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

In Re Liquidator Number:	**2008-HICIL-35**
Proof of Claim Number:	**EMTL 705271-01**
Claimant Name:	**VIAD**
Claimant Number:	
Policy or Contract Number:	**HEC9557416** **HEC 9304783** **HEC4344748**
Insured or Reinsured Name:	**VIAD (predecessor The Greyhound Corporation/Transportation Leasing Company)**
Date of Loss:	

ORDER REGARDING VIAD CORPORATION'S CLAIM FOR INSURANCE COVERAGE

AND PROVIDING AS ALLOWANCE FOR VIAD CORPORATION'S PROOF OF CLAIM

RELATED TO THE SAN DIEGO CALIFORNIA SITE

PROCEDURAL HISTORY

Viad Corporation ("Viad")[1] has filed an objection to the Liquidator's Notice of Determination and seeks a determination that it is entitled to coverage for costs incurred related to remediation of a maintenance facility previously owned by Viad and/or its predecessors in San Diego, California ("the site").

In an earlier ruling Referee Paula Rogers determined that California law applies in this dispute.

RELEVANT FACTS

Viad incurred costs for remediation at the site as the result of an administrative cleanup order issued by the California Regional Water Quality Control Board for the San Diego Region ("the Water Quality Control Board"). Viad was served with the clean up order in 1989. Viad did not challenge the Water Quality Control Board's order in Court. Viad submitted its Proof of Claim for remediation at the site as part of the Home liquidation proceedings in June, 2004.

Viad's predecessor in interest, The Greyhound Corporation, operated a bus maintenance facility at the site between 1953 and 1982. Viad's records indicate that in or about 1953 or 1954, two 10,000 gallon underground storage tanks were installed at the site. Between 1954 and 1967, the tanks contained gasoline. Between 1963 and 1973, the tanks contained #1 diesel fuel. In 1973, the fuel storage systems' underground fuel lines were replaced and the old ones were abandoned on site.

[1] References to Viad include its predecessor in interest as to the Home policies, Greyhound Corporation/Transportation Leasing Company.

In 1989, Viad was notified by the Water Quality Control Board that there was possible petroleum contamination on the property. Dr. Kenneth Reis, a consultant to Viad, and formerly employed by Viad as their corporate Director, Environmental and Energy, has testified that here is some amount of contamination at the site that was caused by spills of petroleum products in the course of filling the underground storage tanks. Dr. Reis has further testified that some of those spills must have taken place during the Home policy periods. Dr. Reis has also testified that there are no records regarding these spills, nor is there any way to determine specifically when any such spills might have occurred.

It is the ground water which is contaminated. For about 10 years after the notification from the Water Quality Control Board in 1989, Viad was required to conduct free product removal from the groundwater at the site. Viad anticipated receiving reimbursement of funds expended from the State of California Underground Storage Tank Reimbursement Fund. In 1999, Viad was directed to do a "dig and haul" operation in order to remediate the groundwater contamination.

Viad has expended a total of $3,718,900 on the remediation of the site. Viad has received reimbursement from the State of California Underground Storage Tank Reimbursement Fund .[2] Viad seeks recovery of the full amount expended, less $750,000 self-insured retention under the Home policies. Should Viad receive funds from Home through the Liquidation, Viad anticipates refunding some amount of any sums received from Home to the State of California Underground Storage Tank Reimbursement Fund.

Viad seeks coverage under three excess general liability policies issued by Home:

HEC 9557416 8/31/66 – 1/1/69 (referred to as "the first Home policy")

HEC 9304783 1/1/69 – 3/31/72 (referred to as "the second Home policy")

HEC 4344748 3/31/72 – 6/19/72 (referred to as 'the third Home policy")

LEGAL DISCUSSION

I. Summary of Order

The Liquidator asserts that there is no coverage for Viad's claims under the first and second Home policies because the amounts spent for remediation do not constitute "damages" recoverable under these policies. Viad argues that the amounts paid for remediation are damages under the first and second Home policies. The Referee agrees with the Liquidator that the amounts are not damages under the first two Home policies.

Viad asserts that each of the three Home policies provides indemnity for the cost of the remediation efforts at the site because there were occurrences during each of the three policy periods. The

[2] It is unclear the exact amount of the reimbursement from the State of California. The brief filed by Viad indicates the amount is $1,740,801 but the Affidavit of Deborah DePaoli includes a figure of $1,427,161.

Liquidator argues that there must be an occurrence or discharge of contaminants during the policy period and that Viad has the burden to demonstrate such an occurrence took place during the policy periods. The Referee agrees that Viad has the burden to demonstrate such a discharge during the policy periods and finds that Viad did not meet that burden.

The Liquidator asserts that the sudden and accidental pollution exclusion in the third Home policy eliminates any coverage under that policy for discharges during the policy period. Viad argues that as the insurer, Home has the burden to demonstrate that the exclusion applies. The Referee finds that the policy exclusion applies.

The Liquidator asserts that the owned property exclusion in the second and third Home policies eliminates coverage for Viad's claims because all of the remediation operations took place within the boundaries of the site itself, and the site had been owned by Viad. Viad argues that the remediation was related to contamination in the groundwater and any work done on the soil was done to clean up the groundwater. The Referee finds that the owned property exclusion applies.

Viad asserts that the Liquidator has waived the right to assert late notice because it has also asserted policy defenses. The Liquidator disagrees. The Referee finds that the Liquidator cannot rely on the late notice argument because Home would not have extended coverage even if the insurer had received timely notice.

II. Remediation Costs As Damages

The Liquidator asserts that there is no coverage for Viad's claims under the first and second Home policies because the amounts spent for remediation do not constitute "damages" recoverable under these policies. First, the Liquidator argues that because there was no Court order requiring payment of the remediation costs, there is only coverage under these two policies if Home consented to the payments. Because Home was not informed of the remediation, it could not and did not consent to the payments made. Second, the Liquidator argues that because there was no judgment or order issued by a Court requiring Viad to pay the remediation costs, they do not fall within the definition of damages in the first and second Home policies. The Liquidator further asserts that the first and second Home policies are not ambiguous and that "excess loss" is a term distinct from "ultimate net loss" as those terms are used the two Home policies.

Viad argues that the amounts paid for remediation are damages under the first and second Home policies because the policy Insuring Agreements incorporate the definition of "ultimate net loss" which includes within it expenses.

The first and second Home policies have identical Insuring Agreements which state, in pertinent part:

> 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:
>
> * * *
>
> (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 or 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.

The first and second Home policies do not include a definition of "loss" but do include a definition of "ultimate net loss" which states, in the first paragraph:

> The term "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 persons 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, or any company acting as his insurer, or both, in investigating, defending and settling occurrences, claims and suits covered hereby (but not ordinary overhead expenses or salaries or annual retainers paid by or incurred by the Insured in connection therewith) shall be pro-rated between the Insured and the Company in proportion to their respective interests in the amount of Ultimate Net Loss Paid.

The first and second Home policies also include a section entitled "Limit of Liability" which indicates that

> The Company's limit of liability under Coverage 1(a) or 1(b) or both combined, shall only be for the ultimate net loss excess of $750,000.00 as a result of 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 (herein called the Retained Limit), and then only up to an amount not exceeding $4,250,00.00 in respect of such occurrence...

California Courts have held that whether payments made by an insured are "damages" is based on the language of the specific policy at issue. *County of San Diego v. ACE Property & Casualty Insurance Company*, 118 P.3d 607(Cal. 2005)("*County of San Diego*"); *Powerine Oil Co., Inc. v. Superior Court*, 118 P.3d 589(Cal. 2005)("*Powerine II*"). In *Powerine II* the Court examined the language of excess or umbrella policies. The insuring agreement at issue stated that the insurer would indemnify the insured for all sums the insured shall be obligated to pay by reason of the liability...imposed by law... for damage, direct or consequential, and expenses, all as more fully defined by the term Ultimate Net Loss and on account of property damage... In the same policy, Ultimate Net Loss was defined as the "total sum which the insured is obligated to pay by reason of property damage either through adjudication or compromise, and shall include...charges and costs for litigation, settlement, adjudication and investigation of claims. The *Powerine II* Court concluded that because the insuring agreement included expenses, the insuring agreement extended to cover those expenses incurred based on from compromise. The *Powerine II* Court also found important that the insuring agreement specifically referred to the term Ultimate Net Loss.

In *County of San Diego*, the same court reached a different conclusion. In *County of San Diego*, the Court reviewed a policy which indicated the insurer would pay all sums the insured becomes obligated to pay by reason of liability imposed by law or assumed under agreement for damages resulting from destruction of or loss of use of tangible property. The policy also included a definition of Ultimate Net Loss but that definition was not included or referred to in the insuring agreement. Because the definition of Ultimate Net Loss was not incorporated in the insuring agreement and the insuring agreement did not specify expenses were included in damages, the insurer was not obligated to pay expenses.

The Liquidator alleges that the first and second Home policies are akin to the policies interpreted in *County of San Diego* because the Insuring Agreement in those two policies does not describe the duty to indemnify as extending to "expenses" and does not refer to the definition of Ultimate Net Loss." Viad believes that first and second Home policies must be interpreted similarly to those at issue in *Powerine II* because the Home Insuring Agreement uses the phrase "excess loss as hereinafter defined,..." Viad further asserts that the definition of Ultimate Net Loss includes fees and expenses.

The Referee agrees with the Liquidator. First, the Insuring Agreement in the first and second Home policies does not refer to expenses. Second, the Insuring Agreement in the first and second Home policies does not refer to or include the term "Ultimate Net Loss." The Insuring Agreement does include the phrase "excess loss as hereinafter defined." Viad asserts that the phrase "excess loss as hereinafter defined" must refer to Ultimate Net Loss as "loss" is not a defined term. The policy does not include a heading "Definition of Excess Loss." However, the first and second Home policies are excess policies providing coverage for losses in excess of the amount retained by the Insured. That is clearly specified in the next paragraph of the Insuring Agreement.

Even if the Insuring Agreement could be interpreted to include the term Ultimate Net Loss by using the phrase "excess loss as hereinafter defined," the Insuring Agreement would not provide coverage for the

remediation costs. The definition of Ultimate Net Loss does not include remediation costs. The first sentence of the definition of Ultimate Net Loss refers only to expenses incurred by the Insured in providing such immediate medical or surgical relief as is imperative at the time of the occurrence covered hereby. It does not refer to any other "expenses." The second sentence of the definition of Ultimate Net Loss does refer to fees and expenses, but only as to how they are to be split between the Insured and the Insurer should there be a claim for which the Home policies do provide coverage. These references do not lead to coverage for remediation costs.

Viad also argues that the policy insuring agreement is ambiguous. The Referee does not find the insuring agreement ambiguous. Under California law, the provisions of an insurance policy must be considered in their full context. *Everett v. State Farm General Insurance Company*, 162 Cal.App.4th 649, 75 Cal.Rptr.3d 812 (2008). The mutual intent of the parties at the time the contract is formed governs its interpretation. *Montrose*, 913 P.2d at 888 (statutory citations omitted). Such intent is to be inferred, if possible, solely from the written provisions of the contract. *Id.* The clear and explicit meaning of these provision, interpreted in their ordinary and popular sense, controls judicial interpretation unless used by the parties in a technical sense, or unless a special meaning is given to them by usage. *Id.* In the Home policies, the use of the phrase "excess loss as hereinafter defined" and lack of section entitled "definition of excess loss" do not make the policy ambiguous. Reading the policy as a whole, excess loss is explained in the first paragraph of the Limit of Liability Section. Regardless of whether that section is titled as a "definition" reading the policy as a whole, there is a definition of excess loss.

Turning to the third Home policy, the insuring agreement states, in pertinent part:

> The Company hereby agrees...to indemnify the Insured for all sums which the insured shall be obligated to pay by reason of the liability (a) imposed upon the Insured by law or (b) assumed under contract or agreement by the Named Insured...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.

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 Home policy requires Home to indemnify Viad for the remediation costs incurred.[3]

III. Whether There was An Occurrence During the Policy Period(s) That Triggers the Grant of Coverage under the Three Home Policies

[3] Nevertheless, there is no coverage under the third policy for other reasons, see Order, *infra*.

Viad asserts that each of the three Home policies provides indemnity for the cost of the remediation efforts at the site. Viad relies first upon the testimony of Dr. Kenneth Reis. Dr. Reis testified that gasoline and/or #1 diesel fuel were stored in the underground storage tanks on the property between 1953 and 1974. In addition, when the underground storage tanks were removed from the ground, they had good structural integrity. Thus, Dr. Reis concludes that the contamination arose from either leaking pipelines, or spills on site. Dr. Ries testified that there were probably spills that 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." However, Dr. Reis also indicated that he could not provide any more clear evidence of when such leaks or spills in fact occurred.

The Liquidator argues that there must be an occurrence during the policy period in order for the Home policies to provide coverage. The Liquidator further asserts that the occurrence is the discharge of contaminants into the soil and that Viad has the burden to demonstrate such an occurrence took place during the Home policy periods. In addition, the Liquidator further claims that Viad has not met that burden because it has no evidence of when any spills may have occurred at the site.

California applies the "continuous trigger" theory in cases involving determination of which insurance policies provide coverage in the event of continuous or progressively deteriorating damage or injury. *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1993). However, the Supreme Court of California recognized that the proper resolution of trigger of coverage issues in any given case may turn on whether the Court is addressing underlying facts involving a single event resulting in immediate injury, a single event resulting in delayed or progressively deteriorating injury, or a continuing event resulting in single or multiple injuries. *Montrose*, at 888. Therefore, the Supreme Court acknowledged the need to review the express language of the contract and apply the rules of contract interpretation.

In *Montrose*, the coverage grant indicated that the insurer would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ...bodily injury or...property damage to which this insurance applies, caused by an occurrence...." The policy defined "property damage" as "physical injury to or destruction of tangible property which occurs during the policy period...." The *Montrose* Court found that policy language unambiguous and held that it "clearly and explicitly provides that the occurrence of bodily injury or property damage during the policy period is the operative event that triggers coverage." *Id.* at 889-890. Because the policy distinguished between the causative event and the resulting damage, and required that the result take place during the policy period, it was the damage that must occur during the policy period.

In the insuring agreements of the first and second Home policies, Home agrees to

> Indemnify the Insured against excess loss as hereinafter defined, subject to the limitation, condition 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:...

(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 or in part to the business operation of the Insured, or any act or omission of the Insured's directors, officers, stockholders, employees, agents, contractor or subcontractors.

The first and second Home policies define "occurrence" as "any one happening or series of happenings, arising out of or due to one event or disaster." These two Home policies also include a "Limit of Liability" provision which states, in pertinent part, that there is no limit to the number of occurrences for which claims may be made hereunder, provided such occurrences occur during the policy period.

This is the only language in the first and second Home policies regarding what must happen during the policy period in order to "trigger" coverage. The policies require there be an event during the policy period. This policy language does not require property damage during the policy period, simply an occurrence.

The evidence presented indicates that the contamination on the site was leaded gasoline and/or #1 diesel fuel. Those fuels were stored in the underground storage tanks on the property between 1953 and 1974. In addition, when the underground storage tanks were removed from the ground, they had good structural integrity. Thus, it appears that the contamination arose from either leaking pipelines, or spills on site. Dr. Ries testified that there were probably spills that 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." However, Dr. Reis also indicated that he could not provide any more clear evidence of when such leaks or spills in fact occurred.

Viad asserts that Dr. Reis' testimony, the conclusions of EAC, the company which undertook the cleanup of the San Diego site, and "common sense" indicate that there were occurrences during the periods in which the Home policies were in place. California law places the burden to demonstrate there has been an occurrence within the policy period. is on Viad to demonstrate that there was an occurrence during the Home policy periods, since it is that "occurrence" that will trigger the policies at issue. *Waller v. Truck Insurance Exchange, Inc.,* 900 P.2d 619, 626 (1995). To meet that 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 periods. 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.

Turning to the third Home policy, the Insuring Agreement of that policy states, in pertinent part:

> The Company hereby agrees...to indemnify the Insured for all sums which the insured shall be obligated to pay by reason of the liability (a) imposed upon the Insured by law or (b) assumed under contract or agreement b the Named Insured...for damages, direct or consequential and expenses, all as more fully defined by the tern "ultimate net loss" on account of...property damage...caused by or arising out of each occurrence happening anywhere in the world.

The third Home policy defines "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." Thus, the third Home policy provides indemnification for property damage which takes place during the policy period due to an accident.

Because Viad has the burden to demonstrate that the damage falls within the language of the insuring agreement, Viad must be able to demonstrate property damage during the period of the third Home policy in order to trigger coverage under that policy. The third Home policy was in effect from March 31, 1972 until it was canceled, apparently on June 19, 1972. None of the evidence provided demonstrates property damage at the site during that time period. Therefore, the insuring agreement of the third Home policy is not triggered.

IV. The Sudden and Accidental Pollution Exclusion in Home Policy HEC 4344748

The third Home policy includes an exclusion for contamination or pollution which states:

> 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 acid, alkalis, toxic chemicals, liquids or gases, waster material or other irritants, contaminant or pollutants unto 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.

The Liquidator asserts that this exclusion applies. The Liquidator argues that under California law, it is the policyholder who has the burden of proving that the property damage for which it seeks coverage was caused by a "sudden and accidental" discharge and that Viad cannot meet that burden.

Viad argues that as the insurer, Home has the burden to demonstrate that the exclusion applies. Viad further asserts that the testimony of Dr. Reis demonstrates that there were sudden and accidental discharges or releases that bring the damage within the sudden and accidental exception to the exclusion.

Preliminarily, California law holds that gasoline and petroleum products are 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). The Supreme Court of California has set forth the test for demonstrating whether a claim is covered, excluded, or covered because of an exception from an exclusion. In *Aydin Corporation v. First State Insurance Company*, 959 P.2d 1213 (Cal. 1998), the Court held that the burden is on an insured to establish that the occurrence forming the basis of its claim is within the scope of insurance coverage. *Id. at 1215; ; see also Waller v. Truck Insurance Exchange, Inc., supra.* Once the insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded. *Aydin at 1215.* The burden then shifts to the insured to demonstrate that a claim comes within the "sudden and accidental" exception to the pollution exclusion. *Id. at 1216.*

California Courts have interpreted the sudden and accidental exclusion and do not find it ambiguous. In *Shell Oil Co. v. Winterthur Swiss Ins. Co.,* 12 Cal.App.4th 715 (Cal.Ct.App.1993), the Court of Appeals indicated that "sudden" does not mean slowly over time even if the action was unintended. The term refers to the pollution's commencement. *Id. at 754.* Moreover, the Court of Appeals reasoned that an "accidental" event is "both unintended and unexpected." *Id. at 755.* In *A-H Plating, Inc. v. American National Fire Ins. Co.,* 57 Cal.App. 4th 427 (Cal.Ct.App. 1997) the Court of Appeals cited *Shell Oil* and reiterated that "in the phrase 'sudden and accidental,' 'accidental' conveys the sense of an unexpected and unintended event while 'sudden' conveys the sense of an unexpected event that is abrupt or immediate in nature." *A-H Plating* at 435-436 citing *Shell Oil* at 755. Again citing *Shell Oil* the Court in *A-H Plating* also indicated that "expect" "requires subjective knowledge of or belief in an event's probability. ...Thus, for purposes of the pollution exclusion, an event is 'unexpected' if the insured did not know or believe that the event was substantially certain or highly likely to occur." *A-H Plating* at 436 citing *Shell Oil* at 746 and fn 4, 748, 783-84.

In *A-H Plating*, the Court had evidence of firsthand knowledge of sudden spills during the policy period and determined that there were triable issues of material fact regarding whether the spills were sudden and accidental. *Id.* at 437. Here, Viad has the burden to demonstrate that there were spills or accidents which were sudden and accidental during the period of the third Home policy. Viad has provided the testimony of Dr. Ries. Dr. Ries has testified that it is his opinion that a significant portion of the releases, spills or overflows that occurred at the Site and are attributable to Viad happened at least in part during the period August 1966 through June 1992. However, Dr. Reis cannot provide any specific information regarding any one or more than one spill, release or overflow during that period of time. In fact, it appears no such documents exist.

The exclusion is not ambiguous. Viad has the burden to demonstrate that there was an occurrence which was sudden and accidental during the period of the third Home policy. The Referee finds that Dr. Reis' testimony does not meet that burden. He is not able to demonstrate or even to provide information regarding any sudden and accidental event during the approximately 3 months in which the third Home policy was in place. Therefore, the pollution exclusion in the third Home policy eliminates coverage for the claims by Viad.

V. The Owned Property Exclusion

The second and third Home policies contain a provision regarding owned property which states:

> 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.

The Liquidator asserts that this provision eliminates coverage for Viad's claims. All of the remediation operations took place within the boundaries of the site itself, and the site had been owned by Viad. Viad argues that the remediation was related to contamination in the groundwater and any work done on the soil was done to clean up the groundwater. Viad further argues that the groundwater is owed by the people of California. According to the Liquidator, even if Viad is correct and the groundwater is the property being cleaned up and it was not owned by Viad, the $5 million self-insured retention for property leased, rented, occupied or used by or in the care, custody or control of the insured, operates to eliminate coverage.

In *A-H Plating*, 57 Cal.App. 4th 427, the Court of Appeals held that the groundwater is owned by the people of California. *Id.* at 442. In that case, the issue facing the Court was whether the insurer had a duty to defend for allegations of contamination of groundwater which extended beyond the confines of the property owned by A-H Plating. The Court assumed that cleanup costs associated with an insured's property are excluded, based on *Shell Oil*. The *A-H Plating* Court then determined that the state and federal governments owed the ground water and that because there was no evidence that A-H Plating owned, occupied, rented, used, cared for, possessed or controlled the groundwater, the owned property exclusion did not eliminate the potential for coverage and the insured could not avoid a duty to defend based on that exclusion. *A-H Plating* at 442.

In this case, the issue is not the duty to defend, but the duty to indemnify. The indemnification sought is for the cleanup of soil and groundwater within the confines of the property owned by Viad. In *Shell Oil*, the Court of Appeals addressed this issue directly and determined that the cost for the cleanup of contaminated groundwater and soil on property in the insured's care, custody or control was excluded. *Id.* at 759. The Court concluded that although private ownership of water is limited, that does not mean that groundwater could not be in Shell Oil's care, custody or control. Given the facts in this case and their similarity to those in *Shell Oil*, the Referee finds the care, custody and control exclusion in the second and third Home policies applies and no coverage is afforded until the ultimate net loss exceeds $5 million.

VI. Late Notice[4]

Viad asserts that the Liquidator has waived the right to assert late notice because it has also asserted policy defenses.

The pleadings demonstrate that Viad first gave notice of the claims for reimbursement for remediation at the site when it filed its Notice of Claim in the Liquidation proceeding. Viad asserts that it did not give notice to Home before then because, during that time, there was no reason to believe that the remediation costs would exceed the allowed amount for which Viad would receive reimbursement from the State of California's Underground Storage Tank Reimbursement Fund, nor did Viad anticipate the remediation costs would implicate the Home policies at issue.

Under California law, the denial of coverage for other reasons also affects the insurer's late notice defense. The Court of Appeals of California has stated that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with." *Shell Oil Company v. Winterthur Swiss Ins. Co.,* 12 Cal. App. 4th 715, 762 (1993).

Thus in this case, the issue is whether Home would have acted differently if it had received timely notice. *Select Ins. Co. v. Superior Court of San Diego County,* 226 Cal. App.3d 631 (1990). The pleadings demonstrate that Home would have denied coverage based on policy defenses even if notice had been given in a timely manner. Therefore, the Liquidator cannot rely on the late notice defense.

CONCLUSION

For the reasons set forth above the Referee denies Viad's claim for insurance coverage for Viad's Proof of Claim related to the San Diego site.

Because the issues addressed above are dispositive of the issues of coverage, the Referee need not reach the remaining arguments raised by the parties.

As the Referee does not find the insurance policy provisions at issue ambiguous, there is no need for additional discovery.

So ordered.

April 13, 2009
Dated

Melinda S. Gehris, Referee

[4] Although the decision based on the language of the insuring agreement and the exclusions in the Home policies is determinative of coverage, the Referee addresses this issue as it may arise again in other contexts.