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 MERITS BRIEF

John F. O'Connor (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile

Attorneys for the Liquidator

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

In its claim, VIAD Corp. ("VIAD") contends that it is entitled to coverage for environmental remediation costs VIAD incurred at a maintenance facility that it owned in San Diego, California under three excess general liability policies issued by The Home Insurance Company ("Home"). However, the undisputed facts are that VIAD incurred these expenses not pursuant to a court order or judgment, but in connection with an administrative cleanup order issued by the California Regional Water Quality Control Board. VIAD did not seek Home's consent to VIAD's incurring these expenses; indeed, VIAD did not even tell Home that VIAD was incurring remediation expenses at the San Diego site until VIAD filed a liquidation claim in 2004, fifteen years after VIAD began incurring these expenses. VIAD also has no evidence as to when any environmental contamination at the site occurred, which is significant because the Home policies were in effect for only six of the thirty-six years that VIAD operated underground storage tanks at the site. VIAD also lacks any evidence to overcome the application of the pollution exclusion in one of the Home policies.

For a multitude of reasons, discussed in detail below, VIAD has no entitlement to indemnification under the Home policies with respect to this claim. Therefore, in applying California law to VIAD's coverage claim, the Referee should rule that the Liquidator correctly valued VIAD's claim regarding the San Diego site at zero. There is no basis for finding a meritorious claim here. The determination that VIAD's claim lacks merit relates solely to the San Diego site. It has no effect on the claims VIAD has asserted with respect to other sites, which will be analyzed separately as agreed by the parties.

II. FACTS

There are relatively few facts necessary to the determination of VIAD's claim, and those facts are largely undisputed. These undisputed facts demonstrate that VIAD is not entitled to

coverage under the Home policies for the costs incurred by VIAD with respect to the San Diego site.

1. The Home Insurance Company ("Home") issued three excess general liability policies to The Greyhound Corporation, which is the predecessor to VIAD.[1] The general liability portion of each of these policies applies excess of a $750,000 per occurrence self-insured retention that must be borne by VIAD. The policy numbers, policy periods, and applicable limits of the three Home policies are as follows:

Policy No.	Effective Dates	Applicable Limits
HEC 9557416	8/31/66 – 1/1/69	$4,250,000 excess of $750,000 SIR
HEC 9304783	1/1/69 – 3/31/72	$4,250,000 excess of $750,000 SIR
HEC 4344748	3/31/72 – 6/19/72	$500,000 excess of $750,000 SIR

Copies of the three Home policies are attached as Exhibits 1-3 hereto.

2. In this proceeding, VIAD seeks indemnification from Home for environmental remediation costs incurred by VIAD at a maintenance facility it owned in San Diego, California. The environmental contamination at the site emanated from underground storage tanks that were in use at the site during the period from 1953 to 1989. Ex. 4 at 2.

3. VIAD incurred the remediation costs for which it seeks recovery from Home as a result of an administrative cleanup order issued by the California Regional Water Quality Control Board for the San Diego Region. Ex. 4 at 1. Importantly for purposes of California law, there was never a court order or court judgment that required VIAD to incur these costs. Ex. 5 at 40. Instead, the only basis for VIAD's incurring of these costs was the *administrative* cleanup order issued by the California Regional Water Quality Control Board. Although VIAD could

---

[1] Because it is undisputed that VIAD is the successor in interest to The Greyhound Corporation ("Greyhound"), the Liquidator refers to both Greyhound and VIAD Corp. as "VIAD" for ease of reference.

have demanded a hearing to challenge this administrative cleanup order, it did not do so, and instead performed the remediation operations outlined in the administrative order. Ex. 6 at 23-25.

4. Although the administrative cleanup order issued by the California Regional Water Quality Control Board was served on VIAD in 1989, VIAD did not notify Home of this order or any demand from California regulators until VIAD filed its claim in the Home liquidation proceedings some fifteen years later in 2004. Ex. 6 at 14. As a result, VIAD elected to perform the remediation operations demanded in the administrative cleanup order, without pursuing a court challenge, and entered into a remediation agreement with California regulatory officials, without seeking or obtaining consent from Home. *Id.*

5. The timing of environmental contamination at the site is unknown. Ex. 7 at 1. Investigation in the late 1980s by VIAD revealed that some of the pipes previously used in connection with the underground storage tanks at the site had corrosion holes and had leaked pollutants into the soil at the site. Ex. 5 at 19-20. In addition, information provided to the California Regional Water Quality Control Board showed that the underground storage tanks were still leaking contaminants into the soil at the site in 1987 and 1988. Ex. 4 at 2. VIAD's environmental consultant testified that VIAD is unable to determine the time period in which the underground storage tanks at the site were leaking pollutants. Ex. 5 at 20. Beyond contamination caused by leaks from the underground storage tanks, VIAD's environmental consultant concludes that there likely was some amount of contamination at the site that was caused by spills of petroleum products in the course of filling the underground storage tanks. *Id.* at 19. However, VIAD's environmental consultant conceded in his deposition that VIAD has no contemporaneous records or other evidence of such spills actually occurring. *Id.* at 19-20.

Moreover, although VIAD's environmental consultant theorized that some such spills likely occurred, he admitted that it was impossible to determine *when* any such spills would have occurred at the site. *Id.* at 20-21.

6. In performing the remediation operations called for by California regulatory officials, VIAD did not remediate any property outside of its own property lines. That is, all of the remediation of soil and groundwater at issue with respect to VIAD's claim took place within the boundaries of the maintenance facility owned by VIAD. California regulators specifically advised VIAD that it did not need to remediate any neighboring properties. Ex. 5 at 36.

III. ANALYSIS

In an interlocutory ruling dated December 4, 2008, the Referee advised the parties that she would apply California law in determining whether VIAD is entitled to any coverage under the Home policies with regard to the San Diego site. Or. of 12/4/08. In conformance with that guidance, the Liquidator will analyze VIAD's coverage claim under California law.[2]

Under California law, ordinary rules of contract construction apply to insurance contracts. *Bank of the West v. Superior Court*, 833 P.2d 545, 551-52 (Cal. 1992). Like all contracts, an insurance policy "must be construed from the language used." *Everett v. State Farm Gen. Ins. Co.*, 162 Cal. App. 4th 649, 656 (Cal. Ct. App. 2008), *as modified* (May 15, 2008). Clear and explicit policy language governs. *Mercury Ins. Co. v. Pearson*, ___ Cal. Rptr. 3d ___, 2008 WL 5101275 (Cal. Ct. App. Dec. 4, 2008) (citing *Bank of the West*, 833 P.2d at 552). "[A]n insurer has a right to limit the policy coverage in plain and understandable language,

[2] The Liquidator reserves his right to contest the Referee's determination that California law should apply to VIAD's claims for coverage under the Home policies in the event that the Referee determines that coverage is available to VIAD under California law, and his right to raise the same or different coverage defenses, including but not limited to late notice, to the extent that it is later determined that the law of New York or some jurisdiction other than California properly should control the construction of the Home policies.

and is at liberty to limit the character and extent of the risk it undertakes to assume." *Everett*, 162 Cal. App. 4th at 656 (quoting *Hackethal v. Nat'l Cas. Co.*, 189 Cal.App.3d 1102, 1109 (Cal. Ct. App. 1987)).

With one relevant exception, the first and second Home policies use the same basic policy structure and language in terms of their Insuring Agreements, conditions, definitions, and exclusions. Therefore, the Liquidator addresses most of the coverage issues involved with the first and second Home policies together. The language used in the first and second Home policies makes clear that no coverage is available for VIAD's claim for three independent reasons: (1) California law is clear that, under the language used in the first and second Home policies, there is no coverage for environmental remediation costs incurred pursuant to administrative cleanup orders issued by the California Regional Water Quality Control Board, as such orders do not constitute "damages"; (2) California law upholds and enforces provisions, such as those in the first and second Home policies, that require a policyholder to obtain the insurer's consent before incurring any costs for which the policyholder will seek indemnification; and (3) VIAD cannot meet its burden of proving that an occurrence, that is, a covered discharge of pollutants, occurred during the period when the first or second Home policy was in effect.

The third Home policy uses a somewhat different policy structure, and in many cases uses different language, from that of the first and second Home policies. Therefore, the Liquidator addresses the coverage issues involved with the third Home policy separately. No coverage is available under the third Home policy for two independent reasons: (1) the third Home policy has a pollution exclusion that precludes coverage; and (2) even if the pollution exclusion did not completely bar coverage, VIAD nevertheless would be unable to meet its

burden of proving that covered property damage took place during the less than three months that the third Home policy was in effect.

The one exception to the general rule that coverage issues may be resolved together for the first and second Home policy, and separately for the third Home policy, relates to a provision in the second and third Home policies (but not the first Home policy) regarding property owned by or under the care, custody or control of the policyholder. This provision excludes coverage for damage to VIAD's own property, and provides that VIAD shall be responsible for the first $5 million under each policy for damage to property that, while not owned by VIAD, was under its care, custody or control. Because all of the remediation operations performed by VIAD were within the boundaries of VIAD's property, coverage under the second and third Home policies is either excluded or subject to a $5 million self-insured retention. Given that VIAD's total claim is less than $5 million, the application of the exclusion or the $5 million self-insured retention would eliminate coverage even if coverage were not already precluded for the myriad reasons described in the preceding two paragraphs.

A. There Is No Coverage For VIAD's Claim Under the First and Second Home Policies

1. Under Clearly Established California Law, VIAD's Claim Does Not Constitute "Damages" That Are Recoverable Under the First and Second Home Policies

It is an undisputed fact that all of the environmental remediation costs for which VIAD seeks recovery were incurred pursuant to an *administrative* order issued by California regulators and VIAD's subsequent entry into a Remediation Agreement by which it agreed to perform certain remediation on its property. Significantly, there was *no judgment or order issued by a court* that required this remediation, nor was there a court judgment awarding damages to any person or entity. The first and second Home policies clearly provide that Home provides

indemnification only for "damages" imposed on the insured, and a series of California Supreme Court decisions make clear that an insurer whose Insuring Agreement provides indemnification for "damages" has no obligation whatsoever to indemnify its insured for remediation costs incurred in response to an administrative remediation order such as the orders involved in this case.

The first and second Home policies contain identical Insuring Agreements. These Insuring Agreements provide as follows:

> The Company hereby agrees to indemnify the Insured against excess loss as hereinafter defined, subject to the limitations, conditions and other terms of this contract, 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:
>
> (a) ***for damages***, including damages for care and loss of services, on account of bodily injury, including death at any time resulting therefrom, sustained by any person or persons;
>
> (b) ***for damages*** because of injury to or destruction of property, including the loss of use thereof;
>
> caused by or growing out of each occurrence and arising out of or due wholly in part to the business operations of the Insured, or any act or omission of the Insured's directors, officers, stockholders, employees, agents contractor or subcontractors.

Exhibit 1 at 2 (emphasis added); Exhibit 2 at 2 (emphasis added).

Under California law, costs incurred by a policyholder pursuant to an administrative environmental remediation order do not constitute "damages," and are not recoverable under insurance policies containing provisions such as those in the first and second Home policies. There are three cases decided by the California Supreme Court that set out the general framework for this analysis and demonstrate that no recovery is available under the first and second Home policies.

a. ***Powerine I***: In *Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94 (Cal. 2001) ("*Powerine I*"), the policyholder faced administrative proceedings initiated by the U.S. Environmental Protection Agency and the California Regional Water Quality Control Boards for the Los Angeles and San Diego Regions, where those agencies had issued administrative orders requiring the policyholder to remediate certain properties in California. *Id.* at 98. The policyholder sued its insurers, seeking a declaration that the insurers had a duty to "defend" the policyholder in these administrative proceedings and, most important for present purposes, that the insurers had a duty to indemnify the policyholder for remediation costs it incurred in complying with administrative cleanup orders issued by these state and federal agencies. Powerine's primary insurers denied any duty to indemnify Powerine for remediation costs incurred pursuant to administrative cleanup orders, arguing that their policies required indemnification only for "damages" and administratively-ordered remediation costs did not constitute "damages."

The California Supreme Court agreed with the primary insurers. The court held that, under the wording of a standard primary general liability policy, a primary insurer's duty to indemnify "is limited to money ordered by a court." *Id.* at 103. The court reached this conclusion because the primary insurers' policies in that case, and standard form primary policies generally, provide that the insurer's duty to indemnify extended only to "all sums that the insured becomes legally obligated to pay ***as damages***." *Id.* (emphasis added). The court concluded that the term "damages" refers to money ordered to be paid by a court, and did not extend to costs incurred pursuant to administrative cleanup orders. *Id.*

b. ***Powerine II***: The California Supreme Court's decision in *Powerine I* concerned the application of Powerine's primary policies, and at least theoretically

did not resolve whether excess insurance policies would, unlike the primary policies at issue in *Powerine I*, have a duty to indemnify an insured for remediation costs incurred pursuant to an administrative cleanup order. However, in 2005, the California Supreme Court issued two decisions on the same day to clarify the extent to which administrative cleanup orders can form the basis of an excess insurer's obligation to indemnify for remediation costs incurred by its insured. In *Powerine Oil Co., Inc. v. Superior Court*, 118 P.3d 589 (Cal. 2005) ("*Powerine II*"), the court held that the excess insurer involved in that decision had a duty to indemnify the policyholder for administratively-ordered environmental remediation costs. The court reached this result based on differences between the insurer's policy language and that in the primary policies the court had considered in *Powerine I*. In particular, the court in *Powerine II* held that the Insuring Agreement in the excess insurer's policies, along with the definition of "ultimate net loss" incorporated into the Insuring Agreement, obligated the insurer to indemnify for losses beyond "damages" ordered by a court. *Id.* at 592. In *Powerine II*, the excess insurer's Insuring Agreement provided as follows:

> The Company hereby agrees . . . to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability . . . imposed upon the Insured by law . . . for damages, direct or consequential ***and expenses, all as more fully defined by the term 'ultimate net loss'*** on account of . . . property damage . . . caused by or arising out of ***each occurrence*** covered hereunder.

Id. at 594-95 (emphasis added by *Powerine II* court). As a result, the court held that while the term "damages" in the Insuring Agreement is limited to paying money ordered by a court, the Insuring Agreement extended the insurer's obligation to indemnify beyond mere "damages" and included indemnification for "expenses," including expenses falling within the definition of "ultimate net loss." *Id.* at 602. Because the definition of "ultimate net loss" in the excess insurer's policies included payments made by compromise, as well as amounts paid to litigate,

settle, adjust, and investigate claims, the court held that the insurer's obligation to indemnify for "expenses" and "ultimate net loss" was broad enough to cover the insured's compliance with an administrative cleanup order. *Id.*

Thus, the court held that the excess insurer had a duty to indemnify Powerine for administratively-ordered environmental cleanup costs because (1) the Insuring Agreement provided not only that the policy indemnified for damages, but also provided that the policy indemnified for "expenses"; and (2) the Insuring Agreement referenced and incorporated the policy's definition of "ultimate net loss" in describing what the insurer would indemnify for under the policies, and the term "ultimate net loss included payments made by compromise, as well as amounts incurred to settle, litigate, investigate, and adjust claims. Based on this specific policy language, the court held that the excess insurer had a duty to indemnify for environmental remediation costs even though the primary policies issued to the policyholder included no such obligation.

c. ***County of San Diego***: On the same date the California Supreme Court issued *Powerine II*, the court issued its decision in *County of San Diego v. ACE Property & Casualty Insurance Co.*, 118 P.3d 607 (Cal. 2005), where the court held that the excess insurers in that case (unlike the excess insurers in *Powerine II*) had no duty to indemnify their policyholder for costs incurred in complying with administrative remediation orders. The facts and relevant policy language in *County of San Diego* are indistinguishable from the claim asserted here by VIAD, and compel a finding that VIAD is not entitled to coverage under the first and second Home policies for costs it incurred pursuant to administrative cleanup orders issued by the California Regional Water Quality Control Board.

In *County of San Diego*, "the Regional Water Board issued a cleanup and abatement order to the County, requiring it to investigate, monitor and remediate groundwater contamination caused by the Ramona Landfill." *Id.* at 610. This is the same type of remediation order issued by the same state administrative agency that issued an administrative order requiring VIAD to remediate its San Diego site. As with VIAD, the policyholder did not challenge imposition of the cleanup order either through an administrative hearing or a court action. *Id.* Instead, the policyholder incurred the remediation costs called for in the administrative cleanup order and sought indemnification from its insurers for these remediation costs. *Id.* The policyholder's excess insurer (Ace Property & Casualty Insurance Company) denied a duty to indemnify the policyholder for these administratively-ordered remediation expenses.

The California Supreme Court agreed with the excess insurer and held that it had no duty to indemnify for administratively-ordered remediation expenses. In reaching this result, the court explained the different result in *Powerine II* (issued the same day) "because the literal insuring language of the excess/umbrella policies at issue in that case is materially different from the insuring language in the Ace excess policy and the standard CGL policy considered in *Powerine I*." *Id.* at 609-10.

In particular, the *County of San Diego* court relied on the language in the insurer's Insuring Agreement, which obligated the insurer to indemnify for

> all sums which [the County] is obligated to pay by reason of liability imposed by law or assumed under contract or agreement [for] *damages* . . . by reason of injury of any nature sustained by any person or persons [and] *damages* because of injury to or destruction of tangible property.

Id. at 613 (emphasis added by *County of San Diego* court). The court distinguished this language from the Insuring Agreement at issue in *Powerine II* because the excess policy in *County of San Diego* "utilizes 'damages' as the sole term of limitation of the indemnity obligation under the

insuring agreement." *Id.* By contrast, the Insuring Agreement in *Powerine II* provided that the insurer would indemnify for not only damages, but also for "expenses" as defined by the term "ultimate net loss."

The County of San Diego argued that the insurer's duty to indemnify extended beyond the payment of damages because the insurer's policy, like the policies in *Powerine II*, defined "ultimate net loss" to include "expenses" and payment of settlement, investigation, and negotiation costs. *Id.* at 615. The court rejected this argument on two bases: (1) unlike the policies at issue in *Powerine II*, the "central insuring clause" did not include an agreement by the insurer to indemnify the insured for "expenses," and instead limited the duty to indemnify to "damages"; and (2) unlike the policies at issue in *Powerine II*, the Insuring Agreement did not incorporate or reference the definition of ultimate net loss, meaning that "the definition of 'ultimate net loss' merely serves to define the insured's total loss that will count toward such policy limits" of the excess policy and underlying insurance. *Id.* In addition, the *County of San Diego* court relied on the existence of "no action" and "voluntary payment" clauses in the excess insurer's policy that barred coverage for settlements entered into or costs incurred without the insurer's written consent. *Id.* at 616. To the court, these provisions further reinforce that there is no coverage for remediation costs that are not ordered by a court as part of a court judgment because coverage for costs incurred short of a court judgment could be covered only with the insurer's consent. *Id.*[3]

* * *

[3] The first and second Home policies also contain provisions that prohibit the policyholder from seeking coverage for costs incurred or settlements made without Home's consent. *See* Section III.A.2, *infra*.

These California Supreme Court decisions make clear that whether an excess insurer is obligated to indemnify its policyholder for remediation costs incurred pursuant to an administrative cleanup order, as opposed to a court judgment, depends on the language of the policy's Insuring Agreement. The holdings of *County of San Diego* and *Powerine II* can be summarized as follows:

- *County of San Diego*: If the Insuring Agreement provides that the insurer will indemnify for amounts incurred "as damages," and the Insuring Agreement neither provides for indemnification of "expenses" nor references or incorporates the policy's definition of "ultimate net loss," there is no coverage for costs incurred in complying with an administrative cleanup order. *County of San Diego*, 118 P.3d at 615-16.

- *Powerine II*: If the Insuring Agreement provides that the insurer will indemnify not only for amounts incurred "as damages," but also will indemnify for expenses as defined by the term "ultimate net loss," the insurer must indemnify the policyholder for costs incurred in complying with an administrative cleanup order. *Powerine II*, 118 P.3d at 602.

Applying these holdings to the first and second Home policies, it is clear that *County of San Diego* controls the result because the language of the Insuring Agreement at issue in *County of San Diego* is virtually identical to the language in the Insuring Agreement of the first and second Home policies. Like the Ace policy in *County of San Diego*, the first two Home policies have Insuring Agreements that identify Home's duty to indemnify in terms of indemnifying VIAD for "damages," and the Insuring Agreements do not describe the duty to indemnify as extending to "expenses" and do not reference or incorporate the definition of "ultimate net loss." The first two Home policies also include the conditions present in the Ace policy that prohibited the insured from settling a claim or incurring costs without the insurer's written consent. Therefore, under California law, VIAD's payment of remediation costs pursuant to an administrative agency order does not constitute "damages" for which Home would have had a duty to indemnify under the first and second Home policies.

2. Even if Remediation Costs Incurred Pursuant to an Administrative Agency Order Could Be Covered Under the First and Second Home Policies, There Would Be No Coverage Because VIAD's Payments Were Made Without Home's Consent

VIAD began incurring remediation expenses at its San Diego site in 1989. VIAD not only failed to seek Home's consent with respect to incurring these expenses, it did not even advise Home of the site, the administrative cleanup order, or VIAD's remediation agreement with state regulators until **2004** when it filed its claim in Home's liquidation proceedings. The first and second Home policies, however, could not be clearer in providing that VIAD is not entitled to seek coverage for any costs incurred absent either a final judgment from a court or Home's written consent to the incurring of such costs. It is undisputed that Home never consented to VIAD incurring costs at the San Diego site, and there is no final order from a court of competent jurisdiction compelling VIAD to incur such costs. Therefore, the first and second Home policies provide no coverage with respect to the costs incurred by VIAD at the San Diego site.

The first two Home policies contain the following conditions:

> 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).

California courts have repeatedly enforced policy provisions that require, as a condition to coverage, that the insured obtain the insurer's consent before settling any claim and/or before making any voluntary payments. *See, e.g., Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G.*, 476 P.2d 406, 416 (Cal. 1970) (holding that the insured's agreement to forgo payment on a project in order to resolve a claim arising out of the project precluded coverage based on the insured's failure to obtain insurer consent to the resolution); *Insua v. Scottsdale Ins. Co.*, 104 Cal. App. 4th 737, 743-44 (Cal. Ct. App. 2002) (holding that voluntary payments made prior to tender were not covered by virtue of the policy's voluntary payments clause, and that no showing of prejudice is required for such a provision); *Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal. App. 4th 966, 976-77 (Cal. Ct. App. 2000) (same); *Jamestown Builders, Inc. v. Gen. Star Indem. Co.*, 77 Cal. App. 4th 341, 346 (Cal. Ct. App. 1999); *see also Faust v. Travelers*, 55 F.3d 471, 472-73 (9th Cir. 1995) (holding that California law does not require prejudice for insurer to rely on "voluntary payments" provision in policy); *Belz v. Clarendon Am. Ins. Co.*, 69 Cal. Rptr. 3d 864, 870 (Cal. Ct. App. 2007) (same); *Low v. Golden Eagle Ins. Co.*, 110 Cal. App. 4th 1532, 1544-47 (Cal. Ct. App. 2003).

Indeed, in *County of San Diego*, 118 P.3d at 616, and *Powerine I*, 16 P.3d at 105 n.4, discussed in detail above, the California Supreme Court referenced with approval "voluntary payments" and "consent to settle" clauses in explaining why the insurers' policies did not provide coverage for costs incurred in complying with administrative remediation orders. Thus, these provisions in the first and second Home policies are clearly enforceable under California law. There is no reasonable dispute that VIAD breached these conditions by failing to obtain, or even seek, Home's consent to VIAD's incurring of remediation costs at the San Diego site in the absence of a final court order requiring VIAD to make such payments. Therefore, even if the

administrative cleanup orders could constitute "damages" under the first and second Home policies, there would be no coverage because Home did not consent to, or even know of, VIAD's incurring of the costs for which it now seeks indemnification.

3. VIAD Has Not, and Cannot, Meet Its Burden of Demonstrating That an Occurrence Took Place During the Policy Periods of the First Two Home Policies

As explained above, VIAD is not entitled to coverage under the first and second Home policies because (1) remediation costs incurred pursuant to an administrative cleanup order are not "damages" covered by the first and second Home policies; and (2) the first and second Home policies provide that VIAD has no entitlement to coverage for costs incurred without Home's written consent. *See* Sections III.A.1 and III.A.2, *supra*. Even if that were not true, it would remain the case that VIAD would have a burden of showing that it incurred a covered loss *during the Home policy periods*, and this is a burden that VIAD cannot satisfy.

As the California Supreme Court has explained:

> "[T]rigger of coverage" is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen during the policy period in order for the *potential* of coverage to arise. The issue is largely one of timing -- what must take place *within the policy's effective dates* for the potential of coverage to be "triggered"?

Montrose Chemical Corp. v. Admiral Ins. Co., 913 P.2d 878, 881 n.2 (Cal. 1993) (emphasis in original).

Moreover, the California Supreme Court has repeatedly held that the policyholder has the burden to bring a claim "within the basic scope of coverage," and therefore must prove that a particular policy period has been triggered by the policyholder's claim. *Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619, 625 (Cal. 1995); *see also Aydin Corp. v. First State Ins. Co.*, 959 P.2d 1213, 1215 (Cal. 1998) (same). A policyholder must thus prove that there has been an

"occurrence within the terms of the policy." *Waller*, 900 P.2d at 626; *see also Aydin*, 959 P.2d at 1215 (same); *see also Lockhead Corp. v. Cont'l Ins. Co.*, 134 Cal.App.4th 187, 194 (Cal. Ct. App. 2005) (finding that the policyholder "has the burden to prove that the property damage liability for which it seeks coverage was caused by an accident that took place during the policy period").

The Insuring Agreements of the first and second 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 . . . ." Ex. 1 at 2; Ex. 2 at 2. 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." Ex. 1 at 3; Ex. 2 at 3.

Two provisions in the first and second Home policies require that the *occurrence* be the event that must take place during the policy period in order for there to be a potential for coverage. 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.*" Ex. 1 at 2 (emphasis added); Ex. 2 at 2 (emphasis added). Second, the "Contract Period, Territory" provision in the first and second 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 [certain specified countries]." Ex. 1 at 3; Ex. 2 at 3. When the above-quoted provisions are read together, coverage is potentially 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. The few cases construing this language have concluded that, consistent with the plain language of these provisions, coverage is triggered only by an "occurrence" taking 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 language similar to that in the first and second Home policies 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, the first and second Home policies potentially provide coverage only where the occurrence (the actual discharge of contaminants) took place during the policy period. VIAD cannot meet its burden of proving that such discharges occurred during the first two Home policy periods.

The first Home policy was in effect for the period from August 31, 1966 to January 1, 1969. The second Home policy was in effect from January 1, 1969 to March 31, 1972. As noted in the California Regional Water Quality Control Board's 1989 administrative cleanup order, VIAD and its subsidiaries used underground storage tanks at the San Diego site from 1953 to 1989. Ex. 4 at 2. Tests conducted at the site in 1987 and 1988 confirmed that the four active underground storage tanks at the site were leaking small amounts of petroleum product at that time, more than fifteen years after the last Home policy expired. *Id.* The Case Closure Summary

prepared by the California Regional Water Quality Control Board in 2003 provides the following additional information concerning the San Diego site:

> Description of the unauthorized release (cause, release date, source[s]): An unauthorized release of diesel, gasoline, waste oil and lube oil was discovered when six UST's [underground storage tanks] were removed in 1989. The unauthorized release was most likely from the UST's. **It is unknown when the unauthorized release occurred**. Free product, 3-4 feet thick initially, has been reduced to 1.24 feet, measured in November 1998.

Ex. 7 at 1 (emphasis added).

VIAD's environmental consultant, Kenneth Ries, testified that VIAD discovered that some underground pipes used for the underground storage tanks at the site had been found with corrosion holes and had leaked as a result. Ex. 5 at 19. However, Mr. Ries forthrightly testified by deposition that VIAD had not been able to determine when any leaks from the underground storage tanks occurred:

> Q: Were any reports prepared that attempted to fix the time period in which this leakage occurred?
>
> A: No, because there was no need to at the time and nor is it really possible to make that determination, to the best of my understanding.

Id. at 20.

Mr. Ries also testified that he believed that, in addition to contamination caused by tank leakage, some of the contamination at the San Diego site was caused by spills of petroleum products made during the course of filling the underground storage tanks. *Id.* Again, Mr. Ries testified that there was no evidence as to when any such spills would have occurred:

> Q: And were you able to find any evidence as to when these overfills occurred?
>
> A: No.

Q: Did you ever look for any contemporaneous records that would document that a report was made that there was an overfill or anything like that?

A: No. The problem with that is that Greyhound Lines didn't keep their daily records for more than a few years, so any historical records would have been destroyed years ago.

Id. at 20-21. Indeed, in response to questioning by VIAD's counsel, Mr. Ries again confirmed that there was no way for VIAD to demonstrate when any spills that might have occurred at the site took place: "Well, experience has taught me that spillage occurs randomly, so you can't define the time period for spillages or overfills." *Id.* at 57.

Under clear California law, VIAD has the burden of proving that the events required for coverage occurred during the Home policy periods. With respect to the first and second Home policies, the required event is a discharge of contaminants. The record is clear that VIAD is unable to prove that a discharge of contaminants occurred during the first or second Home policy periods, which cover less than six of the thirty-six years the underground storage tanks were used at the site. Therefore, even if VIAD's expenses in complying with an *administrative* cleanup order constituted "damages" (which it does not) and even if VIAD had complied with its duty to obtain Home's written consent prior to incurring expenses for which it would seek coverage (which VIAD did not), there still would be no coverage available under the first and second Home policies because VIAD cannot meet its burden of proving a covered event occurred during the first or second Home policy periods.

B. There Is No Coverage For VIAD's Claim Under the Third Home Policy

The third Home policy was in effect for less than three months, incepting on March 31, 1972 and expiring through cancellation on June 19, 1972. Ex. 3 at 7. VIAD has no entitlement to coverage under the third Home policy with respect to the site by virtue of the pollution exclusion contained in the third Home policy, as well as by virtue of VIAD's inability to prove

the existence of covered property damage taking place during the 81 total days that the third Home policy was in effect.

1. The Pollution Exclusion Precludes Coverage Under the Third Home Policy for VIAD's Claim Regarding the San Diego Site

The third Home policy contains a pollution exclusion that unambiguously excludes coverage for all property damage arising out of the discharge of pollutants, with the sole exception of property damage caused by a "sudden and accidental" discharge. California law is clear that the exception for "sudden and accidental" discharges of pollutants requires an abrupt discharge of pollutants, and that gradual environmental contamination from leaks, seepage, and similar gradual processes are not covered under policies containing such as exclusion. California law is also clear that the policyholder has the burden of proving that the property damage for which it seeks coverage was caused by a "sudden and accidental" discharge of pollutants, and this is a burden that VIAD cannot satisfy. Indeed, as discussed in Section III.B.2 below, even if VIAD could meet its burden of proving a sudden and accidental discharge of contaminants, it cannot meet its burden of proving that such a sudden and accidental discharge caused covered property damage during the less than three months the third Home policy was in effect.

The pollution exclusion in the third Home policy provides as follows:

EXCLUSION
CONTAMINATION OR POLLUTION

> 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 watercourse or body of water; but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden and accidental.

Ex. 3 at 24.

California courts have routinely construed "sudden and accidental" pollution exclusions similar or identical to the exclusion in the third Home policy and have held that such exclusions are unambiguous and enforceable. As the California Supreme Court noted in *Aydin Co. v. First State Ins. Co.*, 959 P.2d 1213, 1217 (Cal. 1998), the "sudden and accidental" pollution exclusion creates "a broad exclusion from coverage for any liability resulting from pollution." *Id.* This broad exclusion can be overcome only if the property damage arose from a discharge of pollutants that was both "sudden" and "accidental." *Id.*

VIAD's claim seeks indemnification for costs incurred by VIAD in remediating property that was contaminated by petroleum products discharged at VIAD's San Diego site. Consistent with the plain language of the "sudden and accidental" pollution exclusion, California courts repeatedly have held that gasoline and petroleum products constitute pollutants or contaminants for purposes of the exclusion. *Legarra et al. v. Fed. Mut. Ins. Co.*, 35 Cal. App. 4th 1472, 1481 (Cal. Ct. App. 1995) (finding that petroleum qualifies as a pollutant); *W.H. Breshears, Inc. v. Fed. Mut. Ins. Co.*, 832 F. Supp. 288, 291 (E.D. Cal. 1993) (finding unleaded gasoline a pollutant as a matter of law), *aff'd in part, rev'd in part on other grounds*, 38 F.3d 1219 (9th Cir. 1994); *Staefa Control System, Inc. v. St. Paul Fire & Marine Ins. Co.*, 847 F. Supp. 1460, 1471-72 (N.D. Cal. 1994) (court found petroleum products qualified as pollutants), *opinion amended on other grounds on reconsideration*, 875 F. Supp. 656 (N.D. Cal. 1994); *see also Truck Ins. Co. v. Pozzuoli*, 17 Cal. App. 4th 856 (Cal. Ct. App. 1993) (court applied pollution exclusion to leaking underground storage tank containing gasoline). Indeed, the *Legarra* court observed that petroleum "has been found to be an environmental contaminant by both courts and legislatures." *Legarra*, 35 Cal. App. 4th at 1481.

Because VIAD seeks coverage for costs incurred as a result of the discharge of pollutants, the pollution exclusion in the third Home policy unambiguously precludes coverage unless the discharge of contaminants at the site was both sudden and accidental. With respect to this required showing, the California Supreme Court has held that the policyholder has the burden of proving that the pollution's release was "sudden and accidental." *Aydin*, 959 P.2d at 1217-18.

Cases interpreting whether a pollution release was sudden and accidental often turn on the meaning of the term "sudden," with policyholders often contending that the term "sudden" merely requires that the discharge of pollutants was "unexpected," and that the gradual discharge of pollutants can therefore be treated as "sudden" discharges. However, the California courts have repeatedly and consistently rejected this argument. As a matter of California law, the "sudden and accidental" exception to the pollution exclusion requires that a policyholder prove that the discharge of contaminants was abrupt and not gradual. *See, e.g., Shell Oil Co. v. Winterthur Swiss Ins. Co.,* 12 Cal. App. 4th 715, 752 (Cal. Ct. App. 1993); *ACL Technologies, Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal. App. 4th 1773 (Cal. App. 4th 1993); *FMC Corp. v. Plaisted & Cos.*, 61 Cal. App. 4th 1132, 1145-46 (Cal. Ct. App. 1998).

As one California court explained, the term sudden "conveys the sense of an unexpected event that is abrupt or immediate in nature." *Shell Oil*, 12 Cal. App. 4th at 755. "Giving 'sudden' a meaning independent of 'accidental' . . . requires giving it a meaning with a temporal aspect – immediacy, quickness or abruptness – that does not allow it to cover events . . . that occurred gradually." *ACL Technologies*, 17 Cal. App. 4th at 1787. Thus, the "sudden and accidental" pollution exclusion "does not allow for coverage for gradual pollution" *Id.* at 1784.

Indeed, the conclusion that the third Home policy excludes coverage for environmental contamination caused by leaking underground storage tanks is compelled by the California Court of Appeal's decision in *ACL Technologies*, 17 Cal. App. 4th at 1787-78. In that case, the policyholder sought coverage for environmental remediation costs incurred as a result of leakage from an underground storage tank caused by rust and corrosion. *Id.* The California Court of Appeal recognized that the term "sudden" as used in the "sudden and accidental" pollution exclusion encompassed the concept of abruptness. The court also noted that gradual is an antonym of sudden; thus, whatever sudden may mean, "it does not mean gradual." *Id.* at 1788. The court concluded that "[c]orrosion is, by definition, a gradual process." The court also found there was no evidence of "any specific trauma to the tanks during the . . . policy period." *Id.* at 1795. Therefore, because the discharge of pollutants involved in that case were gradual, not sudden, the court held that coverage for the policyholder's claim was barred by the "sudden and accidental" pollution exclusion.

Here, the evidence demonstrates that leaking underground storage tanks at the San Diego site caused a discharge of contaminants. Coverage for claims arising out of such a gradual discharge is plainly barred by the pollution exclusion in the third Home policy as a matter of California law. Therefore, in order to avoid the application of the pollution exclusion in the third Home policy, VIAD would have to meet its burden of proving that contamination at the site was attributable to a sudden, abrupt discharge of pollutants, and VIAD cannot meet this burden of proof. As discussed in Section III.A.3, *supra*, VIAD's own environmental consultant acknowledged that corroded pipes caused the leakage of pollutants at the site. Ex. 5 at 19. Moreover, the California Regional Water Quality Control Board found that leakage of pollutants

– by definition a gradual process – was emanating from the site's underground storage tanks as late as 1987 and 1988. Ex. 4 at 2.

While VIAD's environmental consultant theorized that some of the contamination at the site would have occurred from spills and overfills taking place over the years, he admitted in his deposition that there are no records, statements, or eyewitness accounts of any such spills or overfills occurring. Ex. 5 at 20-21. Thus, VIAD is unable to meet its burden of proof of showing that its claim involves a sudden discharge of pollutants at the San Diego site, as opposed to a gradual discharge and migration of contaminants. Moreover, as discussed below, VIAD's burden is not merely to prove that a sudden and accidental discharge of contaminants occurred at the site – VIAD must prove that such a sudden and accidental discharge occurred that would trigger coverage during the mere 81 days that the third Home policy was in effect.

2. VIAD Cannot Meet Its Burden of Proving That a Sudden Discharge of Contaminants Caused Property Damage During the 81 Days That the Third Home Policy Was in Effect

The Insuring Agreement of the third Home policy provides that Home will indemnify VIAD's predecessor in interest for:

> all sums which the insured shall be obligated to pay by reason of the liability . . . imposed upon the insured by law . . . for damages . . . on account of . . . Property Damage . . . caused by or arising out of each occurrence happening anywhere in the world."

Ex. 3 at 2. The policy further defines an "occurrence" as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in . . . property damage . . . during the policy period. *Id.* When these two provisions are taken together, they provide for indemnification, subject to all of the policy's other provisions, for property damage taking place during the policy period. The policy period is the 81 days from March 31, 1972 to June 19, 1972. Because the Insuring Agreement is a grant of coverage, the

policyholder has the burden of proving that covered property damage occurred during the policy period. *Waller*, 900 P.2d at 625; *Aydin Corp.*, 959 P.2d at 1215; *Lockhead Corp.*, 134 Cal. App. 4th at 194.

As the analysis in Section III.B.1 makes clear, the pollution exclusion in the third Home policy precludes coverage for property damage arising out of a gradual discharge of pollutants, such contamination resulting from a leaking underground storage tank. The only type of property damage arising from pollution that is potentially covered under the third Home policy is a "sudden," or abrupt discharge of contaminants. Therefore, in order for VIAD to meet its burden of proving a covered claim, it would need to prove that an abrupt discharge of contaminants at the site caused property damage during the 81 days that the third Home policy was in effect. VIAD cannot meet this burden.

As discussed in Section III.A.3, *supra*, there is evidence of leakage from the underground storage tanks at the San Diego site, but this type of contamination is by definition gradual, and therefore not covered by the third Home policy. VIAD's environmental consultant, Kenneth Ries, has theorized that there likely were spills and overfills taking place at the site over the years, but he has admitted that he has no records or eyewitness accounts of any such spills. Even more to the point, even if there were spills or overfills at the site, Mr. Ries testified that VIAD is unable to identify when any such spills or overfills would have occurred. At the risk of repetition, this is Mr. Ries's testimony on the subject:

> Q: And were you able to find any evidence as to when these overfills occurred?
>
> A: No.
>
> Q: Did you ever look for any contemporaneous records that would document that a report was made that there was an overfill or anything like that?

A: No. The problem with that is that Greyhound Lines didn't keep their daily records for more than a few years, so any historical records would have been destroyed years ago.

Ex. 5 at 20-21. With VIAD admittedly unable to identify when any spill of contaminants occurred at the site, it cannot meet its burden of proving that a spill at the site resulted in property damage during the less than three months that the third Home policy was in effect. Therefore, even if VIAD could meet its burden of proving the occurrence of one or more abrupt spills of pollutants at the site, a premise entirely lacking in evidentiary support, no coverage is available because there is no evidence that property damage from a spill caused property damage during the 81 days the third Home policy was in effect out of the 36 years the underground storage tanks were in operation.

C. The Second and Third Home Policies Exclude Coverage for Property Damage to Property Owned By the Policyholder and Impose a $5 Million Self-Insured Retention for Property Damage to Property in the Policyholder's Care, Custody, or Control

The second and third Home policies contain the following provision:

> It is understood and agreed that all property owned by the insured or subsidiary companies is excluded from coverage under this policy. It is further understood and agreed that with respect 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), this excess policy shall only apply for the ultimate net loss excess of $5,000,000.00 legal liability as respect any one occurrence, whether insurance shall be purchased by or on behalf of the insured or the insured shall retain such first loss for its own account.

Ex. 2 at 32; Ex. 3 at 17.

VIAD's environmental consultant testified that all of the remediation operations performed by VIAD in connection with the site took place within the boundaries of the site itself, which was owned by VIAD. Ex. 5 at 36 ("We were not ultimately required to do any remediation of the surrounding streets that surrounded our property."). Therefore, under the

second and third Home policies, there is no coverage available for costs incurred by VIAD in remediating its own soil because the provision quoted above plainly provides that "all property owned by the insured or subsidiary companies is excluded from coverage under this policy." Ex. 2 at 32; Ex. 3 at 17.

VIAD seeks to avoid the implications of this exclusion by arguing that it not only remediated the soil at the site, which it admittedly owned, but that it also remediated groundwater located within its property lines, the argument being that an "owned property" exclusion does not apply because, under California law, the people (and not individual property owners) own groundwater located within the state. The flaw in this argument is that it ignores the second half of the provision quoted above, which imposes a $5 million self-insured retention, that must be borne by VIAD, for "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. Thus, the $5 million self-insured retention applies not based on who *owns* the property, but applies to any property occupied, used, or in the care, custody, or control of VIAD.

In *Shell Oil Company*, 12 Cal. App. 4th at 759, the policyholder made the same argument as VIAD offers here, arguing that an exclusion for property damage to property under the policyholder's "care, custody or control" could not apply because the policyholder remediated not only soil, but groundwater that was owned by the people and not the policyholder. The California Court of Appeal rejected this argument, noting that ownership of groundwater was an entirely different issue than whether groundwater within a policyholder's property lines is within its care, custody or control:

> Shell also claims the [care, custody or control] exclusions do not apply because its response costs related to remedying soil and groundwater contamination. Shell argues that, as a matter of law, it cannot own or have care, custody, or control of groundwater and

> soil. Although private ownership rights in water may be limited by state law, this does not mean that lake waters or groundwater could not be in Shell's care, custody, or control. Indeed, controlling groundwater quality by interception and treatment is part of the remedial activities under the consent decree. Further, the exclusions plainly apply to soil within Shell's leasehold or control.

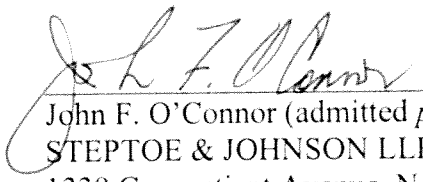
Id. (footnote omitted).

VIAD's argument is indistinguishable from the argument rejected in *Shell Oil*. All of VIAD's remediation activities involved remediation of soil and groundwater *within VIAD's property lines*. Ex. 5 at 36. As in *Shell Oil*, VIAD intercepted and remediated soil and groundwater solely within its property lines, with VIAD even installing sheathing at its property lines so that it could excavate the soil and groundwater that was within its custody and control, *i.e.*, the soil and groundwater on its own property. *Id.* ("And there was soils on the other side of the sheathing that we did not access . . . ."). Therefore, as mandated by the California Court of Appeal's decision in *Shell Oil*, coverage is excluded under the second and third Home policies for remediation of soil at the site, and costs involved in remediating groundwater is subject to a $5 million self-insured retention under each policy. Because VIAD's total costs with respect to the site is less than $5 million, there would be no coverage available under the second and third Home policies even if coverage was not otherwise precluded for the reasons previously stated.

IV. CONCLUSION

For the foregoing reasons, the Referee should uphold the Liquidator's determination that VIAD is not entitled to coverage under the Home policies for costs incurred with respect to the San Diego site.

Respectfully submitted,



John F. O'Connor (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile

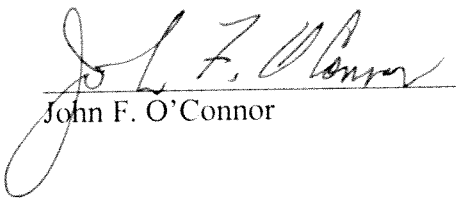
Attorneys for the Liquidator

CERTIFICATE OF SERVICE

I certify on this 16th day of January, 2009, I served a copy of the foregoing, along with all accompanying exhibits by first class U.S. Mail, postage prepaid, on the following counsel of record:

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

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos & Haley PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318



John F. O'Connor