage. *Id.* (citing cases from other jurisdictions reaching the same conclusion with respect to policies triggered by an occurrence during the policy period); *see also A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund*, 838 N.E.2d 1237, 1250-51 (Mass. 2005) (holding that exposure to asbestos, and not asbestos-related injury itself, was the appropriate trigger of coverage for policies requiring that the occurrence take place during the policy period). Therefore, coverage can exist under the Home policies only where the occurrence (the actual discharge of contaminants) took place during the policy period, and that the policies therefore provide no coverage to the extent that VIAD seeks coverage for the migration of contaminants discharged prior to the Home policy periods.

The materials we have received do not provide sufficient information to make a determination as to when the occurrence would have taken place that caused environmental contamination at or around the San Diego site, and certainly do not support a conclusion that the relevant discharge took place during the Home policy periods. Based on the absence of such information, our preliminary conclusion

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[1] The second Home policy increases the number of countries not covered by the policy to include events taking place in certain then-communist countries in Europe and Asia, but is otherwise identical to the provision in the first Home policy.

is that VIAD's claim should be disallowed. If VIAD has information regarding the timing of any discharges that occurred at the San Diego site, we invite VIAD to provide us with such information.

V. POLLUTION EXCLUSION

The third Home policy provides as follows:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water-course or body of water, but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden and accidental.

New York courts have held that the "sudden and accidental" exception to the pollution exclusion has a temporal element and requires that a discharge be abrupt in order for the exception to apply. *See, e.g., Northville Indus. Corp. v. Nat'l Union Fire Ins. Co.*, 657 N.Y.S.2d 564, 569 (N.Y. 1997). The United States Court of Appeals for the Ninth Circuit similarly has held that "under Arizona law, the 'sudden and accidental' exception unmistakably connotes a temporal quality." *Smith v. Hughes Aircraft*, 22 F.3d 1432, 1437 (9th Cir. 1993).

We have seen no suggestion from the materials we have reviewed that VIAD is able to point to an abrupt event that caused a discharge of contaminants from its underground storage tanks at the site. Therefore, our preliminary conclusion is that VIAD's claim should be disallowed with respect to the third Home policy based on the pollution exclusion in that policy. If VIAD has evidence of a relevant, abrupt discharge of contaminants at the site, we invite VIAD to provide such information to us within the time allotted.

VI. ALLOCATION/EXHAUSTION

New York law generally provides that indemnification for claims involving progressive and indivisible property damage under standard "accident" and/or "occurrence" type CGL policies is prorated among successive policy periods. *Consolidated Edison Co. v. Allstate Ins. Co.*, 746 N.Y.S.2d 622 (N.Y. 2002). Courts applying such proration under New York law typically have allocated liability by a time-on-the-risk method. *See, e.g., Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1201-04 (2d Cir. 1995), allocating the liability equally throughout the period in which the bodily injury or property damage occurred. Therefore, to the extent that VIAD's claim regarding the San Diego site involves property damage and/or occurrences implicating multiple years, VIAD's remediation costs would have to be prorated throughout the applicable trigger of coverage period and then applied to each relevant policy period. VIAD has provided Home with no information concerning the timing of discharges and property damage at the San Diego site. Therefore, we have no current basis

to conclude that the Home policies are triggered with respect to VIAD's claim, or if the Home policy periods are in fact triggered, that the liability applicable to each Home policy period would exhaust the underlying self-insured retentions. Therefore, with respect to the first two Home policies, and with respect to the third Home policy if New York law applies to it, Home requests that VIAD provide any information concerning the timing of discharges of contaminants at the site. In the absence of any available information, our preliminary conclusion is that VIAD's claim should be disallowed on the basis of trigger of coverage and exhaustion.

To the extent that Arizona law applies to the third policy, we have seen no indication that Arizona courts would adopt a different construction of the third Home policy than a New York court. Therefore, our analysis in the preceding paragraph applies with full force to VIAD's claim with respect to the third Home policy regardless of whether New York or Arizona law applies to the construction of that policy

VII. OWNED PROPERTY

Our understanding is that Greyhound was the owner of the San Diego site, and Home's analysis is based on that understanding. With respect to the first Home policy, any costs incurred by VIAD to remediate its own property would not appear to constitute "damages," and the Insuring Agreement obligates Home to provide coverage only for amounts Greyhound is ordered to pay "as damages." This analysis applies with equal force to the second Home policy to the extent that an occurrence took place during that policy period prior to October 1, 1970.

On October 1, 1970, the second Home policy was amended, by Endorsement No. 19, to (1) exclude coverage for damage to property owned by the policyholder, and (2) to impose a $5 million SIR for damage to "property leased, rented, occupied or used by or in the care, custody or control of the insured or any of its employees (other than property of passengers)." The third Home policy, per Endorsement No. 8, similarly excludes coverage for property damage to the insured's own property while imposing a $5 million SIR to property that, while not owned by the policyholder, was in the policyholder's custody or control.

Based on our understanding that Greyhound was the owner of the San Diego site, Endorsement 19 of the second Home policy and Endorsement 8 of the third Home policy exclude coverage for any damage to Greyhound/VIAD's own property at the San Diego site. Therefore, to the extent that remediation occurred of Greyhound/VIAD's own property, our preliminary conclusion is that VIAD's claim should be disallowed with respect to any portion of it claim relating to such remediation costs.

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The coverage analysis in this letter is based on the facts currently known by Home. As we stated at the beginning of this letter, we invite VIAD to provide any information that it believes would affect

the analysis set forth herein, with such submission being delivered to our office within thirty days of the date of this letter.

Very truly yours,

John F. O'Connor

cc: Ronald Barta