THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Docket No. 03-E-106
IN THE MATTER OF THE REHABILITATION / LIQUIDATION OF THE HOME INSURANCE COMPANY

VIAD CORP'S MOTION TO RECOMMIT AND OBJECTIONS TO ORDER ENTERED BY REFEREE ON APRIL 13, 2009

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MOTION TO RECOMMIT AND OBJECTIONS TO REFEREE'S ORDER

Viad moves this Court to Recommit this matter, and objects to the Order entered by the Referee on April 13, 2009. Viad seeks a de novo review of the rulings or determinations by the Referee. Additionally, Viad requests oral argument on these issues. As grounds for this Motion and Objection, Viad would show this Honorable Court as follows:

PRELIMINARY STATEMENT

On February 4, 2009, an evidentiary hearing regarding Viad's right to coverage under three insurance policies was conducted before Referee M. Gehris ("the Referee"). The parties stipulated that the sole evidence presented at the hearing would be through documents, depositions, and affidavit testimony. On April 13, 2009, the Referee issued a ruling denying an allowance to Viad Corp ("Viad") for the San Diego, California, site.

Viad seeks this Court's review of the Referee's findings and order. The Referee erred both in her findings of fact and in her application of the relevant law to the facts. For purposes of this Motion to Recommit all exhibits, deposition testimony, and affidavit testimony are referred to as appendices and abbreviated as "App." Exhibits to Viad's original brief are referred to as Exhibits and abbreviated as "Exh."

STATEMENT OF FACTS AND OF THE CASE

Viad is the successor-in-interest to three commercial liability insurance policies issued by Home Insurance Company from 1966 through 1972. Home is presently in liquidation under the supervision of the New Hampshire Superior Court. Viad, as the successor-in-interest to The Greyhound Corporation ("Greyhound") seeks insurance coverage from Home in Liquidation and on June 11, 2004, timely filed a Proof of Claim with the Liquidator.

Viad's predecessor-in-interest, Greyhound, owned a bus maintenance facility site (the "Site") from 1954 until 1987, when it sold the Site. The Site was located at 539 First Avenue, San Diego, California. Greyhound sold the Site to an unrelated corporation named Greyhound Bus Lines in 1987 and thereafter had no care, custody, or control over the Site[1]. In 1989, two years after Greyhound sold the site (relinquishing any possible care, custody, or control over it), contamination of the Site's soil and groundwater was discovered.

The sole evidence presented at the hearing showed that Greyhound owned and operated the bus maintenance facility from 1954 to 1987 when Greyhound sold the Site to Greyhound Bus Lines (a company that is unaffiliated with The Greyhound Corporation). Importantly, the contamination that was discovered was gasoline and almost exclusively No. 1 diesel fuel. Equally as important, Greyhound stored No. 1diesel on the Site only during the time frame from 1966 until 1973 and gasoline from 1954 and 1966. As such, the only time that No. 1 diesel could have contaminated the Site was during the Policy period of 1966 through 1972. This fact, of course, is critical because, as was shown by Viad's expert witness, it is improbable that the corrosion and leakage of the pipes occurred in the brief time period from 1972 to 1973. Simply stated, it is improbable to conclude that such corrosion all took place during that brief time period.

While the cause of the contamination cannot be disputed (gasoline from 1954 to 1966 and No. 1 diesel fuel from 1966 until 1973), the time of the contamination within that period is disputed by Home. Home, however, presented absolutely no proof as to when the contamination occurred. Instead, the Liquidator claims that Viad did not carry its burden of proving that any contamination or injury "occurred" during Home's Policy periods of 1966 through 1972.

[1] Dr. Kenneth Ries, Viad's expert witness, testified by affidavit that Viad had no care, custody, or control over the Site. This is the sole evidence in this case on this issue. The Liquidator provided absolutely no evidence to the

Dr. Kenneth Ries, Viad's environmental expert witness, testified that the contamination must have occurred between 1954 and 1973. Since No. 1 diesel fuel was not even used at the Site until 1966, common sense and basic logic compel the inescapable conclusion that the No. 1 diesel fuel contamination could not have occurred until the Home Policy period began, i.e., 1966. Thus, the only time possible time period for the No. 1 diesel was from 1966 through 1973.

Dr. Ries further testified that some of the contamination probably occurred during the Home Policy periods between 1966 and 1972 because it was during this time period that No. 1 diesel was stored and used on the Site, and further, in his experience, underground pipe leakages generally occur after the pipes have been installed for a period of time; therefore, the leakage (and thus the "occurrence") most likely occurred during the Policy periods up until the time that Greyhound discontinued using the pipes in 1973. He also testified that it would have taken only a few weeks for spilled diesel fuel to have reached the groundwater.

Further, Dr. Ries testified that given the use of the Site as a bus maintenance facility, most likely there were also sudden and accidental spillages continuously during the entire course of use of the Site with No. 1 diesel fuel and gasoline, i.e., from 1954 through 1973. The Liquidator did not produce any evidence that such spillages did not occur, but simply alleged that Dr. Ries' expert testimony is insufficient to shift the burden to Home on this issue.

In 1989, pursuant to Abatement Order 89-49, the California Regional Water Quality Control Board ("CRWQCB") ordered that Viad (as Greyhound's successor-in-interest) clean up and remediate the Site. Pursuant to that Abatement Order, Viad undertook to remediate the Site, which at that time was owned by the wholly unrelated company, Greyhound Bus Lines. Viad did not settle with the CRWQCB, but instead based upon its analysis of the facts, determined that it was appropriate to comply with the Abatement Order.

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contrary.

In 1989 Viad initially began monitoring the Site and under the supervision of the CRWQCB attempted to remediate the Site's groundwater by pumping out the No. 1 diesel fuel and gasoline (known as "free product" that floats on the groundwater). The expected costs for this process were less than the self insured retention under the three Home Policies, so Viad did not at that time notify Home of the San Diego Site claim.

In 1999, however, the CRWQCB demanded that Viad undertake another method of remediation of the Site. Instead of monitoring and pumping out the diesel fuel and gasoline, the CRWQCB demanded that Viad begin the more expensive task of removing soil (digging and hauling) in order to the remediate the groundwater. In so doing, the CRWQCB also advised Viad that Viad should qualify for reimbursement from the State of California for up to $1.49 million. Viad therefore filed for reimbursement from the State of California, and when it did so, Viad, at that time had no reason to notify Home of the San Diego Site claim.

During this time period during the mid-1990s, however, Viad did notify Home of almost identical environmental site claims, and Home uniformly denied each of the claims. As such, Viad did not otherwise notify Home of the San Diego Site claim until Viad filed its Proof of Claim on June 11, 2004, in the Liquidation proceedings.

Viad completed the remediation of the San Diego Site in 2001. Viad continued to seek reimbursement from the State of California. On October 24, 2006, the State of California paid $314,487.00 to Viad as partial reimbursement for the damages Viad incurred remediating the Site. On October 23, 2008, the State of California paid Viad an additional $ 1,112,314.00 for reimbursement for the damages Viad incurred in remediating the Site, making the total reimbursement to Viad $1,426,801.00. During this same time period (2002 through 2004), due

to the claims filing deadline of June 13, 2004, in the liquidation proceedings of Home, Viad timely filed its proof of claims that included a claim for the San Diego Site.

The Home issued three Policies to Viad's predecessor in interest. The first Policy covers the period from August 31, 1966, through January 1, 1969; the second Policy covers the period from January 1, 1969, through March 31, 1972; and the third Policy covers the period from March 31, 1972, through June 19, 1972. Home has denied coverage under all three Home Policies based upon the following grounds: (a) The Home initially claimed that Viad did not give proper notice to Home of the San Diego Site claim; for purposes of the February hearing, Home withdrew this argument, and in any event, the Referee ruled that Home waived that argument; (b) Home claims that as regards only the first two Policies, the language of these Policies required Viad to refuse to comply with the CRWQCB's order and require the CWQCRB to sue Viad in a court of law so that the remediation expenses would be converted into "damages" before those two Policies would provide coverage; Home admits that the Third Policy provides coverage on this issue because the Third Policy uses language covering "expenses" as well as "damages" so that the CRWQCB's order is a covered expense under the Third Policy; (c) Home claims that as to all three Policies, Viad did not carry its burden of proving that an "occurrence" (i.e., an event of contamination) happened during the Policy periods from 1966 through June 1972, even though Dr. Ries testified that some of the contamination probably did occur during all three of the policy periods and the kind of pollutant (gasoline and no. 1 diesel fuel) was used only from 1954 through 1973; (d) without providing any proof whatsoever and in spite of Dr. Ries' testimony to the contrary that the property was not under the care, custody or control of Viad, Home claims that the groundwater being remediated was somehow under the care, custody, or control of Viad; and (e) Home claims that as to the

Third Policy, which has an exclusion for events that are not "sudden and accidental," that Viad did not carry its burden of proof that the any contamination was sudden and accidental; Home claims this in spite of the fact that Dr. Ries testified that some of the events of contamination probably were sudden and accidental and Home provided no testimony to the contrary.

The first issue in this case to be determined by the Referee was the applicable choice of law. Home argued that New York law applied to the first two Policies and possibly Arizona law applied to the Third Policy. Viad argued that New Hampshire's choice of law rules, just like the Restatement of Conflicts of Laws, required that since the insured risk was located in California, then California substantive law must be applied. On December 4, 2008, Referee P. Rogers ruled that California substantive law applies to the interpretation of the three Policies because the risk was located in California. For this reason, Viad will refer to California law in its arguments in this Brief.

SUMMARY OF ARGUMENTS

California law states that a commercial general liability insurance policy can provide coverage for the cost of governmentally ordered remediation due to environmental contamination. The question is whether the insurance policy, in its central insuring clause, states that the insurer shall pay for loss resulting from "damages," but then defines damages to mean more than what the California courts have held is the implied limitation on the word "damages," i.e., that the damages result from a lawsuit in a court action. California law is clear that "a proceeding conducted before an administrative agency pursuant to an environmental statute does not constitute a 'suit,' i.e., a civil action prosecuted in court, but rather implicates a 'claim.' *Certain Underwriters at Lloyd's v. Superior Court,* 16 P. 3d 94 (Cal. 2001), at 103. In the present case, the First Two Home Policies contain the express language defining damages and

expenses to include "claims." As such, the First Two Home Policies contain the necessary language further defining "damages" so that they provide Viad coverage for the Abatement Order issued by the CRWQB. The Liquidator concedes that the Third Home Policy contains the sufficient language to provide Viad coverage on this issue.

California law, and the majority rule across the United States, does not require that an insured under a commercial general liability policy to prove that some specific event of environmental contamination occurred. Instead, the insured carries its burden of proof by simply showing "when the contamination began and when it ended or was discovered…" At that point, the trial court must presume that property damage was "continuous from its initiation until the time of clean-up or discovery." *Domtar, Inc., v. Niagara Fire Ins. Co*., 563 N.W. 2d (Minn. 1997). At that time, the burden of proof shifts to the insurer to prove that no appreciable damage occurred during its policy period. Using this standard, the Referee completely failed to apply the proper standard of proof in this case. Viad presented the sole evidence that (1) the contamination occurred beginning in 1954 (and 1966 regarding No. 1 diesel) and continued until 1973, and (2) the contamination probably occurred mostly during the Home Policy periods of 1966 through 1972. The Liquidator provided nothing whatsoever to contradict this evidence. The Referee erred in requiring Viad to meet the unattainable standard of proving that some specific event (such as a spill) occurred. In fact, under the Referee's rigid, unworkable analysis, no coverage is ever available for an insured if the contamination results from leakage of pipes unless someone actually can testify that they saw the leaks occur.

California law also imposes upon the insurer to burden to prove that an exclusion of coverage applies, and the insured has the initial burden of proving that an exception to the exclusion applies. Once the insured provides general proof, by expert testimony or otherwise,

that an incident or series of incidents were sudden and accidental, then the burden shifts to the insurance company to prove the exclusion applies. The Third Home Policy contains a pollution exclusion, but that exclusion has an exception for sudden and accidental occurrences. In this case, Viad presented the sole evidence, through testimony of Dr. Ries, that the spillages of gasoline and No. 1 diesel fuel were probably sudden and accidental. At such point, the standard of proof shifted to the Liquidator. The Liquidator provided no proof that such incidents were not sudden and accidental. As such, the Liquidator failed to carry its burden of proof on this issue.

California law is clear that groundwater is not, and never is, owned by a property owner. Groundwater is owned by the people of California. Viad's predecessor-in-interest, Greyhound Corp., owned the Site from 1954 until 1987 when it sold the Site to an unaffiliated company called Greyhound Bus Lines. The contamination was not even discovered until 1989, two years later. Viad therefore did not own, control, possess, or have custody of the Site or its groundwater. The sole testimony in this case is that Viad did not own, control, possess, or have custody of the Site or its groundwater. The Liquidator provided no proof whatsoever that Viad had any possession, custody, or control of the Site or its groundwater. The Referee erred in rejecting the only evidence presented in this case.

Finally, the Referee properly rejected the Liquidator's claim that Viad failed to give proper notice of the claim for coverage. The Liquidator, however, has continued to assert throughout these proceedings lack of coverage based both on Viad's alleged failure to give proper notice of the claim and also substantive policy defenses. The Referee permitted the Liquidator to continue pursuing both theories, but ruled that the Liquidator has waived lack of notice as a defense to coverage. Because the Liquidator has continued to pursue lack of notice as a defense, the converse of the Referee's ruling also must be true: the Liquidator has instead

waived any substantive defenses to coverage because it continues pursuing lack of notice as a defense.

STANDARD OF REVIEW

The standard of review of the Referee's legal conclusions is *de novo*. The standard of review for the Referee's findings of fact is whether a reasonable person could have reached the same decision or conclusion as the Referee based upon the evidence presented. *In re Reiner's Case*, 883 A.2d 315 (N.H. 2005); *Bianco P.A. v. Home Insurance Co.*, 786 A.2d 829 (N.H. 2001). In the present case, there are no disputed facts.

The evidence in this case, by stipulation of the parties, was based solely upon the testimony and evidence presented by Viad's witnesses and certain documentary exhibits. The Referee reviewed the deposition and affidavit testimony of Dr. Ken Ries and erroneously determined that such testimony was not sufficient to carry Viad's burden of proof; or, the Referee erroneously placed the burden of proof of certain issues upon Viad. Whether undisputed evidence is sufficient is a question of law. As such, there are no factual issues for this Court to resolve, but only legal issues. Therefore, all of the issues raised in this Motion to Recommit and Objections to Referee's Order are subject to *de novo* review by this Court.

ARGUMENT

I. THE FIRST TWO HOME POLICIES PROVIDE COVERAGE FOR VIAD's EXPENSES RESULTING FROM THE CWQCRB's ABATEMENT ORDER WITHOUT THE NECESSITY OF FILING SUIT AGAINST THE BOARD, BECAUSE THE LANGUAGE OF THE TWO POLICIES EXPRESSLY INCLUDES SUCH ADMINISTRATIVE ORDER EXPENSES AS PART OF THE "LOSS" WITHIN THE POLICIES' COVERAGE. HOME ADMITS THAT THE THIRD POLICY PROVIDES COVERAGE ON THIS ISSUE.

A. Viad's Remediation Expenses Incurred as a Result of the CWQCRB's Administrative Order Constitute Loss and Damages that are Covered by the First Two Home Policies because "damages" is not restricted and is further defined to include "claims", which under California law Specifically Includes Injury Resulting from Administrative Orders. Home Admits that the Third Policy Provides Coverage on this Issue.

A divergence of opinion between California courts and a majority of other states' courts has developed as to whether certain commercial general liability insurance policies provide coverage for the injuries or expenses that an insured has incurred as a result of being required to comply with administrative orders issued by governmental agencies or boards.[2] The majority of courts across the country have held that "damages" is a broad term that encompasses the injury or expenses that an insured incurs as a result of being compelled to comply with an order of a governmental agency or board within the plain meaning of commercial liability insurance policies that provide coverage for damages for which an insured becomes liable. *AIU Ins. Co. v. Superior Court*, 799 P. 2d 1253, 1262-63 (Cal. 1990) (noting that most state court decisions have concluded that cleanup costs incurred under environmental statutes are covered by liability policies)[3]; *Central Illinois Light Co. v. Home Ins. Co.*, 821 N.E. 2d 206, 222-24 (Ill. 2004) (holding that an insured responding to a claim by a regulatory authority for cleanup under

[2] *See Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 869 A.2d 82, 89 (Vt. 2004).

[3] "[T]hese decisions have generally held that the costs of reimbursing governments or third parties for their remedial and mitigative efforts are covered, either because such costs are plainly 'damages' that the insured is 'legally obligated to pay as a result of 'property damage', or because these phrases are ambiguous and therefore must be resolved in favor of coverage. . . ." *Id.*

environmental regulations is covered as 'damages' an insured is 'legally obligated to pay,' and recognizing several cases from other jurisdictions that ruled cleanup costs were damages insureds were legally obligated to pay even if an action had not yet been filed).

The California Supreme Court has issued three cases that purport to explain the present rule in California. The first California case is known as *Certain Underwriters of Lloyd's v. Superior Court*,[4] 16 P. 3d 94 (Cal. 2001) and is called "*Powerine I*" because the insured in that case, Powerine Oil Company, sought to obtain coverage under its insurance policies based upon its costs of remediation as a result of complying with cleanup and abatement orders by the regional water boards pursuant to the Water Quality Control Act.

In *Powerine I*, the California Supreme Court ruled that the liability policy in that case *impliedly* precluded coverage to the insured, Powerine Oil Company, because the use of the word "damages" implied that the policy only provided coverage for money ordered by a court to be paid pursuant to a lawsuit. The court addressed commercial general liability policy language that provided coverage for "all sums that the insured becomes legally obligated to pay as damages." *Id*. at 100.

In so ruling, the California Supreme Court adopted an artificial and convoluted analysis that (a) required an insured *under the policy in that case* (providing a duty to defend) to refuse to comply with a governmental or regulatory order so that the expenses of remediation it incurred would be converted into "damages" when a lawsuit was filed, and (b) rejected the commonly understood meaning of the word "damages," which is understood by most people as including

[4] In an earlier case the California Supreme Court addressed the issue of whether an insurer's duty to defend an insured in a "suit seeking damages" was limited to a civil action prosecuted in a court and held that it was. *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co*., 959 P. 2d 265 (Cal. 1998). *Foster-Gardner* dealt with the duty to defend and the term "suit," but nonetheless the court later relied upon this ruling in its *Powerine I* decision.

expenses incurred by an insured whether or not those expenses were the result of a lawsuit.[5] The California Supreme Court's ruling has been roundly rejected by commentators and courts across the United States as creating an artificial and incorrect distinction between expenses and "damages."

In 2005, the California Supreme Court had an opportunity to revisit the issue of whether a commercial liability insurance policy provides coverage for expenses incurred by an insured in complying with an administrative order issued by a governmental agency or board. In two cases that were issued the same day, the California Supreme Court attempted to explain and limit the *Powerine I* rule, but still did not overrule *Powerine I*. In one of the cases, now known as *Powerine II*, Powerine Oil Company's case made it back to the Supreme Court on different insuring agreements. *Powerine Oil Company v. Superior Court*, 118 P. 3d 589 (Cal. 2005) (*Powerine II*). In another, the County of San Diego sought coverage under its policies for responding to an abatement order and for costs incurred settling claims outside of lawsuits. *County of San Diego v. Ace Property & Co.*, 118 P. 3d 604 (Cal. 2005).

In *Powerine II*, the California Supreme Court held that the central insuring agreement[6] included language that broadened the meaning of damages so that coverage would not be limited to money awarded in a court suit, but included remediation expenses incurred as a result of a governmental order. The Court looked at the following language in the policy in that case:

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

[5] *See, e.g., Aerojet-General Corp. v. Superior Court*, 211 Cal App. 3d 216, 257 Cal. Rptr. 621 (1989) (finding that from the standpoint of the lay insured damages could include any sum expended under sanction of law).
[6] A central insuring agreement is the clause in the beginning of an insurance policy that tells what is being insured.

The policy then went on, as is referenced in the central insuring clause, and defined the Ultimate Net Loss as follows:

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

The court focused on the fact that the insuring language included "expenses" and referred to the "ultimate net loss," which was defined in the policy to include expenses for litigation, and investigation (among other) costs. The court held that the policy language was clearly not intended to be limited to merely monetary sums awarded by a court in a lawsuit, and that the policy language provided coverage for the insured's remediation expenses in responding to an administrative order. *Id* at 603.

In *County of San Diego*, the California Supreme Court examined policy language different from the insuring language in *Powerine II* and held that the central insuring language referred only to coverage for "damages," and as such the term limited coverage to *only* sums ordered by a court to be paid. *County of San Diego*, 118 P. 3d at 616. The policy language the court examined in that case provided coverage for:

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

The court rejected the County's argument that the definition of ultimate net loss expanded the definition of damages because ultimate net loss was neither referenced nor included in the central insuring agreement language. Citing *Powerine I*, the court held that because the term "damages" did not expressly or intentionally incorporate the ultimate net loss definition in any way, nor refer to expenses, "damages" were limited to sums ordered by a court. *Id*. As such, where the insuring language does not expressly include "expenses," refer to the ultimate net loss, or further expand "damages" in any way, the California Supreme Court holds that it will limit damages to money awarded by judgment of a court.

In the present case, the first two Home Policies contain the following central insuring language describing losses that are covered:

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

Just like in *Powerine II*, the Home Policies incorporate by reference a "loss as hereinafter defined." In searching through the Policies, however, the only excess "loss" that is defined anywhere in the policy is the term "Ultimate Net Loss." Thus, "excess loss hereinafter defined" can only refer to the Ultimate Net Loss.

The term "Ultimate Net Loss" is then defined as follows:

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

> of judgment) ***paid by the Insured … in investigating, defending and settling occurrences, claims and suits covered hereunder*** … shall be pro-rated between the Insured and the company in proportion to their respective interests in the amount of Ultimate Net Loss paid. (emphasis added).

Importantly, the term "Ultimate Net Loss" in the Home Policies defines the loss to include "damages," but then immediately qualifies the term "damages" by the parenthetical clause "as determined by settlement or adjustment of claim or claims as hereinafter provided, or final judgment." As such, the term "damages" cannot possibly be limited to money recovered in a lawsuit, because the Home Policies specifically and expressly state that the damages that constitute the Ultimate Net Loss, may be recovered in "settlement or adjustment of claim or claims."

California courts have made clear that the word "claim" is far broader than lawsuit. *PowerineI* , 118 P.3d at 602 . They hold that the word "claim" specifically covers matters before a lawsuit. In fact, *Powerine I*, specifically held that "a proceeding conducted before an administrative agency pursuant to an environmental statute does not constitute a 'suit,' i.e., a civil action prosecuted in court, but rather implicates a 'claim.' *Powerine I*, *supra*, at 103. The concept of damages determined by "adjustment of claim or claims" clearly includes monies that are paid before any lawsuit is filed, as the Court in *Powerine I* specifically held. Therefore, by clear definition of damages as including "claims," the first Two Home Policies incorporate the precise word that the California Supreme Court says is necessary to create coverage for expenses resulting from compliance with administrative orders such as the CRWQCB Abatement Order.

The first two Home policies at issue contain policy language like that addressed in *Powerine II*, and clearly do not limit or restrict "damages," but rather expand the term, and as such provide coverage. Just as discussed in *Powerine II*, the central insuring agreement in the

Home Policies expressly more fully defines damages that are covered under the policy by referring to "excess loss as hereinafter defined". The central insuring agreement clearly states that "excess loss" is further defined in the policy. The only further definition of loss is through the definition of "ultimate net loss." Therefore, the provision, to make any sense at all, must incorporate the definition of Ultimate Net Loss.

Where an insurance policy first purports to define a term, then fails to define it, at the very least, the term is capable of more than one reasonable interpretation, the policy is thus ambiguous as a matter of law, and such ambiguity should be construed against the insurer and in favor of the insured. The Referee in the present case, however, failed to apply this rule. Instead, the Referee clearly erred by construing the insurance policy in favor of the insurance company. This is contrary to the law regarding insurance contract interpretation. *See, e.g., Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 828-29, 12 Cal. App. 4th 715, 737 (Cal. 1st Dist. App. 1993) (holding that policy ambiguities are construed against the insurer); *Powerine II*, 118 P.3d at 598 ("If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage.").

The Referee completely ignored the "hereinafter defined" language and then incredibly found that "excess loss **as hereinafter defined**" does not mean that it is really defined later on in the Policies, like one would expect (emphasis added). Instead, the Referee ignored the meaning of "herein after defined" and said it merely refers to the fact that the policy is an excess policy. The Referee then attempted to explain her conclusion by stating that loss is "clearly specified in the next paragraph." Order, p. 5. The "next paragraph" to which the Referee refers is Paragraph

"II, "Limit of Liability." This paragraph, however, explicitly refers to "ultimate net loss" (explaining that the limit of liability will be for "the ultimate net loss excess of $750,000"). Thus, by referring to Paragraph II for explanation of "excess loss" in Paragraph I, the Referee points to a provision describing it as "Ultimate Net Loss." In fact, "excess loss" can mean nothing other than ultimate net loss, which is specifically defined, as Paragraph I states it is ("hereinafter defined").

In contrast to Home's policies presently at issue, in the policy considered in *County of San Diego* the central insuring agreement made *no* reference to ultimate net loss, or loss further defined anywhere in the policy. *See County of San Diego*, 118 P. 3d at 609. As noted by the court, the language in the central insuring agreement of the excess policy at issue in that case was more similar to the policy considered in *Powerine I* "which, like the standard CGL policy considered in *Powerine I*, utilizes 'damages' as the sole term of limitation of the indemnity obligation under the insuring agreement." In contrast, here the first two Home policies state that Home "agrees to indemnify the insured against excess loss as hereinafter defined. . . ." This is clearly different from the policy language in *County of San Diego* and *Powerine I*, and further defines "damages." Accordingly, "damages" is not limited to mean only money judgments.

Next, Home's policy is further distinguishable from the language of *County of San Diego*'s policy because it does not contain the "no action" clause found in that policy, and Home disclaims any duty to defend. The *County of San Diego* Court explained additional factors that weighed in favor of the court following the limited reading of damages adopted in *Powerine I* were the following policy provisions:

i. "[N]o action shall lie against the company unless, as a condition precedent thereto, . . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

ii. Insured "shall not, except at [its] own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the occurrence."
County of San Diego, 118 P. 3d at 616.

In contrast to these provisions relied upon by the *County of San Diego* court, the Home Policies at issue contain no similar provisions.[7] Thus, none of the reasoning applied by the County of San Diego court applies to the First Two Home Policies. It is clear that Home's Policy language includes expenses, did not limit "damages," and is distinguishable from the *County of San Diego* policy.

B. Additionally, the First Two Home Policies Provide Coverage for Remediation Expenses Incurred by Viad Resulting from the CRWQCB's Abatement Order, Because the Term "Expenses" is Included in the definition of Ultimate Net Loss.

The California Supreme Court in *Powerine I, II,* and *County of San Diego* also holds that where "damages" are more fully explained by incorporation of the term "ultimate net loss" which includes "expenses," then costs associated with responding to clean-up or abatement orders by a regulatory authority are covered. The central insuring agreement in Home's First Two Policies likewise incorporates and refers to the "ultimate net loss" by providing coverage for "excess loss hereinafter defined. . ." The Ultimate Net Loss paragraph expressly states that

The Referee erroneously concluded that even when the expenses are inserted within the same paragraph as the definition of "ultimate net loss" they are not part of the "ultimate net loss." This conclusion leads to an illogical result because these expenses are included within the definitional section entitled "Ultimate Net Loss."

[7] The only provision of Home's policy prohibiting payments states that "[i]t is further understood that the Insured shall not *make settlement of any claim or* group of claims . . . without the consent of the Company." As Viad argued in its Brief in Support of Coverage, this provision is in conflict with other policy provisions, but in any event, even if

But most importantly, the definition of "damages" in the Ultimate Net Loss section clearly includes expanded "damages," i.e., damages resulting from settlement or adjustment of claims, which cannot be limited to lawsuits because settlements and adjustments of "claims" occur before, during, and after lawsuits. The Referee's conclusion that these expenses in the definition of Ultimate Net Loss are not part of the Ultimate Net Loss fails to consider that the expanded definition of "damages" and concomitant "expenses" both belong under the same definitional section, and logically must be treated the same. The Referee compounds her error by now asserting that the expenses are those "covered hereunder." The Referee, however, fails to consider the language just before the words "covered hereunder" – those words are "claims and suits". Again, "claims" means more than just "suits." *See Foster-Gardner, Inc*., 18 Cal. 4th at 877 ("A 'claim' can be any number of things, none of which rise to the formal level of a suit. . . ."). How can expenses logically be limited to "suits" (lawsuits) when they also expressly include expenses for "claims"? The Referee's analysis is simply incorrect.

Finally, the first two Home Policies contain a specific clause telling us how to the policies should be interpreted. In Paragraph VII. D, the policies state:

> The contract shall be considered an honorable undertaking, the purposes of which are **not to be defeated by a narrow or technical construction of its provisions**, but shall be **subject to a liberal interpretation** for the purpose of giving the effect to the real intention of the parties hereto. (emphasis added).

As such, in addition to the general insurance contract interpretation rules, the Referee was required to construe the first two Home Policies *liberally* in favor of their intended purpose, i.e., to provide coverage to Viad. In interpreting the policy language liberally in order to effectuate the policies' purpose, there is only one reasonable meaning of "excess loss," where the provision

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valid and enforceable, it mentions only settlement of a claim, not "expenses," which the court focused on for determining whether environmental cleanup response costs are covered.

states it is further defined: it is the same as the "ultimate net loss" which is defined in the first two policies. If there is a question it should be resolved in Viad's favor. To the contrary, the Referee's interpretation is a narrow, technical construction prohibited by the policy terms.

C. Home Admits that the Third Policy Provides Coverage for Expenses Incurred by Viad for Remediation Due to the CRWQCB's Order, and the Referee's Reasoning for Concluding that the Third Home Policy Provides Coverage Applies with Equal Force to the First Two Home Policies.

The Third Home Policy contains language that is almost identical to the policy language used in the *Powerine II* case, and similar in substance to the policy language in the first in second Home policies. The Third Home Policy contains the following language:

> "The Company hereby agrees. . . to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of liability. . . for damages, direct or consequential and expenses, all as more fully defined by the term 'ultimate net loss' on account of . . . (ii) Property Damage. . . .

This language therefore clearly provides coverage for expenses resulting from complying with administrative orders, and the Liquidator admits that the Third Home Policy provides coverage on this issue.

The Referee agreed and held that:

> Because the Insuring Agreement in the third Home policy includes the term expenses and incorporates the definition of Ultimate Net Loss, which is **defined to include payments incurred by reason of property damage through compromise** and specifically listed expenses, the language of the Insuring Agreement of the third policy requires Home to Indemnify Viad for the remediation costs incurred.
> Order, p. 6

This same analysis applies to the first two Home Policies, because they likewise define "damages" in the Ultimate Net Loss expanded definition as including payments incurred "as determined by settlement or adjustment of claim or claims" – in other words damages includes payments "through compromise." As such, the Referee's analysis for holding that the Third

Home Policy provides coverage on this issue applies with equal force to the First Two Home Policies.

II. VIAD CARRIED ITS BURDEN OF PROOF BY PRESENTING EVIDENCE OF WHEN THE CONTAMINATION BEGAN AND WHEN IT ENDED, THUS SHIFTING THE BURDEN TO HOME TO PROVE THAT NO APPRECIABLE DAMAGE OCCURRED DURING HOME'S POLICY PERIOD. UNDER CALIFORNIA'S CONTINUOUS TRIGGER RULE, HOME MUST THEREFORE INDEMNIFY VIAD TO THE FULL EXTENT OF EACH POLICY.

A. The Referee Erred by Rejecting as Mere Allegations Viad's Unrefuted Evidence and Expert Testimony That an Occurrence Took Place During Home's Policy Periods.

In proving that an environmental contamination occurred so as to implicate coverage a general liability insurance policy, the initial burden is on the insured to show that the injury more likely than not occurred during a period of coverage. *Armstrong World Industries, Inc., v. Aetna Cas. & Surety Co.*, 45 Cal. App. 4th 1 (Cal. 1st App. 1996), at 46-47. While the insured bears the burden of proving that a policy has been triggered, "if the insured proves when the contamination began and when it ended or was discovered, the trial court should presume that property damage was continuous from its initiation until the time of clean-up or discovery." *Domtar, Inc., v. Niagara Fire Ins. Co.*, 563 N.W. 2d 724, 732 (Minn. 1997) (applying the continuous trigger theory); *see also Towns v. Northern Security Ins. Co.*, 2008 WL 2941568, ¶ 32 (Vermont 2008). In the present case, Viad clearly proved that the contamination of the Site began in 1954 (and for No. 1 diesel fuel, 1966) and ended in 1973. But, Viad proved much more than this. Viad went further and through the testimony of Dr. Ries, proved that such contamination probably occurred during all three Home Policy periods. As such, Viad carried its burden of proof. The Liquidator, however, failed to carry its burden of proof in any way. The Referee therefore erred in finding that Viad failed to carry its burden of proof on this issue.

All relevant evidence is admissible. *N.H. R. Evid*. 401. Both direct and indirect (circumstantial) evidence are equally relevant and probative where each addresses a material issue of fact, and the distinction between the two types of evidence is irrelevant to the strength of a case. *Sylvester v. SOS Children's Villages Illinois, Inc*., 453 F.3d 900, 903 (Cir. 7th 2006). A trier of fact must look to the evidence presented as a whole in resolving issues, but in some cases, circumstantial evidence may be even more compelling than direct testimony of eye witnesses because "eye witness testimony. . . . depends for its accuracy on the accuracy of the eyewitness's recollection as well as on his honesty." *Sylvester*, 453 F. 3d at 903. *See also U.S. v. Glenn*, 312 F.3d 58, 70 (Cir. 2d 2002)(finding that circumstantial evidence can be as compelling as direct evidence).

Admitted but unrefuted evidence must be accepted as true and it is error to reject it. *Michael v. Roberts*, 23 A.2d 361, 91 N.H. 499 (1941) (finding that the only evidence in the case regarding a certain point must be accepted as true). Rejecting uncontradicted facts is not permitted because a trier [of fact] would be required to make assumptions on the basis of non-existent facts, which it cannot do. *Zwiercan v. International Shoe Co.*, 176 A. 286, 87 N.H. 196 (1935). In the instant case, Viad introduced both direct and circumstantial evidence of its injury/damages and that the contamination injury occurred between 1954 and 1973. Because that evidence was neither refuted nor contradicted, it must be accepted as true. The Referee does not, therefore, have the discretion to ignore or deny Viad's evidence of damage/injury during the Home policy periods at issue.

The sole and unrefuted evidence presented by Viad demonstrated that the occurrences for which coverage is sought could only have taken place between 1954 and 1973, and those occurrences were likely the result of accidental spills, overflows, and leakage. Because the

Liquidator did not refute or contradict this evidence the only reasonable conclusions that can be drawn from the uncontroverted evidence (which must be accepted as true) are that: (1) accidental, not intentional spills were the cause of the groundwater contamination, and those spill could only have occurred between 1954 and 1973; (2) the underground piping/line leakage that contributed to the groundwater contamination must have occurred during the period from 1966 through 1973, which is almost identical to the time period that the Home Policies were in effect; (3) the time period for which the Home Policies at issue provide coverage was the period 1966 through 1972, and (4) the occurrences more likely than not occurred during Home's Policy periods, and (5) as a matter of scientific fact, the leakage in the pipes of No. 1 diesel fuel could only have taken place during Home's policy period, unless some miraculous event occurred and the pipes all deteriorated and leaked within a period of one year, from 1972-1973. The Referee's rejection of this evidence as "general allegations" is clearly contrary to law as no refuting facts were introduced by the Liquidator.

In a similar case the court in *Westling Manuf. Co., Inc. v. Western Nat'l Mut. Ins. Co.*, 581 N.W.2d 39 (Mn. Ct. App. 1998) found that because "there was no evidence of an intentional spill at the location of the concrete pad, "by process of elimination, the *circumstantial evidence* supports the possibility that the event was an accident, an unexpected, unfor[e]seen, or undesigned happening or consequence." (emphasis added) The court in *Westling* also took note of the evidence that known prior spills had been accidental in nature such that the jury's conclusions that the contamination occurred accidentally were not conjectural.

B. Viad's Evidence Was Sufficient to Demonstrate that Occurrences During the Policy Periods Triggered Each of the Home Policies and the Referee Applied the Wrong Legal Theory as to Trigger of Coverage.

California applies the "continuous trigger" theory to establish whether an insurance policy is triggered so as to provide coverage for property damage resulting from an occurrence, continuous, or progressively deteriorating damage or injury. *Montrose Chemical Corp. v. Admiral Ins. Co*., 913 P.2d 878 (Calif. 1993); *Armstrong World Industries, Inc. v. Aetna Cas. & Surety Co*., 45 Cal. App. 4th 1, 43, 63 (Calif. App. 1996). Under the continuous trigger theory ". . .absolute precision is not required as to when the injury occurred. All that is necessary is reasonably reliable evidence that the injury . . .more likely than not occurred during a period of coverage."[8] *Armstrong World Industries, Inc.*, 45 Cal. App. 4th at 47 (emphasis added)(internal quotations omitted, quoting *American Home Products Corp. v. Liberty Mut. Ins. Co*., 565 F. Supp. 1485, 1509 (S.D.N.Y. 1983).[9] Accordingly, the timing of an occurrence is "largely immaterial to establishing coverage: it can occur before or during the policy period. . . It is only the effect-the occurrence of . . . property damage during the policy period . . . that triggers potential liability coverage." *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 10 Cal. 4th 645, 673-674 (Cal. 1995).

Equally important is the fact that an "insurer is responsible for the full extent of the insured's liability (up to the policy limits), not just for the part of the damage that occurred during the policy period . . . It is irrelevant that the damage took place across several policy periods and only a part of the damage occurred during any particular policy period." *Armstrong*

[8] As previously stated, an occurrence can be proved by the use of documents, testimony, direct, indirect or circumstantial evidence. *State v. Wayne Kelley*, 120 N.H. 14, 16, 413 A.2d 300, 302 (1980)(facts may be proven by circumstantial evidence). "Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved." *State v. Gruber*, 132 N.H. 83, 93, 562 A.2d 156, 162 (N.H. 1989) (citing *State v. Canney*, 112 N.H. 301, 294 A.2d 382 (1972)).

[9] *See also Domtar, Inc. v. Niagara Fire Ins. Co.* 563 N.W. 2d 724, 732 (Mn. 1997) (holding that a policy is "triggered" by damage occurring during the policy period when the insured proves when the contamination began and when it ended or was discovered, at which time "the trial court should presume that property damage was continuous from its initiation until the time of clean-up or discovery"); *Chemical Leaman Tank Lines, Inc., v. Aetna Cas. And Surety Co.*, 89 F.3d 976, 995 (Cir. 3d 1996) (citing *Owens-Illinois, Inc. v. United Ins. Co*., 650 A.2d 974, 981 (N.J. 1994) and holding that under the continuous trigger theory "exposure to the harm causing agent is

World Industries, Inc., 45 Cal. App. 4th at 105-106. These rules, as applied to the facts of the instant case, provide that Viad's burden is not to show precisely when, where, and how, an event or occurrence took place, rather, Viad is only required to demonstrate that an occurrence more likely than not took place during some portion of the coverage period. Here, although the Referee correctly quoted California law in applying the continuous trigger theory, the Referee incorrectly applied the "injury-in-fact" trigger theory by requiring Viad to demonstrate that an occurrence "in fact" took place during the policy periods.[10] Because this ruling imposes an incorrect trigger of coverage on Viad the Referee erred as a matter of law. As further outlined below, the Referee also erred by rejecting Viad's uncontradicted and reasonably reliable evidence that confirmed an occurrence(s) occurred during a "period of time" that encapsulated the Home policies' coverage period.

C. Viad Proved, Pursuant to The Continuous Trigger Theory, That an Occurrence Took Place Some Time During the Policy Period.

Applying the continuous trigger theory to the facts presented, it is indisputable that Viad met its burden of proof by demonstrating that more likely than not occurrences took place during the coverage period. Specifically, at the hearing, Viad produced testimony from Dr. Ries that: there was no record of fuel being used at the Property prior to 1954;[11] gasoline was used at the Property from 1954 to 1966;[12] No. 1 diesel fuel was used at the Property from 1966 to 1972-1973;[13] evidence of overfilling and spillage of the underground tanks was found at the

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sufficient to trigger potential coverage. Actual manifestation of the injury is not required, so long as there is a continuous, indivisible process resulting in damage").

[10] See page 8 of the Referee's ruling wherein it is stated: "The burden to demonstrate an occurrence requires more than general allegations based on length of time and existence of gasoline and fuel oil on site. It requires a demonstration that there were**, in fact, occurrences during the period in which the Home policies were in place. Viad has not met that burden."** (emphasis added).

[11] App. A., pp. 19

[12] App. A, pp. 25

[13] App. A, pp. 55-56.

Property;[14] there was evidence of some leakage from the piping system in use between 1954 and 1973;[15] "an overflow of sufficient volume to saturate the soils from the source all the way down to the water. . . could have occurred in probably a few weeks, and that the same would be true for any underground piping leaks;"[16] and that since gasoline and No. 1 diesel were the main contaminants found in the groundwater,[17] the only possible conclusion to be drawn from these facts is that the groundwater could only have been contaminated with gasoline or #1 diesel between 1954 and 1973.[18] There is no other time period when the products were used on the Property and no evidence was presented by the Liquidator to prove the groundwater contamination was the result of any another source.

Based on these facts Dr. Ries testified to a reasonable degree of professional certainty, that: groundwater contamination was likely the result of accidental tank overfills, accidental pump spills, and piping leaks;[19] the No. 1 diesel contamination or events resulting in such contamination could only have occurred during the time period between 1966 and 1973; and that a "significant portion of [any underground piping] leakage would have toward the end of that period.[20] Viad also introduced the Home Policies which reflected a coverage period from 1966 to 1972. Together, these facts unequivocally demonstrate that an occurrence took place during the policy periods and the Liquidator admitted no evidence to demonstrate otherwise. Once these facts are accepted as true, which they must be, the only reasonable conclusion to be drawn

[14] App. A, p. 18, lines 22-24
[15] App. A, p. 19 lines 8-11.
[16] App. A, pp.45-46.
[17] App. A, p. 27.
[18] App. A, p. 59; App. B, ¶¶. 5 and 14 , App. C, ¶8.
[19] App. A, pp. 20, 32, 57, 66. Ries concluded that overspills occurred during the coverage period based on his knowledge of Greyhound's experience that virtually all of its locations have occasionally had tanks filled beyond their capacity, and on those occasions "the fuel overflows and actually spills out."
[20] App. A, pp. 27, 56-59; App. B, ¶¶. 5 and 14 , App. C, ¶8.

is that Viad has met its burden of proving that an occurrence(s) took place during the coverage period.

D. The Referee Erred by Rejecting Viad's Undisputed Evidence that An Occurrence Took Place During the Coverage Period.

The Referee's ruling suggests that Viad cannot possibly prove an occurrence took place unless it presents uncontroverted evidence of dates, times, and places of specific events. Pointedly stated, Viad is not required by California law to meet the Referee's imputed higher "injury-in-fact" standard.[21] Such a position is tantamount to requiring eyewitness testimony to prove a shooting, when the victim was obviously dead of a bullet wound. Since the only conclusion to be drawn is that a shooting occurred, an eyewitness to it is unnecessary. So too, here, there can be no other conclusion but that the gasoline and #1 diesel contaminating the groundwater was the result of accidental spills or accidental tank overflows that could only have occurred during the time period during which the fuels were on the Property: 1966-1973, which also happens to be the same as the insurance policy coverage period. The Referee erred by rejecting this immutable conclusion.

Because there is no distinction between the probative value of circumstantial evidence and direct evidence, Viad's testimonial, documentary, and circumstantial evidence clearly meets the requirement that reasonably reliable evidence demonstrate an occurrence during some portion of the coverage period (as per *Armstrong World Industries, supra*). Furthermore, because California law does not require evidence of specific spills the Referee's wholesale dismissal of the facts presented is error as a matter of law.

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[21] In addition to the California law already cited, *see also Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Surety Co.*, 89 F.3d 976, 995(Cir. 3d 1996)(finding that undisputed evidence of discharges over a period of time was sufficient as a matter of law to establish that property damage occurred and triggered coverage for each policy providing coverage during the period of discharge); and *Towns v. Northern Security Ins. Co.*, 2008 WL 2941568

III. VIAD CLEARLY CARRIED ITS BURDEN REGARDING THE SUDDEN AND ACCIDENTAL DISCHARGE PROVISION OF THE THIRD HOME POLICY.

The insurer bears the burden of proving that an exclusion to insurance coverage applies, and exclusionary language must be plain, clear, and conspicuous. *ML Direct, Inc. v. TIG Specialty Insurance Co.*, 79 Cal. 4th 137, 141-142, 93 Cal. Rptr. 2d 846, 850 (Cal. App. 2d Dist. 2000).[22] While the insured bears the burden of proving that an exception to a coverage exclusion applies, such exception provisions are construed broadly in favor of the insured, and in light of the insured's objectively reasonable expectations. *See Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 10 Cal. 4th 667.[23] Here, because the first two Home policies do not contain a pollution exclusion clause, there is no applicable sudden and accidental exception at issue.

Regarding the third Home policy, however, the pollution exclusion in that policy provides coverage for occurrences that are sudden and accidental, and which unexpectedly and unintentionally result in property damage. In the context of pollution exclusions, while courts vary in their interpretations of the meaning of the terms "sudden and accidental," an accidental event under California law is considered an event that is unexpected and unintended. *See Shell Oil Co. v. Winterthur Swiss Ins. Co*., 12 Cal. 4th 715, 15 Cal. Rptr. 2d 815.[24] An event is considered "unexpected" if the insured did not know or believe the event was substantially certain or highly likely to occur. *A-H Plating*, 57 Cal. 4th App. at 436. Moreover, "sudden and accidental discharge of a dangerous pollutant could continue unabated for some period because of a negligent failure to discover it, technical problems or a lack of resources that delay

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(Vt. 2008)(finding that evidence of spills or discharges during a particular time period were damage-producing occurrences sufficient to trigger coverage).

[22] *See also Intel Corp.*, 952 F. 2d at 1561-62 (affirming summary judgment in favor of the insured and holding that the insurer made no showing that the contamination fell within the exclusion in its policy); *Dart Indust., Inc. v. Commercial Union Ins. Co*., 52 P. 3d 79 (Cal. 2002).

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

curtailment, or some other circumstance,…" and still constitute "sudden and accidental. *Shell Oil, supra,* at 756.

Through the testimony of Dr. Ries, which is the only and undisputed evidence presented on this issue, Viad carried its burden of proving the applicability of the sudden and accidental exception to the pollution exclusion. Specifically, Dr. Ries testified that the groundwater contamination was, to a reasonable degree of professional certainty (an even stronger position than the "more likely than not" requirement of *Armstrong, supra*.), the result of accidental spills or tank overfills, and leaks from corrosion holes found in buried fuel lines.[25]

Because Viad's evidence was unrefuted and uncontradicted it must be accepted as true, and Viad carried its burden of establishing entitlement to coverage based on the sudden and accidental exception to the pollution exclusion of the third Home policy. *See Intel Corp.*, 952 F. 2d at 1561 (granting summary judgment in favor of insured where insurer provided no evidence showing that pollution claim fell within terms of a pollution exclusion). The Referee erred as a matter of law in rejecting Viad's unrefuted evidence regarding the applicability of the sudden and accidental exception to the pollution exclusion of the third Home policy, particularly because the Liquidator presented no evidence to the contrary.

IV. THE "OWNED PROPERTY" EXCLUSION DOES NOT APPLY, BECAUSE VIAD DID NOT HAVE ANY "CARE, CUSTODY, OR CONTROL" OF THE CONTAMINATED GROUNDWATER AND CONTRARY TO THE REFEREE'S RULING, THE *SHELL OIL* CASE HAS NO APPLICABILITY ON THIS ISSUE.

Pursuant to California law, groundwater is owned by the people of California, and therefore cannot be "owned" property of an insured property owner (or lessor). *See California Water Code*, § 102; *A-H Plating*, 57 Ca. App. 4th 427, 442. *See also AIU Ins. Co. v. Superior*

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[24] *See also A-H Plating, Inc. v. American Nat'l Fire Ins. Co*., 57 Cal. 4th 427, Cal. Rptr. 2d (2d. App. 1997); *Intel Corp. v. Hartford Accident & Indemnity Co.*, 952 F. 2d 1551, 1561-62 (9th Cir. 1991).
[25] App. A, pp. 28-29, lines 3-25, lines 1-8; App. B, ¶¶ 5 and 15, App. C, ¶ 8.

Court, 799 P. 2d 1253, 1261 n.6 (Cal. 1990). Damage to the groundwater constitutes damages to third party property and an exclusion in a liability policy for property owned, leased by, or in the care, custody or control of an insured, does not preclude coverage for cleanup resulting from contaminated groundwater. *See A-H Plating, Inc.* 57 Cal. App. 4th at 442; *AIU Ins. Co.*, 51 Cal. 3d at 818; *Intel Corp.*, 952 F.2d at 1565.

In the present case, the evidence presented showed that Viad was held responsible for clean-up costs and remediation costs related to alleged contamination originating from property that Viad did not own, and Viad's only connection to such property was that its predecessor in interest previously owned it before selling it. At the time of discovery of the contamination, the Site had been sold for two years. Viad in no way had care, custody, or control of such Site. The testimony and evidence further demonstrated that the purpose for the remediation was the contamination of the groundwater and the threat of injury to the public and of contamination to other waters.

In Viad's claim, it is undisputed that, based on the facts and testimony presented, Greyhound owned the property at the time of the spills or overflows causing the contamination for which the CRWQCB sought remediation, but not at the time of the clean-up activities. In fact, Dr. Ries specifically testified that "When Greyhound first received notice of environmental contamination at the San Diego Site in 1989, Greyhound no longer owned or had any interest in the Site."[26] He further stated that "[a]t all times during the remediation of the San Diego Site, Greyhound and subsequently Viad did not exercise any occupation, use, ownership, possession, control, care, or custody over the groundwater under the [Site]."[27] This is the sole, unrefuted evidence. At issue are three of Home's Policies, which as explained above, Viad has met the

[26] App. C, ¶ 5-6
[27] App. C ¶ 6

burden of demonstrating that a covered occurrence took place during Home's policy periods. During that time period when the insured (Greyhound) owned or leased the property, not the time period when any clean-up was conducted. Further, all clean-up activities were conducted to remedy groundwater contamination as relates to Viad's claim, and the CWRQB allege such groundwater contamination damaged or threatened to damage other water sources and other properties.

The Referee relied upon the California case of *Shell Oil, supra*, asserting that this case is more like the facts of *Shell Oil*. Equally as important as the fact that the sole evidence in this case is that Viad had no care, custody, or control of the Site, is the fact that *Shell Oil* simply does not say what the Referee claims it said. *Shell Oil* specifically held that "whether Shell's coverage claims fell within the scope of the exclusion was an issue for the trier of fact." *Shell Oil*, 15 Cal. App. 4th at 759. As such the entire basis for the Referee's ruling on Viad's allege care, custody, or control of the Site is in error.

A. The Liquidator had the burden of proving that the property was in Viad's care, custody, or control, and wholly failed to meet this burden.

It is well-settled that an insurer bears the burden of proving any exclusions apply that it claims bar coverage. *ML Direct, Inc*., 79 Cal. 4th at 141-142; *See also Intel Corp*., 952 F. 2d at 1561-62 (affirming summary judgment in favor of the insured and holding that the insurer made no showing that the contamination fell within the exclusion in its policy). In the present matter, the Liquidator asserted that the owned property exclusion precluded coverage because the property cleaned up was within the borders of the property Viad's predecessor previously owned. This assertion falls far short of meeting its burden that this exclusion applies. Viad presented

reliable, competent evidence that Viad had no ownership interest, control or custody of any of the property during the time that the remediation activities took place.[28]

The costs incurred in responding to the CRWQCB's Order required remediation to clean up and restore the groundwater, involved property previously owned by Viad's predecessor, however it was in response to alleged contamination to other properties and alleged harm or threat of harm to public water sources and other property. Thus, the issue of indemnification Viad seeks is not accurately framed. While Viad's predecessor company previously owned the property that was subject to the Abatement Order for clean-up, Viad had no ownership or control of the property at the time of any of the clean-up efforts, and the clean-up efforts all began based upon the City of San Diego's claims that other property downtown had been contaminated by Viad's former property (as well as by other owners of property in the area). Even if the evidence demonstrating that Viad did not own or control the Site was ignored, the Liquidator has failed to contradict Viad's evidence that the contamination affected or threatened third party property, which accordingly renders inapplicable the owned property exclusion.

B. Regardless of whether the property was in Viad's care, custody or control, the Liquidator still fails to prove that the exclusion applies because damage was alleged and threatened third-party property.

Despite the clear evidence presented that Viad maintained no ownership, care, custody, or control of the property being remediated,[29] even if this evidence is ignored and the Liquidator's mere assertion is accepted, the owned property (or "care, custody or control") exclusion still does not preclude coverage. Where damage is alleged to or contamination threatens third party property, contamination remediation expenses are covered as third party property damage. *See Township of Gloucester v. Maryland Cas. Co.*, 668 F. Supp. 394, 400 (D. N.J. 1987) (holding

[28] See App. A, p. 18; App. C, ¶ 6.
[29] See App. C, ¶6.

that clean-up costs covered even when expenditures include repairs to insured's property where the clean-up costs were inextricably linked to damage claims to a third party); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 754 F. Supp 358, 366 (D. Vermont 1990)(finding that if remedial work to an insured's property was necessary to stop injury to others, such expenses are not excluded by the owned property exclusion). In fact, *Shell Oil* specifically ruled that remediation costs would not fall within the category of property owned or leased by or in the care, custody or control of Shell where such costs for remediation "were necessary to prevent imminent damage to third party property." *Shell Oil*, 15 Cal. Rptr. 2d at 758,843.

The sole evidence presented and testimony in this matter demonstrates that the contamination at issue involved far more than the property than that previously owned by Viad's predecessor. In fact, the entire clean-up effort was prompted by the City of San Diego's development efforts of other downtown property. Dr. Ries testified that:

> [i]n the process of redeveloping a property called Super Plating in downtown San Diego, had, in the course of developing that property, had discovered some contamination on that site. And a Greyhound maintenance bus garage was diagonally opposite that corner. And the belief was, at that time that the Greyhound facility was a source of the contamination on the Super Plating site, and we were so advised of that.

App. A, p. 15, lines 4-14

Further, the Abatement Order clearly alleges damage to third-party property and the threat of damage to other property:

> 19. . . . The on-going discharge of petroleum hydrocarbons to the ground water has resulted in pollution of the ground water and threatens to pollute waters of San Diego Bay for beneficial uses listed in Finding No. 15. Additionally, the on-going discharge violates Resolution 68-16 because the Regional Board finds that the decrease in ground-water quality is not consistent with the maximum benefit to the people of the state.

> 20. These discharges have polluted and threaten to further pollute ground water of the basin and threaten to pollute surface water of San Diego Bay.
>
> 22. . . . The petroleum hydrocarbon concentrations are hazardous to marine life and may impact other beneficial uses of San Diego Bay, as described in Finding No. 15, if allowed to migrate to the Bay.

App. D, Abatement Order 89-49.

As such, the only evidence shows that CRWQCB required the remediation based on contamination to other property and the threat of contamination to further property and bodies of water affecting the public. While it is clear that Viad had no care, custody or control of the property, regardless of that finding, the nature of the contamination takes the damages completely outside of any such exclusion. The Referee (and Liquidator) wholly fail to recognize that the *Shell Oil* court made this distinction, and that *Shell Oil* did not rule that groundwater remediation was property in Shell's care, custody or control, but rather, that a juror may find that it could be, if, and only if, such remediation was not necessary to prevent imminent damage to third party property. In the present case since the remediation was necessary to prevent imminent threat of damage to other property, coverage is clearly provided.

V. THE REFEREE CORRECTLY RULED THAT THE LIQUIDATOR CANNOT RELY UPON LATE NOTICE AS A DEFENSE, BUT BY CONTINUING TO ASSERT LACK OF NOTICE, THE LIQUIDATOR HAS NECESSARILY WAIVED ANY SUBSTANTIVE POLICY DEFENSES.

California law is well established that "where insurers ma[k]e wide ranging denial of any coverage under policies, such denial waive[s] any claim that insurers would have acted differently had they received timely notice." *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715 (Cal. 1st Dist. Ct. App. 1993). By denying liability on substantive issues the insurer waives a right to assert notice as a defense because if there is no liability then it does not

matter whether notice was timely made. *See Wasson v. Atlantic Nat. Ins. Co.*, 24 Cal. Rptr. 665 (1962).

Conversely, it logically follows that if an insurer asserts notice as a defense, then all other coverage defenses are rendered moot, because the two positions are completely inconsistent and mutually exclusive. If there was insufficient notice then any other coverage defenses are moot because the notice, as a condition precedent to coverage, would trump the other defenses. If substantive coverage defenses are asserted, then notice becomes immaterial because coverage will be denied regardless of when notice of a claim is made. In the instant case the Liquidator cannot have it both ways: either a notice defense precludes coverage and Home lives or dies by this coverage defense (e.g., to the exclusion of substantive coverage defenses), or the other coverage defenses render delayed notice moot because Home would have denied the claim regardless of when notice was given.

Here, the Referee correctly determined that the Liquidator could not rely on notice as a defense. The Liquidator, however, has persisted in its defense based upon lack of notice. Therefore, the converse must be true. If the Liquidator persists in claiming lack of notice as a defense, then the Liquidator must necessarily have waived its substantive defenses. Otherwise, the Liquidator is able to have the best of both worlds, and two bites at the apple. By continuing to assert both lack of notice and substantive policy defenses, the Liquidator has improperly forced the Court to rule upon both of them.

The Liquidator also relied on the following the policy provision of the first two Home policies to deny Viad's claim based on Viad's alleged failure to secure Home's consent to incur remediation expense and costs:

> Section VIII. CONDITIONS
>
> . . . .

B. INCURRING OF COSTS

In the event of claim or claims arising *which appear likely to exceed the Underlying limits* no ***Costs*** shall be incurred by the Insured without the written consent of the Company. (emphasis added)

This provision is clearly a condition to coverage. By raising this condition to coverage, the Liquidator has additionally waived any substantive policy defenses.

VI. VIAD REQUESTS A HEARING ON THIS MOTION

Viad respectfully requests a full hearing and oral argument on its Motion to Recommit.

VII. CONCLUSION & RELIEF REQUESTED

For the foregoing reasons Viad asserts that the Referee erred as a matter of law in denying an allowance for insurance coverage for Viad's San Diego claim. Viad prays that this Honorable Court grant a full hearing and oral argument on this Motion to Recommit.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided by U.S. Mail on April 28, 2009, to: Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator of the Home Insurance Company c/o J. David Leslie, Esquire and Eric A. Smith, Esquire, Rackemann, Sawyer & Brewster, P.C., 160 Federal Street, Boston, MA, 02110-1700; Liquidation Clerk, The Home Insurance Company in Liquidation, c/o Merrimack Superior Court, 163 N. Main Street, Concord, NH 03302-2880; and John O'Connor, Esq., Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, DC, 20036-1795.

Respectfully submitted,

VIAD CORP

By its attorneys,

Dated: April 28, 2009

By: /s/ Peter G. Callaghan

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