THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-106

IN THE MATTER OF THE LIQUIDATION
OF THE HOME INSURANCE COMPANY

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

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I. INTRODUCTION

On April 13, 2009, Referee Melinda S. Gehris entered an order upholding the Liquidator's denial of the Proof of Claim submitted by VIAD Corp. ("VIAD") with respect to environmental remediation expenses incurred at its maintenance facility in San Diego, California. Order of April 13, 2009 ("Order").[1] Because the Referee correctly concluded that VIAD has no entitlement to coverage for the expenses associated with the san Diego site, the Court should deny VIAD's motion to recommit and overrule its objections.

II. BACKGROUND

A. Facts Concerning VIAD's Claim

1. The Home Insurance Company ("Home") issued three excess general liability policies to The Greyhound Corporation, which is the predecessor to VIAD.[2] 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 disputed claim proceeding, VIAD sought indemnification from Home for environmental remediation costs incurred by VIAD at a maintenance facility it owned

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[1] While VIAD has submitted proofs of claim for a number of different sites, the Referee's ruling applies only to the San Diego site. By agreement of the parties, VIAD's proofs of claim for such other sites will be evaluated by the Liquidator separately. Order at 1.

[2] 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.

in San Diego, California. The environmental contamination at the site appears to have emanated from underground storage tanks that were used at the site from 1953 to 1989. Ex. 4 at 2.

3. VIAD incurred the costs for which it seeks recovery as a result of an ***administrative cleanup order*** issued by the California Regional Water Quality Control Board for the San Diego Region ("CRWQCB"). Ex. 4 at 1. There was no court order or judgment that required VIAD to incur these costs. Ex. 5 at 40. Although VIAD could 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 CRWQCB 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.

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 allegedly had leaked pollutants into the soil at the site. Ex. 5 at 19-20. Information provided to the CRWQCB 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 surmised 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 actual evidence of such spills actually occurring. *Id.* at 19-20. Moreover, even if such spills had occurred, VIAD's environmental consultant admitted that it was impossible to determine *when* any such spills would have occurred. *Id.* at 20-21.

6. In performing the remediation operations called for by California regulatory officials, VIAD did not remediate property outside of its own property lines. 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.

B. Procedural History

In structuring the disputed claim proceeding at issue here, Referee Paula Rogers ruled that the proceedings would be bifurcated, with the Referee deciding choice of law first and then the parties briefing the coverage issues under the applicable state law. In briefing choice of law, the Liquidator argued that the first two Home policies were governed by New York law, and that the third Home policy was governed by either New York or Arizona law. VIAD argued that all three Home policies should be construed in accordance with California law. *See* Referee Rogers Order of Dec. 4, 2008 at 2. Referee Rogers adopted VIAD's position, ruling that California law would apply to all three Home policies for VIAD's claim with respect to the San Diego site. *Id.*; *see also* Order at 1.

As a result, the parties briefed the coverage issues under California law, and argued their respective positions at a hearing before Referee Gehris on February 4, 2009.[3] On April 13, 2009, Referee Gehris issued an order ruling that VIAD was not entitled to coverage under the Home policies with respect to the San Diego site. In particular, Referee Gehris ruled:

[3] The Liquidator reserved his right to raise different or additional defenses in the event that Referee Rogers' decision to apply California law were reversed.

- That VIAD was not entitled to coverage under the first and second Home policies because the remediation expenses incurred by VIAD did not constitute "damages" under controlling California law. Order at 6;

- That VIAD had not met its burden of proving that an occurrence took place during the periods in which the first and second Home policies were in effect. Order at 6-8;

- That VIAD had not met its burden of proving that covered property damage took place during the period in which the third Home policy was in effect. Order at 8-9;

- That the pollution exclusion in the third Home policy precludes coverage because VIAD did not meet its burden of proving a sudden and accidental discharge of contaminants implicating the third Home policy. Order at 9-10; and

- That the owned property provisions in all three Home policies precluded coverage. Order at 11.

Although the Liquidator did not pursue a late notice defense, and with Referee Gehris recognizing her analysis as *dicta*, Referee Gehris nevertheless stated that the Liquidator would not have been entitled to rely on the late notice provisions in the Home policies because Home would have denied coverage if notice had been timely provided. Order at 12. In addition, Referee Gehris did not decide whether VIAD had breached the voluntary payments and consent-to-settle provisions in the Home policies because she had already found no coverage for other reasons. *Id.*[4] VIAD timely moved to recommit with respect to Referee Gehris's order.

[4] While the Liquidator believes that Referee Gehris's Order correctly concludes, based on the coverage issues addressed in the Order, that VIAD is not entitled to coverage with respect to the San Diego site, the Liquidator notes that a remand to Referee Gehris for consideration of the Liquidator's other asserted coverage defenses likely would be necessary if the Court sustained VIAD's objections to Referee Gehris's Order.

III. ANALYSIS

A. Standard of Review

As VIAD acknowledges, VIAD Mot. at 9, Referee Gehris's rulings on questions of law are reviewed *de novo*, but "[t]he standard of judicial review for findings of fact made by a judicial referee is whether a reasonable person could reach the same conclusion based on the evidence presented." *Bianco, P.A. v. Home Ins. Co.*, 147 N.H. 249, 253, 786 A.2d 829, 833 (2001); *see also In re Reiner's Case*, 152 N.H. 594, 597, 883 A.2d 315, 318 (2005) (referee's findings of fact must be upheld "if a reasonable person could have reached the same decision as the referee"). Where VIAD errs, however, is in its conclusory assertion that all aspects of the Referee's Order involve questions of law and that there are no questions of fact. VIAD Mot. at 9. This is clearly not the case.

While Referee Gehris decided a number of questions of law in construing the Home policies under California law, the Order also resolves at least two questions of fact that must be upheld if a reasonable person could reach the same result found by Referee Gehris: (1) whether VIAD met its burden of proof in presenting evidence of a covered occurrence or property damage, as the case may be, during the Home policy periods; and (2) whether VIAD met its burden of proof to establish that a sudden and accidental discharge of contaminants caused property damage during the third Home policy period.

Whether a party has presented evidence sufficient to meet its burden of proof is a classic question of fact. *In re Rockingham County Sheriff's Dep't*, 144 N.H. 194, 197, 737 A.2d 1130, 1133 (1999); *Byblos Corp. v. Salem Farm Realty Trust*, 141 N.H. 726, 728-29, 692 A.2d 514, 516 (1997). Moreover, California law, which controls here, recognizes that these are pure questions of fact. *See Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 907 (Cal. 1995) ("Whether the damages and injuries were in fact 'continuous' is itself a matter for final

determination by the trier of fact."); *Travelers Cas. & Sur. Co. v. Superior Court*, 75 Cal. Rptr. 2d 54, 62 (Cal. Ct. App. 1998) ("[I]t is axiomatic that the insured has the burden of establishing that the occurrence which forms the basis of the coverage claim is within the basic scope of the insurance coverage."); *Vann v. Travelers Cos.*, 46 Cal. Rptr. 2d 617, 621 (Cal. Ct. App. 1995) (whether a discharge of contaminants is sudden and accidental is a question of fact). Therefore, contrary to VIAD's assertions, the Referee's rulings on trigger of coverage and the pollution exclusion involve questions of fact that must be upheld if a reasonable person could reach the same result.

B. The Referee Correctly Concluded That There Is No Coverage For VIAD's Claim Under the First and Second Home Policies Because Under Established California Law, VIAD's Claim Does Not Constitute "Damages" That Are Recoverable Under the First and Second Home Policies

The remediation costs for which VIAD seeks recovery were incurred pursuant to an *administrative* order issued by California regulators. 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 Referee correctly ruled that no coverage is available under the first and second Home policies because, as a matter of California law, remediation expenses incurred pursuant to an administrative cleanup order do not constitute "damages."

While it successfully advocated for application of California law, VIAD now seeks to distance itself from that position, arguing that "[a] divergence of opinion between California courts and the majority of other states' courts has developed" as to whether administrative cleanup costs are covered under policies such as the first and second Home policies. VIAD Mot. at 10. But whether labeled as judicial estoppel[5] or invited error,[6] or both, VIAD cannot now

[5] "The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in

avoid the application of California law to its claim. As discussed below, and as found by the Referee, California law could not be clearer in holding coverage unavailable to VIAD under the first and second Home policies.

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, as the Referee found, costs incurred by a policyholder pursuant to an administrative 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.

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another phase." *Cohoon v. IDM Software*, 153 N.H. 1, 4, 891 A.2d 552, 555 (2005); *see also Porter v. City of Manchester*, 155 N.H. 149, 156, 921 A.2d 393, 400 (2007).

[6] "Under the 'invited error' doctrine, a party may not avail himself of error into which he has led the court, intentionally or unintentionally." *State v. Goodale*, 144 N.H. 224, 227, 740 A.2d 1026, 1029 (1999).

Three cases decided by the California Supreme Court set out the general framework for this analysis and demonstrate that no recovery is available under the first and second Home policies.

1. ***Powerine I***: In *Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94 (Cal. 2001) ("*Powerine I*"), Powerine faced administrative proceedings initiated by the U.S. EPA and the CRWQCB, in which those agencies had issued administrative orders requiring the policyholder to remediate certain properties in California. *Id.* at 98. Powerine sued its insurers, seeking a declaration that the insurers had a duty to indemnify it for remediation costs incurred in complying with these administrative cleanup orders. Powerine's primary insurers denied any duty to indemnify, arguing that their policies required indemnification only for "damages," and that 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.*

2. ***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 the "damages" issue where a policyholder sought recovery under its excess policies for administratively-ordered cleanup costs. 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 Powerine for administratively-ordered environmental remediation costs. The court reached this result based on differences between the excess 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).

Unlike the policies in *Powerine I*, the excess policies in *Powerine II* contained an Insuring Agreement that provided coverage for damages *and expenses*, including expenses falling within the definition of "ultimate net loss." *Id.* at 602. Because the excess policies' "ultimate net loss" definition 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, based on this specific policy

language, the court held that the excess insurer had a duty to indemnify Powerine for its environmental remediation costs.

3. ***County of San Diego***: On the same day the California Supreme Court issued *Powerine II*, the court also decided *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, as the Referee determined, 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 CRWQCB.

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. As with VIAD, the County did not challenge 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 held that the excess insurer had no duty to indemnify for administratively-ordered remediation expenses. 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 [*Powerine II*] 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 excess 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 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 because: (1) unlike the policies 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 in *Powerine II*, the Insuring Agreement did not incorporate 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.*

* * *

As the Referee correctly concluded, these 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. Order at 5. 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. As the Referee correctly determined, the first and second Home policies, like the Ace policy in *County of San Diego*, 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," nor do they reference or incorporate the definition of "ultimate net loss." Order at 5. Therefore, VIAD's remediation expenses, incurred pursuant to an administrative order, do not constitute "damages" for which Home would have had a duty to indemnify under the first and second Home policies.

C. The Referee Correctly Ruled That VIAD Did Not Meet Its Burden of Proving That Its Claim Triggers Coverage Under the Home Policies

As explained in Section III.B, *supra*, VIAD is not entitled to coverage under the first and second Home policies because remediation costs incurred pursuant to an administrative cleanup order are not "damages" covered by the first and second Home policies. Even if that were not true, however, it would remain the case that VIAD would have a burden of proving a loss that triggers coverage *during the Home policy periods*, and the Referee correctly found that VIAD did not satisfy this burden.

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, 913 P.2d at 881 n.2 (emphasis in original). There are two elements to a trigger of coverage analysis, one legal and one factual. The first element is the legal question of contract construction – what does the insurance policy require to happen during the policy period for coverage to be potentially available? *Id.*

The second element of a trigger analysis is a pure question of fact – whether the policyholder has met its burden of proving facts sufficient to bring its claim "within the basic scope of coverage," *i.e.*, whether the policyholder has proven that the events required by the policy in fact took place during the policy period. *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); *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").

As a matter of contract construction, the Referee correctly concluded that the first and second Home policies require that a covered "occurrence" take place during the policy period, and that the third Home policy requires that covered "property damage" take place during the policy period. Order at 7-9. The Referee also correctly found, as a matter of fact, that VIAD had not met its burden of proving an occurrence during the first and second Home policy periods, or covered property damage during the third Home policy period. *Id.*

1. The First and Second Home Policies Require an Occurrence During the Policy Period, and the Third Home Policy Requires Property Damage 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.

As the Referee correctly held, 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. The few cases construing this type of policy 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.

With respect to the third Home policy, the Referee concluded that the policy provides coverage, subject to all of its other terms, only for property damage taking place during the policy period. The Insuring Agreement of the third Home policy provides that Home will indemnify VIAD 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.

2. The Referee's Finding That VIAD Failed to Meet Its Evidentiary Burden Is Amply Supported By the Record

The Referee found that VIAD did not meet its burden of proving that a covered occurrence (for the first two Home policies) or covered property damage (for the third Home policy) took place during the Home policy periods. This is a finding of fact that the Court must adopt if "a reasonable person could reach the same conclusion based on the evidence presented." *Bianco*, 147 N.H. at 253, 786 A.2d at 833. Referee Gehris's factual determination is well supported by the record.

VIAD offers two threshold arguments in an attempt to avoid its burden of proof, neither of which is availing. First, VIAD concedes that it has "the initial burden to show that the injury more likely than not occurred during a period of coverage," VIAD Mot. at 21, but that California law somehow shifts this burden to the insurer. *Id.* at 7, 21. But the only authority offered for this statement of California law is a decision by the *Minnesota* Supreme Court construing *Minnesota* law. *Id.* (citing *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732 (Minn. 1997)). It is well established as a matter of California law that the burden of proof rests with the policyholder, and there is no support under California law for the proposition that this burden shifts to the insurer. *Waller*, 900 P.2d at 625; *Aydin Corp.*, 959 P.2d at 1215; *Lockhead*, 134 Cal. App. 4th at 194.

Second, VIAD claims that the facts are somehow unrefuted and that, therefore, Referee Gehris was required to accept *any* evidence presented by VIAD as sufficient to meet its evidentiary burden. This argument is based on a misdescription of case law, as the cases cited by

VIAD do not stand for any such proposition.[7] In any event, as Referee Gehris found, VIAD's argument is contrary to the factual record, which clearly demonstrates that VIAD has nothing better than unsupported speculation as to when any occurrences or property damage might have taken place at the San Diego site.

Taken together, the Home policies were in effect from 1966 to 1972. 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 CRWQCB 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, Dr. Kenneth Ries, testified that some pipes used for the underground storage tanks at the site had corrosion holes and had leaked as a result. Ex. 5 at

[7] VIAD cites two New Hampshire cases for the proposition that the Referee was required to accept any scintilla of evidence from VIAD as sufficient to meet its burden in proof. But both of the cases on which VIAD relies – *Michael v. Roberts*, 23 A.2d 361, 362 (N.H. 1941), and *Zwiercan v. Int'l Shoe Co.*, 87 N.H. 196, 176 A. 286 (1935), merely stand for the commonplace proposition that a plaintiff fails to carry its burden when it presents no evidence on a critical element of its case. In such a situation, the trier of fact must accept the defendant's evidence of no liability because the plaintiff has presented no evidence to satisfy its burden of proof. These cases do not stand for the proposition that the party bearing the burden of proof satisfies that burden by presenting *some* evidence on an issue, no matter how weak or improbable.

19. However, Dr. Ries forthrightly testified 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.

Dr. 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, Dr. 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.

Weighing this evidence, which is her function as the trier of fact, Referee Gehris found that VIAD's own environmental consultant could do no better than testify that leaks "probably" occurred between 1952 and 1973 and that the leaks "most likely occurred during the last several

years, because during the earlier years the pipes were less likely to be deteriorated and leak." Order at 8. Based on this testimony, Referee Gehris correctly found that "Dr. Reis also indicated that he could not provide any more clear evidence of when such leaks or spills in fact occurred." *Id.* The Referee thus concluded that to meet its burden, "[VIAD] must do more than rely on the fact that there was gasoline and diesel fuel on site and 'common sense' indicates there must have been spills during the policy period." *Id.*; *see also* Order at 9 ("None of the evidence provided demonstrates property damage at the site during" the third Home policy period). Because VIAD – the party with the burden of proof – could not prove when any occurrence or property damage took place at the site, Referee Gehris determined that VIAD had failed to meet its burden of proving that the Home policies were triggered with respect to the San Diego site. The record, as excerpted above, shows that this factual finding was not only eminently reasonable, but was the only reasonable factual finding based on the record. Therefore, the referee's finding should be accepted by the Court.

D. The Referee Correctly Ruled That There Is No Coverage For VIAD's Claim Under the Third Home Policy Due to That Policy's Pollution Exclusion

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.*[8]

As a matter of California law, a claim can fall within the "sudden and accidental" exception to the pollution exclusion only if the discharge causing the contamination 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

[8] 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. Therefore, the only issue with respect to this exclusion is whether any contamination at the site was caused by a sudden and accidental discharge of contaminants.

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.

Of particular importance with respect to VIAD's claim, California law is clear that environmental contamination caused by leaking underground storage tanks is ***not*** a "sudden" discharge of contaminants for purposes of a pollution exclusion. *ACL Technologies*, 17 Cal. App. 4th at 1787-78. In that case, the California Court of Appeal recognized that the term "sudden" as used in the "sudden and accidental" pollution exclusion encompassed the concept of abruptness, and that whatever "sudden" may mean, "it does not mean gradual." *Id.* at 1788. The court concluded that "[c]orrosion is, by definition, a gradual process."[9] Thus, the exclusion requires proof of spills or other abrupt discharges of contaminants, and contamination from leaks, seepage, or corrosion are subject to the exclusion.

The California Supreme Court has held that, for purposes of a pollution exclusion, the policyholder has the burden of proving that the release of contaminants was "sudden and accidental." *Aydin*, 959 P.2d at 1217-18.[10] Therefore, with respect to the third Home policy,

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[9] The court also found that, as with VIAD's claim, there was no evidence of "any specific trauma to the tanks during the . . . policy period." *ACL Technologies*, 17 Cal. App. 4th at 1795.

[10] Despite *Aydin*, a 1998 California Supreme Court case squarely holding that the policyholder has the burden of proving a sudden and accidental discharge, VIAD inexplicably asserts that the burden of proof was on the Liquidator, citing two inapplicable cases for this dubious proposition (and not citing *Aydin* at all). First, VIAD relies on *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1561 (9th Cir. 1991), a case in which the Ninth Circuit predicted that California courts would assign this burden to the insurer. That prediction turned out to be wrong, however, as the California Supreme Court held seven years later in *Aydin* that the burden rests with the policyholder. Second, VIAD relies on *ML Direct, Inc. v. TIG Specialty Ins. Co.*, 79 Cal. App. 4th 137, 141-42 (Cal. Ct. App. 2000), but that case is not even a pollution exclusion case, and merely stands for the general proposition that insurers have the burden of proving the applicability of a policy exclusion. But as the California Supreme Court recognized in *Aydin*, the "sudden and accidental" provision is not an exclusion, but an exception to a broad

VIAD's burden was not only to prove that *property damage* occurred during the 81 days that policy was in effect, but also that any such property damage resulted from an *abrupt* discharge of contaminants. VIAD's own environmental consultant testified that VIAD did not have a record of a single spill or other abrupt discharge at the site, much less one that caused property damage during the third Home policy period. *See* Ex. 5 at 20-21. Thus, the Referee's finding of fact that VIAD failed to prove there "was an occurrence which was sudden and accidental during the period of the third Home policy," Order at 10, is reasonable and should be affirmed by the Court. *Bianco*, 147 N.H. at 253, 786 A.2d at 833.

E. The Owned Property Provisions in the Home Policies Preclude Coverage for the San Diego Site

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.[11] The Referee correctly concluded that this provision precludes coverage for VIAD's claims under the second and third Home policies because VIAD had care, custody or control over the soil and groundwater at the site.

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exclusion for claims involving pollution, and the court held that the burden of proof for this exception should rest with the policyholder. *Aydin*, 959 P.2d at 1217-18.

[11] The first Home policy contains similar language. Ex. 1 at 5 ("However, with respect to property leased, rented, occupied or used by or in the care, custody or control of the Insured, it is warranted that the Insured shall maintain primary insurance covering damage to or destruction of such property in the amount of $5,000,000.00 and this policy shall only pay losses in excess thereof.").

As an initial matter, 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.

In an attempt to avoid this clear language, VIAD argues 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. In *Shell Oil Company*, 12 Cal. App. 4th at 759, the policyholder, like VIAD here, argued 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).

The Referee correctly concluded that VIAD's argument is indistinguishable from the policyholder argument rejected in *Shell Oil*. Order at 11. All of VIAD's remediation activities, as the Referee acknowledged, involved remediation of soil and groundwater *within VIAD's property lines*. Ex. 5 at 36; Order at 11. 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. Ex. 5 at 36 ("And there was soils on the other side of the sheathing that we did not access . . . ."). VIAD attempts to avoid this result by relying on *A-H Plating, Inc. v. American National Fire Insurance Co.*, 57 Cal. App. 4th 427 (Cal. Ct. App. 1997), but the *A-H Plating* court expressly distinguished *Shell Oil* on the grounds that the *A-H Plating* case involved remediation of groundwater extending beyond the boundaries of the policyholder's property. *Id.* at 442 ("Assuming that cleanup costs associated with an insured's property are typically excluded by such a policy provision, we note that the third party complaints in this case alleged that groundwater had been contaminated. Further, the contaminated groundwater extended beyond the confines of A-H Plating's property.").

Because all remediation occurred within the confines of VIAD's own property, the Referee correctly applied *Shell Oil* and held that 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 are less than $5 million (Order at 2), there is no coverage available under the second and third Home policies even if none of Home's other coverage defenses applied.

F. The Liquidator did not Waive its Right to Assert Other Coverage Defenses Because the Liquidator also Raised the Late Notice Defense

VIAD argues that the Liquidator has waived all coverage defenses because VIAD also asserted a late notice defense. VIAD Mot. at 34-35.[12] Notably, however, VIAD cites not a single authority to support such a remarkable contention. Indeed, a multitude of California cases have rejected VIAD's argument by addressing both late notice and other substantive defenses on their merits and without finding waiver. *See I-Tell Publishing, Inc. v. Hartford Cas. Ins. Co.*, 24 Fed. App'x 723 (9th Cir. 2001) (court found that policyholder's breach of policy provision requiring retention of damaged property barred coverage even though insurer had also pressed a late notice defense); *Am. States Ins. Co. v. Estate of Bakhtiary*, No. C94-3092 FMS, 1995 WL 748060 (N.D. Cal. Oct. 11, 1995) (court did not reach insurer's late notice defense because court found that the sudden and accidental pollution exclusion barred coverage); *Collin v. Am. Empire Ins. Co.*, 21 Cal. App. 4th 787 (Cal. App. 1994) (court found no coverage existed because (1) there was no accident as required by the policy, (2) there was no property damage as required by the policy, and (3) the insured gave late notice that caused the insurer substantial prejudice). Thus, contrary to VIAD's position, California courts regularly allow insurers to assert both a late notice defense and substantive coverage defenses.

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[12] Before the Referee, VIAD devoted the first half of its merits brief to a discussion of late notice, which relates to VIAD's failure to provide notice of the 1987 discovery of environmental contamination at the San Diego site, or of the 1989 administrative remediation order issued by the CRWQCB, until VIAD filed a claim in the Home liquidation in 2004. But in light of the Referee's interlocutory ruling that California law would apply to the Home policies for the San Diego site, the Liquidator did not raise late notice as a defense in its briefs before the Referee, instead focusing on the other coverage defenses available under California law. The Referee, however, addressed the issue and ruled that under California law, Home would not prevail on a late notice defense because "Home would have denied coverage based on policy defenses even if notice had been given in a timely manner." Order at 12. The Liquidator expressly reserved his right to assert a late notice defense should Referee Rogers' choice of law ruling be reversed.

Moreover, California law is clear that doctrines such as waiver and estoppel cannot apply to enlarge coverage beyond that provided by the terms of an insurer's policy. *R&B Auto Ctr., Inc. v. Farmers Group, Inc.*, 44 Cal. Rptr. 3d 426, 447 (Cal. Ct. App. 2006) ("The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom . . . ."); *Manneck v. Lawyers Title Ins. Co.*, 33 Cal. Rptr. 2d 771, 777 (Cal. Ct. App. 1994) (same). Every defense the Referee found applicable to VIAD's claim is based on either a term of coverage or an exclusion from coverage. As a matter of black-letter California law, such provisions cannot be waived. This result is consistent with the multitude of cases in which California courts have addressed both late notice defenses and substantive coverage defenses, all without finding waiver of substantive coverage defenses.

Indeed, the court in *Shell Oil*, 12 Cal. App. 4th at 763, discussed the interplay between late notice and substantive coverage defenses, and its discussion explains why assertion of a late notice defense would have no effect on substantive coverage defenses:

> If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, then earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability.

Shell Oil Co., 12 Cal. App. 4th at 763. Thus, the point from *Shell Oil* is that it is difficult for an insurer to prevail on a late notice defense when it is also disclaiming coverage substantively because a late notice defense requires proof of prejudice, and prejudice could be difficult to show when the insurer likely would have denied coverage if notice had been timely. The reverse, however, is not true. An insurer has no need to prove prejudice to rely on the terms of coverage

and exclusions from coverage contained in its insurance policies. Such provisions simply apply according to their terms. Therefore, there is no rational reason why the assertion of a late notice defense, which the Liquidator did not even press before the Referee, would have any effect whatsoever on coverage defenses based on the grants of coverage, and exclusions from coverage, in the Home policies.

IV. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify on this 7th day of May, 2009, I served a copy of the foregoing, along with accompanying exhibits, by overnight delivery and electronic delivery on the following counsel of record:

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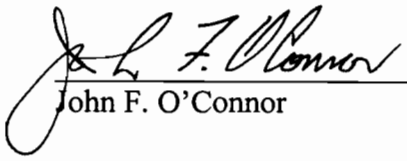

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