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 (San Diego, Calif)
Claimant Name	: VIAD
Claimant Number	:
Policy or Contract Number	: HEC 9557416 HEC 9304783 HEC 4344748
Insured or Reinsured Name	: VIAD (predecessor, The Greyhound Corporation/ Transportation Leasing Company)
Date of Loss	: 1966-1972

VIAD CORP'S BRIEF IN SUPPORT OF INSURANCE COVERAGE AND PROVIDING AN ALLOWANCE FOR VIAD CORP'S SAN DIEGO, CALIFORNIA, PROOF OF CLAIM

PRETI, FLAHERTY, BELIVEAU, PACHIOS, LLP
PETER G. CALLAGHAN
N.H. Bar ID No. 6811
57 N. Main Street
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500

DE BEAUBIEN, KNIGHT, SIMMONS, MANTZARIS & NEAL, LLP
DAVID H. SIMMONS
Florida Bar Number 240745
MARY ANN ETZLER
Florida Bar Number 54836
332 North Magnolia Avenue
P.O. Box 87
Orlando, Fl 32801
Telephone: (407) 422-2454
Facsimile: (407) 849-1845
Attorneys for Viad Corp
admitted pro hac vice

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PRELIMINARY STATEMENT

Upon receipt of the June 13, 2003, Order of Liquidation regarding Home Insurance, on June 11, 2004, Viad Corp (hereinafter "Viad") timely filed with the Home Insurance In Liquidation (hereinafter "Home") its proof of claim for the San Diego, California, site that is presently at issue. [App. A] On January 25, 2008, the Liquidator issued a Notice of Determination offering a $0 allowance for Viad's San Diego claim. [App. B] Viad timely filed its Notice of Receipt of the Notice of Determination and its objection to the Notice of Determination on March 25, 2008. [App. C and D].

The Liquidator provided Viad with its claim file on or about May 8, 2008, and Viad submitted its mandatory disclosures on June 10, 2008. A Structuring Conference was conducted telephonically on October 21, 2008, after which the parties were instructed to submit briefs on the conflict (choice) of law issue. [App. E] Briefs were submitted in November 2008, and on December 4, 2008, the Honorable Paula T. Rogers, Referee, issued an order finding that the insurance contracts shall be governed and interpreted pursuant to California law. [App. F]

Thereafter, the parties entered into a Joint Stipulation outlining the procedures to be followed in presenting their respective positions regarding coverage arguments. [App. G] Pursuant to that stipulation, both parties agreed to an evidentiary hearing on February 4, 2009, and to rely on affidavits, deposition testimony, and/or documentary evidence at the February 4, 2009, evidentiary hearing.

For purposes of this brief, all exhibits are referred to as appendices and abbreviated as "App.," deposition testimony is referred to as deposition transcript or abbreviated as "depo. T.," and affidavit testimony is abbreviated as "Aff."

STATEMENT OF FACTS AND OF THE CASE

The present dispute involves Viad's[1] claim for insurance coverage arising from environmental contamination at a bus maintenance operation located at 539 First Avenue, San Diego, California (hereinafter, "the Property"). Viad timely submitted its Proof of Claim for damages to the Property on or about June 11, 2004, and provided Home with extensive documentation regarding the San Diego site, its history, and its remediation. [Apps. A and. G] The sole evidence in this matter arises from documents and the deposition/affidavit testimony of Ms. Deborah DePaoli and Mr. Ken Ries.

From approximately 1953 to 1982 Viad's predecessor in interest regarding the Home policies at issue, The Greyhound Corporation, operated a bus maintenance facility at the Property where buses were fueled, repaired, washed, and otherwise maintained. [App. H and App. I]. On or about 1953-1954 two 10,000 gallon underground storage tanks were installed on the Property. [App. I and J] Between 1954 and 1967 those tanks contained gasoline, and between 1963 and 1973 those tanks contained #1 diesel fuel. [Ries T. 24-25] In 1973 the fuel storage systems' underground fuel lines were replaced and the old lines were abandoned on site. [Ries T. 25] Later, #1 diesel fuel and gasoline were found in the soil and groundwater, the result of presumed accidental spills at the fuel pumps, fuel ports, and possibly corroded old fuel lines. [Ries T. 31, 33-35]

In 1989 Viad was notified by the California Regional Water Quality Control Board ("CRWQCB"), via Abatement Order 89-49, that there was possibly petroleum contamination on the Property. [App. J; K. Ries Aff. (A554

[1] Viad, as referenced herein, includes its predecessor in interest for purposes of the insurance policies at issue, The Greyhound Corporation/Transportation Leasing Company.

pp. K) p. 2, ¶ 3] Pursuant to Abatement Order 89-49 and its later amendments/addenda, the CRWQCB ordered Viad to undertake an assessment and remediation of the Property, and later directed Viad to conduct a full soil excavation. [Ries T. 39, 53-55; DePaoli T.(App. L) 18, 26, 41; D. DePaoli Aff. ¶16] To avoid possible fines, other financial sanctions, and to minimize the costs that may be incurred to litigate the order, Viad remediated the site as was ordered by the State of California. [D. DePaoli Aff. (App. U) ¶16-18]

For a period of about 10 years Viad was required only to conduct free product removal from the groundwater at the Property [Ries T. 52-53], a process that is reasonably inexpensive and cost effective. [Ries T. 53 and DePaoli T.26-27]. Viad did not then notice Home of the possible claim as it had no reason to believe that those remediation costs would exceed the allowed amount for which Viad expected reimbursement from the State of California's Underground Storage Tank Reimbursement Fund [DePaoli T.26-27], nor did Viad anticipate that the remediation costs under that obligation would implicate the Home policies presently at issue. [DePaoli T.26].

On or about 1999, however, Viad received a directive from the CRWQCB that Viad free product was no longer an acceptable remediation method and that Viad was required to conduct a full scale dig and haul operation in order to remediate the groundwater contamination. [Ries T. 38-39 and DePaoli T. 18-19]. This directive and subsequent remediation necessarily implicated a significant increase in costs which might exceed the reimbursement that Viad anticipated from the State of California, but until the remediation was finished and Viad's application for reimbursement was processed and completed, Viad could not know its actual final costs.

The Property was remediated by 2001 and a No Further Action Letter was issued on April 23, 2003. App. M. In 2001 Viad submitted its first application for reimbursement to the

State of California. [Ries T. 44-45]. Thereafter, Viad made subsequent amended submittals that resulted in a $314,000.00 reimbursement to Viad on October 24, 2006, and a $1,426,801 reimbursement to Viad on October 26, 2008. [Ries T. 45]

By 2003, when Home was placed into liquidation, Viad had not yet received reimbursement from the State of California, and therefore, Viad's damage claim to Home could not be fully determined. Given Home's June 2004 proof of claim deadline, however, Viad timely filed its proof of claim with the Liquidator to preserve its rights to coverage. [App. L.]

SUMMARY OF ARGUMENTS

Home waived its right to assert notice as a defense by asserting other coverage defenses and by failing to timely object to Viad's claim notice. Further, because the Home policies required notice only when in the "insured's judgment a claim might result," notice was unnecessary where Viad expected reimbursement from the State of California for its c osts Additionally, even if notice was delayed (which it was not) delay does not preclude coverage or affect Home's liability because: the policies contemplate such delay; inadvertent failure to promptly notify Home does not affect Home's liability; and because Home cannot demonstrate actual and substantial prejudice. Finally, Home breached the policies by its prior denial of Viad's similar claims and is therefore estopped from asserting notice as a defense.

The policies do not require Viad to obtain Home's consent to respond to an abatement order or to enter into an agreement with potentially responsible parties. Further, the policies do not require Home's consent for payment of costs where an insured incurs costs imposed by law or judgment. Additionally, contradictory provisions in the policies are against public policy and must be construed against Home in favor of coverage. Remediation costs are losses or damages

as contemplated by the insurance policies, and Home is estopped from relying on the insurer consent provision because it breached its obligations under the policies.

Expert testimony and records demonstrate that the occurrences took place between 1954 and 1973, as a result of accidental spills and overflows, and some line leakage during the last few years in the period. Accordingly, Home's policies are implicated and Home bears the burden of refuting same, which it cannot do.

There are no pollution exclusions in the first two Home policies at issue. The third policy provides coverage for occurrences that are sudden and accidental and which unexpectedly and unintentionally result in property damage. The facts show that the contamination was most likely the result of accidental spills or tank overfills, and/or from leaks from small corrosion holes later found in buried fuel lines. Accordingly, each of the Home policies provides coverage for the accidental contamination at the San Diego site.

The facts demonstrate that the Abatement Order issued to Viad was for the remediation of groundwater contamination. Because the groundwater at issue is owned by the people of the State of California, Viad's notice to Home is related to a third party claim which is clearly contemplated by the Home policies. The CRWQCB's directive that Viad excavate all soils above the groundwater was made necessary because the groundwater could not be remediated without removing the soils. Because the costs to remediate the groundwater are inextricably intertwined with the soil removal, the owned property exclusion does not preclude coverage.

ARGUMENT

I. VIAD'S NOTICE TO HOME WAS TIMELY PURSUANT TO THE NOTICE PROVISIONS OF THE RELEVANT POLICIES, HOME WAS NOT PREJUDICED BY ANY ALLEGED DELAYED NOTICE, AND IN ANY EVENT, HOME WAIVED ANY OBJECTION TO VIAD'S NOTICE BY FAILING TO TIMELY OBJECT TO SUCH NOTICE.

The Liquidator argues that Viad's 2004 notice of claim was untimely as provided for either by contract or by law, and as such, coverage for the Property should be denied. Pursuant to California law and the notice provisions of the three policies at issue, however, Viad's notice was timely, Home was not prejudiced by any alleged delay, and Home waived any objection to Viad's notice. Therefore, coverage must be afforded.

The notice provision in policies HEC 9557416 and HEC 9304783 states in pertinent part

> The Insured shall give prompt notice to the Company of any event or development *which, in the judgment of the Insured, might result in a claim* upon the Company hereunder. *Inadvertent failure to so notify shall, however, not affect the liability of the company*, but the Insured agrees to use its best efforts to comply with the foregoing stipulations with a view to *affording the Company every possible opportunity of safeguarding their interest* in any claim in which they may be involved. (emphasis added) [App. N and O]

The third policy, HEC 4344748 [App. P] states in pertinent part:

> Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the Insured should be held liable, is likely to involve this policy, notice shall be sent to the Company *as soon as practicable,* provided, however, that *failure to give notice of* any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date would appear to give rise to claims hereunder, *shall not prejudice such claim.* (emphasis added)

Additionally, regarding Home's duty to defend and duty to investigate claims, the first two policies state:

> The Company *will not undertake to investigate claims or defend suits or proceedings on behalf of the Insured.* . .It is the intention of the parties that under this contract *the Insured will investigate all occurrences and claims covered hereby and defend all suits thereon,* unless and until the *Insured shall elect to effect settlement thereof.* (emphasis added)

The third policy states:

> The Company *shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought* or proceeding instituted against the Insured. (emphasis added)

For at least six (6) reasons, Viad's notice of claim for the Property was not delayed or unreasonably delayed, the notice did not prejudice Home, the notice was not otherwise violative of any other policy(ies) provisions, and Home waived any objection to Viad's notice.

A. Home Waived its Right and is Estopped from Asserting Notice as a Defense.

By denying liability based on the assertion of other coverage defenses such as a pollution exclusion and an owned property exclusion, Home has waived its right to assert notice as a defense.[2] This issue was squarely addressed in *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715 (Cal. 1st Dist. Ct. App. 1993) where the court held that "where insurers made wide ranging denial of any coverage under policies, such denial waived any claim that insurers would have acted differently had they received timely notice." Likewise, in *Perkins v. Allstate Ins. Co.*, 63 F. Supp. 2d 1164, 1177 (C. D. Calif. 1999), the court reiterated that "the law is well established 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." (citing *CNA Cas. Of Calif. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 617, 222 Cal. Rptr. 276 (1986) (internal citations omitted).[3] Conversely, it logically follows that if an insurer asserts notice as a defense then all other coverage defenses are rendered moot.

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[2] Home also waived its right to assert notice (or allegedly delayed notice) as a defense when it failed to timely object to the 2004 notice Viad made to Home as required by California Insurance Code § 554. Specifically, California Insurance Code §554 states that "Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by an act of his [insurer], or if he omits to make objection promptly and specifically upon that ground." *National American Ins. Co. of California v. Certain Underwriters at Lloyd's London,* 93 F.3d 529, 538 (Cir. 9th 1996)(finding insurer's two year delay in objecting to an insured's notice of potential claim was untimely).

[3] *See also Wasson v. Atlantic Nat. Ins. Co.,* 24 Cal. Rptr. 665 (1962)[3](holding that by denying liability the insurer waived any right to assert notice as a defense because if there is no liability, then it does not matter whether notice was timely made.)

Home cannot deny coverage based on an alleged lack of notice while at the same time denying coverage for other substantive reasons. The two positions are completely inconsistent and mutually exclusive. If there was insufficient notice then any other coverage defenses are moot because the notice issue would trump the other defenses. If Home asserts other coverage defenses, then Home must be deemed to have waived the notice issue because the two cannot reasonably co-exist. Home cannot have it both ways: either notice precludes coverage and Home lives or dies by this coverage defense, or the other coverage defenses render delayed notice moot because Home would have denied the claim regardless of when notice was given.

Furthermore, Home's wide ranging, effective denial of coverage on prior similarly situated claims waived any right by Home to assert that Home may have acted differently had it received earlier notice of the San Diego claim. "Wrongful failure to provide coverage or defend a claim is a breach of contract." *See Isaacson v. California Ins. Guarantee Assn.*, 44 Cal. 3d 775, 791, 244 Cal. Rptr. 655 (Cal.1998) *citing California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 35-39 (1985). "Accordingly, if an insurer erroneously denies coverage and/or improperly refuses to defend the insured in violation of its contractual duties, the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement. . . ." *Id. quoting Clark v. Bellefonte Ins. Co.*, 113 Cal. App. 3d 326, 335-336 (1980) (internal quotations omitted).

Here, Viad notified Home in 1996 and in 1998 of several environmental claims, each of which was similar to the claim at issue and each was covered by the same or similar Home policies. [App. Q] By way of a 1999 letter issued by Home's agent, Risk Enterprise Management Limited ("REM"), each of those claims were effectively denied and Home took no action to indemnify Viad for those claims. [App. R]

In the wake of Home's previous denial of similar claims, Viad's notice to Home in 2004 was neither unreasonable nor untimely under the circumstances, because Viad had no reason to expect or believe that Home would have responded any differently to an earlier claim notice. In fact, earlier notice to Home would have resulted only in an earlier denial of coverage, so its prior denials serve as a waiver of Home's right to insist upon compliance with the notice provision of the policy(ies).

B. Viad Did Not Anticipate That a Claim Against Home Might Result.

The Home policies require notice only when an event occurs "*which in the judgment of the Insured might result in a claim.*" The operative language of this provision is that Viad was not required to notify Home of a potential claim unless, and until in Viad's (insured's) judgment, a claim might result.

In 2001Viad filed for and believed it would qualify for reimbursement from the State of California Underground Storage Tank Clean Up Fund, and if obtained, the state would reimburse Viad for certain of the expenses it incurred in conducting the mandatory remediation at the Property. So long as that reimbursement request was pending and until Viad was either paid or notified that reimbursement would not be forthcoming, Viad had no reason to notify Home of a claim as Viad could not have known its actual loss. [DePaoli T. 49-50] Accordingly, Viad's 2004 notice cannot be construed as late or delayed: Viad complied with the policy terms, used its best judgment, and provided notice only when it appeared that the State of California may delay or deny reimbursement of Viad's remediation costs.

On October 24, 2006, nearly 2 ½ years after Viad filed its proof of claim, Viad received its first reimbursement from the State of California for $314,487.00, [App. S] and on October 23, 2008, Viad received its second and believed to be final, reimbursement from the State of

California for $1,112,314.00, making the total reimbursement to Viad $1,426,801.00. [App T; DePaoli T.44] Having received its maximum reimbursement from the State of California in October 2008, only then could Viad calculate that its actual covered loss was $2,291,739.00. So despite Home's assertion that notice was delayed, but for Home's liquidation proceedings, Viad actually had no obligation to notice Home of a claim until it received the final check from the State of California just three (3) months ago.

C. The Policies Contractually Provided That Delayed Notice Shall Not Preclude Coverage, And in Any Event, Home Suffered no Prejudice From Any Delayed Notice.

While the notice provision in the first two Home policies refers to "prompt notice" of an anticipated claim, that provision is modified by and must be read *in pari materia* with, and be subject to, the rest of the paragraph which states that, "[i]nadvertent failure to so notify shall, however, not affect the liability of the Company." Likewise, the notice provision in the third policy which states that "notice shall be sent to the Company as soon as practicable," must also be read *in pari materia* with, and be subject to, the rest of the paragraph which states that "*failure to give notice of* any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date would appear to give rise to claims hereunder, *shall not prejudice such claim.*"

The above-quoted language clearly demonstrates that the parties (Home and its insured) contemplated the possibility of delayed notice and contractually agreed that late notice would not preclude coverage. In fact, California law follows this notion precisely, consistently holding that timely notice of a possible claim is not a condition precedent to an insurer's liability, and there is no presumption of prejudice based solely on delayed notice. *Campbell v. Allstate Ins. Co.*, 384 P.2d 155, 60 Cal. 2d 303 (Calif. 1963). California law is equally well-settled that it is the

insurer's burden to show that it has been *actually* and *substantially* prejudiced by any allegedly delayed notice before it can raise the "breach of a notice condition" defense. *Campbell, supra.*[4]

Here, even if Viad's notice was delayed (which it was not) Home cannot show any prejudice, let alone "actual and substantial prejudice." To demonstrate actual, substantial prejudice from a lack of timely notice Home must show that through the passage of time it lost something that would have changed the way the underlying claim was handled. *See, Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 763 (Cal. 1 Dist. Ct. App. 1993). Stated another way, establishing actual prejudice requires that Home show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would or could have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability. *Id.* The record does not support such a position.

Mr. Ries and Ms. DePaoli testified that Viad remediated the contamination as efficiently and inexpensively as possible. Home has presented absolutely no evidence to the contrary. Home is in no worse position today than it would have been in the 1990s had Viad sent notice of a claim at that time, and in fact, Home is in a better position having had the benefit of Viad's prudent and judicious handling of the Property's remediation. Home cannot, therefore, demonstrate any actual and substantial prejudice that might support its notice defense.

D. Viad Used Its Best Efforts to, and Did, Safeguard Home's Interests.

As addressed previously, the first two Home policies provide that "Inadvertent failure to . . . notify [Home] shall, however, not affect the liability of the company, but the *Insured agrees to use its best efforts to afford the Company [Home] every possibility of safeguarding their interest in any claim.*" Here, although Viad does not assert an inadvertent failure to notice Home, even if

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[4] *See also Clemmer v. Hartford Ins. Co.*, 22 Cal. 3rd 865, 881-3, 587 P.2d 1098 (Cal. 2d Dist. Ct. App. 1949); *Billington v. Interinsurance Exchange,* 71 Cal. 2d 728, 737-8, 79 Cal. Rptr. 326, 456 P.2d 982 (Calif. 1969); *Select*

there had been such inadvertence, Viad used its best efforts in accordance with the policy, to protect Home's interests. Viad did so by expeditiously undertaking and completing an economical and efficient remediation of the Property and by securing over $1.4 million in reimbursement from the State of California. Additionally, through the use of contractor bids and two layers of contractor supervision, Viad's expenses and remediation costs were reasonable and kept to a minimum. [Ries T. 41; App. U; DePaoli T.41-46] These efforts demonstrate that Viad actively pursued a course of action that was unquestionably and inherently designed to protect and safeguard Home's interests by minimizing expenses and by mitigating ultimate net losses through the state's reimbursement program.

As noted above, Viad has successfully recovered $1,426,801.00 of its losses from the State of California. Given that Viad has successfully mitigated its loss from approximately $3,718,900.00 loss to $2,292,099.00, Viad has indisputably "use[d] its best efforts to comply with the [policy] stipulations with a view to affording the Company every possible opportunity of safeguarding their interest. . . ." [DePaoli T.43, 46, 50].

E. Home Previously Denied Viad's Similar/Identical Claims in Reliance on The Same or Similar Policy Language, So Viad Had no Reasonable Expectation That Other Like Claims Would be Covered.

"An open-ended denial in which the insurer expresses a willingness to reconsider upon additional information *is tantamount to a denial." Fuller-Austin Insulation Co. v. Fireman's Fund Ins. Co.*, 2002 WL 31005090 *24 (Cal. Sup. Ct. August 6, 2002) *citing Cal. Prac. Guide* ¶12:615.5, *rev. on other grounds*, 135 Cal. App. 4th 958 (2006). In 1996 Viad notified Home of several claims similar to the San Diego claim [Ries T. 42-43, 63-64, 66] but Home failed to take any action to indemnify Viad for those claims. In 1998 Viad provided Home with notice of two more similar environmental claims. Rather than promptly responding to either Viad's 1996 or

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Ins. Co. v. Superior Court, 226 Cal. App. 3d 631, 636-7, 276 Cal. Rptr. 598 (Cal. 4th Dist. Ct. App. 1990).

1998 claim notice, Home waited until 1999, some three (3) years after Viad's first notice of claim, to issue a letter through its agent, REM, reserving Home's rights to provide coverage "as to all sites," stating that "[o]ur coverage evaluation is continuing." App. R.

Home took no further action until 2001 when REM sent a letter offering Viad the "opportunity to submit additional information," but the letter did not identify what specific information Home may want or need. App. V. As Ms. DePaoli testified and the 1999 REM letter reflects, Viad had already provided Home with "a lot of documents" regarding Viad's corporate history and the history of the site(s) [DePaoli T.14-15], Viad provided Home with "information and packages upon packages of information" [DePaoli T.30], and Home acknowledged receipt of "large packages of invoices periodically which allegedly represent costs incurred at particular sites." See App. R, pp. 1-2.

Based on the authority of *Fuller-Austin Insulation, supra,* Home's inaction coupled with an open ended denial accompanied by a willingness to reconsider the claim, its written reference to "all sites" amounted to a denial of coverage as to each of the referenced claims as well as all other similarly situated claims. In fact, that is exactly how Viad perceived Home's 1999 and subsequent correspondence: a denial of coverage and an abandonment of its insured [Viad]. [DePaoli T.18, 29, 31, 36, 49] Given that each of the earlier claims were made and denied pursuant to the same three insurance policies (or nearly identical policies) as those at issue here; that the policies only required notice when in the insured's judgment (e.g., Viad's subjective judgment [DePaoli T.34-35]) a claim might result; Home's denial of Viad's earlier claims having referred to "all sites," and that Viad was effectively abandoned by Home, Viad had no reasonable expectation that notice of the San Diego Property would result in indemnity coverage

for the Property, and Viad was free to handle the San Diego matter in as prudent a manner as it could under the circumstances and in compliance with the directives given it by the CRWQCB.

F. Given The "No Duty to Defend" And "No Duty to Investigate" Policy Provisions, Home Would Not Have Paid Viad For The San Diego Claim Until Viad Resolved The Matter And Became Obligated to Pay a Sum Certain, So Earlier Notice Would Not Have Changed the Outcome.

The first two Home policies provide that "The Company will not undertake to investigate claims or defend suits or proceedings on behalf of the insured," and that "The Company's limit of liability under . . . Coverage 1(b) [damage to property], . . . shall only be for the *ultimate net loss* excess of $750,000. . . . 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 determined by settlement or adjustment of claim or. . . *by final judgment).* . . . "(emphasis added). This language clearly contemplates the fact that not only did Home expect and anticipate that its insured, Greyhound/Viad, would be responsible for defending and resolving its own claims, Home also expected that any and all claims would first be resolved by the Insured before payment would be considered.

The third policy even more clearly demonstrates that Home expected and contemplated that Greyhound/Viad would resolve any claim before Home would indemnify, stating "The Company [Home] shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the insured...." (emphasis added) Further, "The Company shall only be liable for the ultimate net loss," with ultimate net loss being defined as "*the total sum which the Insured,* or any company as his insurer, or both, *become obligated to pay* by reason of . . . property damage liability claims, . . *either through adjudication or compromise.* . . ." " (emphasis added) Finally, the policy states that "Liability under this policy with respect to any occurrence *shall not attach* unless and until the Insured, or

the Insured's underlying insurer *shall have paid the amount of the underlying limits* on account of such occurrence. "(emphasis added).

By requiring Viad to "pay the amount of the underlying limits" before liability attached to Home, and by defining 'ultimate net loss' as the actual sum or sums paid or payable to any person or persons. . . (as determined by settlement or adjustment of claim or. . .*by final judgment)*. . . , " the language in these policies unequivocally evidences Home's expectation that its insured, Greyhound/Viad, would undertake the defense of claims at its own expense, and Home's expectation that Viad must *resolve* those claims at its own expense before Home became obligated to make a payment. In fact, based on Home's handling of the earlier environmental claims that is exactly what Viad expected its obligations were: to pay all expenses along the way. [DePaoli T.15, 17-18, 28-32]

It is incongruous and unconscionable to require an insured to pay costs and expenses in response to an order from a government entity, while at the same time demanding the insured obtain consent from Home to each and every expense along the way. An insurer does not have the right to hover in the background, watching and waiting, and thereafter resist responsibility for its contractual obligation based on an alleged lack of consent to incur costs.

Moreover, Home was not entitled to notice until Viad incurred an Ultimate Net Loss, which is defined "to mean the actual sum or sums paid or payable to any person or persons. . . (as determined by settlement or adjustment of claim or. . . *by final judgment)*. . . . "Here, the CRWQCB's orders and directives were the functional equivalent of a judgment because as the regulatory agency charged with preserving the groundwater quality in California, the CRWQCB had the power to impose fines and other sanctions for non-compliance with its orders. The Abatement Order (and all addenda) issued to Viad regarding the Property bears every indicia of a

judgment because it was final, subject only to a discretionary appeal to a court of law. Nothing in the Home policies, however, required Viad to appeal the CRWQCB's Abatement Order or to incur costs challenging the order. Rather, Viad was only obligated to use its judgment in responding to, investigating, and resolving all occurrences before making a claim for reimbursement to Home. Viad did exactly that: it determined that challenging the Abatement Order would be an improvident endeavor, a challenge would require resources that could be put to better use, and the likelihood of prevailing was small. A judgment having been rendered, the only remaining task was to establish the amount of the judgment, which was not conclusive until Viad received its final reimbursement from the State of California's Underground Storage Tank Reimbursement Fund in October 2008.

By immediately responding to the CRWQCB's Abatement Order, by carrying out its own investigation, by conducting the required remediation, and by incurring all costs until the site was fully remediated, Viad complied with its obligation under the policy(ies) to resolve the claim. Only after final resolution of the claim in October 2008 was Home entitled to notice because until that time, Viad did not know the extent of its actual loss. As such, Viad's 2004 notice as to the San Diego claim was both timely and reasonable.

II. THE STATE OF CALIFORNIA'S ABATEMENT ORDER AND PAYMENT OF REMEDIATION COSTS DID NOT VIOLATE THE INSURANCE CONTRACT'S SETTLEMENT OR VOLUNTARY PAYMENTS PROVISION AND, IN ANY EVENT, HOME HAS FAILED TO SHOW THAT IT WAS PREJUDICED IN ANY WAY.

A. The Abatement Order and Subsequent Remediation Agreement Were Not a Settlement as Contemplated By the Insurance Policies, Thus Home's Consent was Not Necessary.

As previously noted the Home policies clearly and unequivocally provide that:

> *The Company will not undertake to investigate claims or defend suits or proceedings on behalf of the Insured. . .*It is the intention of the parties that under this contract *the Insured will investigate all*

> *occurrences and claims covered hereby and defend all suits thereon,* unless and until the Insured shall elect to effect settlement thereof.

and

> The Company *shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought* or proceeding instituted against the Insured.

Additionally, Section VIII (D) of the first two policies provides as follows:

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

Read together, as they must be, section VIII (D) requires a liberal interpretation of the terms and conditions of the policies and prohibits a narrow or technical construction of the provisions. A clear reading of the policy demonstrates that Viad was allowed and in fact, was required, to conduct at its own expense, all investigations and defense of claims made against it, and Viad was required to do so until in Viad's judgment (a subjective standard since the word "reasonable" is not present to modify 'judgment') [DePaoli T.35], a settlement was appropriate. As written, the policy language clearly identifies a distinct difference between 'investigating' claims and 'settling' claims, otherwise, there would be no need to separate the two terms.

A settlement is defined as the act in which parties who have been dealing together arrange their accounts and strike a balance. Black's Law Dictionary. Said another way, a settlement involves two parties that voluntarily give and take to reach a contractual compromise and resolve a dispute between them. That did not happen in the present case. [DePaoli T.39]. In the present case, Viad received an Abatement Order from a governing authority demanding remediation and clean up of contaminated groundwater, and Viad complied with it. The Remediation Agreement [App. W] is not a settlement agreement either. It was simply an agreement between several responsible parties on how to allocate or share their liability to the government. In sum, there was no compromise and no settlement; instead, there was only an

order mandating cleanup of contaminated groundwater with which Viad complied. [Ries T. 36-37, 50-52, 67; DePaoli T.40-41, 51]. Viad's only choice was to comply or suffer financial consequences for non-compliance. Such conduct cannot be construed as a settlement as it bears no indicia of a settlement. The Abatement Order was for all practical purposes a judgment by which Viad was bound to comply, and it is a substantively different legal concept than Viad resolving or settling a dispute with another person or entity through compromise.

B. <u>The Home Policies Do Nor Require Viad to Obtain Home's Consent to Settlement/Payment of Costs to Conduct Remedial Activities on a Contaminated Site Where the Insured is Compelled to Remediate, Either by By Law or Abatement Order, Which is the Functional Equivalent of a Judgment.</u>

The policies contain the following provisions or some minor variation thereof:

> "It is the intention of the parties that under this contract *the Insured will investigate all occurrences and claims covered hereby and defend all suits thereon, . . .*"
>
> "The Company *shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought* or proceeding instituted against the Insured, . . ."
>
> The Company hereby agrees to *indemnify the Insured against excess loss* as hereinafter defined, . . .which the *Insured may sustain by reason of the liability imposed on the Insured by law . . .* for property damage. . ." and
>
> "Ultimate Net Loss . . . shall be deemed to mean *the actual sum or sums paid or payable to any person or persons as . . . damages, . . .(as determined by settlement adjustment of claim . . . or by final judgment)*, . . .

As stated earlier, these policy provisions can only be construed to mean that the insured, Viad/Greyhound was obligated to bear the full cost of investigating, defending, and responding the Abatement Order issued by the CRWQCB, and that this language absolved Home from undertaking any such activities and from any obligation to indemnify Viad for its losses[5] until a sum(s) "is paid or becomes payable" either as imposed by law or as imposed by final judgment.

[5] Losses and damages by definition of the three policies include damages, fees, investigative costs, and expenses.

Because Viad's costs arose from liability imposed by law or final judgment, Viad was not obligated to obtain Home's consent to incur the mandatory remediation expenses.

The CRWQCB's 1989 Abatement Order[6] was an order imposed upon Viad "by law" as it was issued pursuant to the authority of a state governing agency and would have resulted in the imposition of financial consequences had Viad not complied with the order. [DePaoli T.23] Since Viad was obligated by law to respond to it, the mandatory expenses Viad incurred in responding to the Abatement Order are losses for which Home is responsible and for which Viad was not required to secure consent from Home to expend. The policy language that obligates Viad to fund its response to claims and proceedings imposed by law can only be read to except Viad from obtaining Home's consent to incur the remediation expenses at issue. To interpret otherwise would be nothing short of a perverse interpretation of the parties' intentions.

Similarly, Viad's expenditures in responding to the Abatement Order are also excepted from any requirement that Viad obtain Home's consent, because as noted in the policy Viad was not required to obtain pre-approval for costs or expenses imposed as a result of a "final judgment." As recognized in *Holiday Spas v. Montgomery County Human Relations Comm'n.* 554 A.2d 1197, 1200 (Md. App. 1989)(case citations omitted), many courts have found that "finality attaches to orders that impose on a party an immediate impact similar in nature to that of an injunction."

Here, the Abatement Order was the equivalent of a final judgment as it determined Viad's rights and liabilities from which legal consequences flowed. As Ms. DePaoli said, such an order is a judgment because the only way to avoid potential fines and sanctions for non-compliance is by appealing to a court. [D. DePaoli Aff. ¶ 14, DePaoli T.23-24, 38-39] If appeal

[6] Viad's response necessarily included the payment of all costs to investigate the site, conduct assessments, and to pay for the remediation mandated by the CWRQCB.

is the available remedy then the order is necessarily a final judgment once the time for appeal expires and Viad's compliance with the final judgment was fixed by law when Viad did not appeal the Abatement Order, making Viad's payment of expenses associated with the mandatory remediation non-voluntary, and rendering Home's consent unnecessary.

C. Home's Proposed Erroneous Interpretation of the Policy Provisions So As to Obligate Viad to Obtain Home's Consent Before Settling Claims Would Be Inconsistent with the Express Provisions of the Policies that Require Viad to Investigate and Settle All Claims, Would Create Ambiguities, and Would Violate Public Policy,

California law follows the general rule that ambiguities or inconsistent provisions in insurance contracts shall be construed against the insurer. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 828-9, 12 Cal. App. 4th 715, 737 (Cal. 1st Dist. Ct. App. 1993) (holding that policy ambiguities are construed against the insurer and construction should not be based on strained interpretations).[7]

The inconsistencies and contradictions in the Home policies are demonstrated in part by the following language in the first two policies:

> *The Company will not undertake to investigate claims or defend suits or proceedings on behalf of the Insured. . .*It is the intention of the parties that under this contract *the Insured will investigate all occurrences and claims covered hereby and defend all suits thereon,* unless and until the Insured shall elect to effect settlement thereof,

while the third policy provides that

> The Company *shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought* or proceeding instituted against the Insured. (emphasis added).

As previously noted, these provisions unequivocally serve as an express denial of any obligation by Home to either defend or investigate potential claims, instead placing the sole burden upon Viad to defend, investigate, and/or settle all claims before seeking indemnity from Home.

Because Home had no obligation to either defend or investigate a potential claim it is unreasonable, contradictory, and against public policy to bind Viad's hands and restrict its ability to defend, resolve, investigate, respond to agency orders, or compromise claims, while simultaneously requiring it obtain Home's consent to costs before undertaking the very defense, resolution, or investigation that Viad was obligated by the policies to undertake. Home simply cannot have it both ways as the two provisions are mutually exclusive. Home's argument attempts to subject Viad to the proverbial catch-22: Viad must pay for its own investigation and defense, but it cannot do so without Home's consent, which Home won't give because it refuses to involve itself in the investigation or defense.

Additionally, the "Honorable Undertaking" provision of the policies which requires liberal construction of the policy terms,[8] as well as California's public policy that contradictory provisions be construed in favor of the insured,[9] inure to Viad's benefit by dictating that contradictory provisions such as the obligation to obtain consent to payment of costs despite a no duty to defend provision, be construed and resolved in favor of Viad. Home's consent to Viad's payment of remediation and related costs was thus neither necessary nor required because Home cannot deny an obligation to defend, while at the same time demand the right to dictate a defense or the expenditure of investigative sums.

Furthermore, the basic premise of an Insurer consent provision, to protect an insurer by allowing it an opportunity to gain control over the defense and settlement of claims where the

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[7] See also *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 42 Cal.Rptr.2d 324 (Cal. 1995)(ambiguous provisions will be construed against the insurer and will be interpreted so as to protect the objectively reasonable expectations of the insured).

[8] Section VIII (D) of the first two policies states that "The contract shall be considered an honorable undertaking the purposes of which are not to be defeated by a narrow or technical construction of its provisions, but shall be subject tot a liberal interpretation for the purpose of giving he effect to the real intention of the parties hereto."

[9] *See Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 42 Cal.Rptr.2d 324 (Cal. 1995)(holding that contradictory contract provisions are ambiguous, and ambiguous language is construed against the party who caused

insurer has a duty to defend an insured,[10] is completely inapplicable to the instant case because Home had neither a duty to defend nor a duty to investigate Viad's claim. Since the instant policies impose no duty upon Home to either defend or investigate, the consent to settlement/payment provision is inevitably inapplicable as there was nothing for Home to protect: Viad was contractually responsible for such protection.

Additionally, even if Home had received earlier notice and had assumed responsibility for the CRWQCB's order to remediate the Property and via the dig, haul and treatment of soil and groundwater, Home's involvement could not have changed the remediation methodology or its financial exposure in any meaningful way, and therefore, Home cannot demonstrate actual and substantial prejudice by Viad's alleged failure to obtain consent for expenditures, rendering Home's coverage defense a contradiction of terms and inapplicable by law.

D. The Response and Investigative Costs Viad Incurred to Remediate the Property are Losses/Damages as Contemplated by the Policy.

The first two policies provide that:

> 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 . . . for *damages* because of injury to or destruction of property . . . caused by or growing out of each occurrence and arising out of or due wholly or in part to the business operations of the Insured, . . ." (emphasis added)

Additionally,

> 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)* . . . . *Fees and expenses* (including taxed court costs and interest accruing after entry of judgment) *paid by the Insured . . . in investigating, defending and settling occurrences, claims and suits* covered hereby *shall be pro-rated between the Insured and the Company*

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the uncertainty to exist, and courts will broadly construe policy language to resolve ambiguities in favor of coverage).

[10] *See Augat, Inc. v. Liberty Mut. Ins. Co.*, 571 N.E.2d 357, 361 (Mass. 1991).

in proportion to their respective interests in the amount of ultimate Net Loss paid." (emphasis added).

The third policy provides that:

The Company agrees . . . to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of liability

(a) imposed upon the Insured by law. . . for *damages, direct or consequential and expenses, all as more full defined by the term "ultimate net loss"* on account of

(iii) property damage, cause by or arising out of each occurrence happening anywhere in the world. (emphasis added)

. . . .

6. ULTIMATE NET LOSS

The term "Ultimate Net Loss" shall mean the total sum which the Insured . . . becomes obligated to pay by reason of . . . property damage . . . either through adjudication or compromise, and shall also include . . . interest *expenses . . . investigators, and other persons, and for litigation,* settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder. . . .

"The [California] Supreme Court has established as general propositions, that contamination of the environment is property damage and, in essence, that amounts the insured is required to pay ... *to comply with government orders* under statutes such as the Comprehensive Environmental Response, Compensation and Liability Act ... are the sums the insured is obligated to pay by reason of liability for property damage." *FMC Corp. v. Plaisted & Companies*, 61 Cal. App. 4th 1132, 1142, 72 Cal. Rptr. 2d 467 (1998)(emphasis added).[11]

Additionally, in *Powerine Oil Co., Inc. v. Superior Court,* 37 Cal. 4th 377, 395 33 Cal. Rptr. 3d 562, 118 P. 3d 589 (2005), the court determined that language nearly identical to that contained in the CGL policies at issue here, included as damages, remediation response costs. In *Powerine*, "the policies' central insuring clause indemnified for damages, direct or consequential and expenses, all as more fully defined by the term 'ultimate net loss'." Ultimate net loss was defined as "the total sum which the Insured or any company as his insurer, or both, become

obligated to pay...either through adjudication or compromise, and shall also include ... all sums paid ... for litigation, settlement, adjustment and investigation of claims and suits." *Id.* at 395-396 (internal quotations omitted). Of import to the *Powerine* court's decision that remediation costs constituted damages under the policy, was the fact that the terms "damages" and "expenses" were more fully defined by the term 'ultimate net loss,' thus affording broader coverage than that of a standard CGL policy language. As in *Powerine,* the Home policies more broadly define the terms 'damages' and expenses' in the definition of 'ultimate net loss.' Accordingly, given that the instant policies contain nearly identical language to that of *Powerine* the Home policies should likewise be interpreted to provide coverage for Viad's remediation response costs.

E. Even if Viad had Settled with the State of California and Was Required to Obtain Home's Consent to Settle, Home is Equitably Estopped from Denying Coverage Based on a Lack of Consent Because California Courts do Not Enforce Provisions Requiring Consent Where The Insurer Has Breached its Obligations Under The Contract and Where Viad Reasonably Relied on Home's Prior Denials for Similar Claims Arising from the Same or Similar Insurance Policies and Acted in Accordance with Home's Coverage Denials,

Although California law allows enforcement of consent provisions, such provisions will not be enforced where there is a demonstrated economic necessity, an insurer breach, or where other extraordinary circumstances exist. *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.*, 3 Cal. 3d 434, 449, 91 Cal. Rptr. 6, 476 P.2d 406 (Cal. 1970). Moreover, consent provisions in liability policies are superseded by an insurer's antecedent breach of its coverage obligation. Where such a breach occurs the burden of proof shifts to the insurer to show that the insured's settlement was not reasonable or was the product of fraud or collusion.

[11] *See also AIU Ins. Co. v. Superior Court (FMC Corp* real party in interest), 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990)(holding that response costs are damages under CGL policies).

Jamestown Builders, Inc., v. General Star Indemnity Co., 91 Cal. Rptr. 2d 514 (Cal. 4th Dist. Ct. App.1999).

Home's repeated denial of coverage for Viad's claims constitutes a breach of its contractual obligation, thus falling within one of the three enumerated exceptions. Having breached its obligation to provide coverage Home cannot deny coverage on the basis that it did not give consent to a settlement or payment of remediation response costs. *See Safeco Ins. Co. v. Superior Court*, 71 Cal. App. 4th 782, 787, 84 Cal.Rptr.2d 43 (Cal. 5th Dist. Ct. App. 1999).[12]

Additionally, "[t]he doctrine of estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment." *Strong v. County of Santa Cruz*, 15 Cal. 3d 720, 725, 543 P.2d 264 (1975). Here, (1) Home knew of the facts surrounding its prior claim denials, (2) Home intended for Viad to act in accordance with those claim denials or that Viad had a right to believe that it was expected to act in accordance with Home's prior claim denials; (3) Viad was unaware of the true facts regarding Home's conduct; and (4) Viad relied upon Home's conduct to its detriment, and as such, Home is estopped from asserting non-compliance with any consent to settle/payment provisions as a coverage defense. Home's prior claim denials and the basis for those denials unquestionably led Viad to believe that it was either not entitled to coverage, or that it was not entitled to coverage until claims were resolved at Viad's expense, and Viad relied on Home's representations to its

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[12] *See also United Services Automobile Assn. v. Alaska Ins. Co.*, 94 Cal. App. 4th 638, 644, 114 Cal. Rptr. 2d 449 (Cal. 4th Dist. Ct. App. 2001)(holding that "when an excess insurer denies excess coverage for a third party claim, it waives the right to challenge the reasonableness of the primary insurer's settlement of the claim"); *Fuller-Austin Insulation Co., v. Highlands Ins. Co.*, 135 Cal. App.4th 958, 984, 38 Cal. Rptr. 3d 716, 736 (Cal. 2d Dist. Ct. App. 2006)(holding that"[I]f an insurer erroneously denies coverage and/or improperly refuses to defend the insured in violation of its contractual duties, the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement").

detriment. As such, it would be unconscionable for Home to assert non-compliance with a consent to settle/payment provision as a defense.

III. VIAD'S CLAIM ARISES FROM AN OCCURRENCE THAT TOOK PLACE DURING THE PERIOD OF HOME'S POLICIES AND AS SUCH HOME MUST PROVIDE COVERAGE TO THE FULL EXTENT OF ITS COVERAGE.

Under California law, injury or damage that is continuous or progressively deteriorating over successive policy periods is covered by all policies in effect during those policy periods. *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 10 Cal. 4th 645, 673-674 (Cal. 1995). This "trigger of coverage" applied to liability policies are referred to as the continuous injury or multiple trigger theory. *Id.* Under this theory, the timing of an occurrence is:

> largely immaterial to establishing coverage; it can occur before or during the policy period. Neither is the date of discovery of the damage or injury controlling: it might or might not be contemporaneous with the causal event. It is only the effect - the occurrence of bodily injury or property damage during the policy period, resulting from a sudden accidental event or the "continuous or repeated exposure to conditions" that triggers potential liability coverage. *Id.*

A. Documentary Evidence and Expert Testimony Clearly Establish that Any Occurrences Took Place During Home's Policy Periods.

The evidence in this matter establishes that all occurrences or events occurred during Home's policy period. [Ries T. 19, 45-46, 55-59; Aff. P. 6, ¶14] Specifically, the evidence demonstrates that the contamination, which was predominantly #1 diesel fuel and some leaded gasoline, was likely the result of dispensing spills and/or underground storage tank overfills involving leaded gasoline and/or #1 diesel fuel at the main facility.[13] Further, based on the contaminants' particular properties and an understanding of the operations at that facility over time, the contamination occurred after 1953 and before 1974. [Ries T. 19, 55-59; Aff. ¶14; App.

[13] Those documents include but are not limited to: California Water Control Board Abatement Order, #89-49, various correspondence, environmental reports, and staff reports, etc., which are attached hereto as App. I, J.

J][14] Furthermore, Viad's experts established and Ries testified that when the three USTs were removed they had no leaks and that the tanks' structural integrity was good and they were in good shape given the period of time they had been in the ground. [Ries T. 59] App. I. This can only mean that the contamination arose either from leaking pipelines[15] or from sudden and accidental spills on site. [Ries T. 18-20, 32, 34-35; Aff. ¶5].

Because Home's policies cover the period from 1966 to 1973, Home's position that a coverage trigger date cannot be established unsupportable. These facts alone contradict Home's position and these facts represent the only evidence presently available on this subject.

Further, these facts satisfy Home's assertion that Viad's claim must meet a temporal component. More importantly, however, is the fact that under California law, "a sudden and accidental discharge could continue unabated for some period [for various reasons]. . ." and the sudden and accidental exception still applies to the event. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 842, 12 Cal. App. 4th 715 (Cal. 1st Dist. Ct. App. 1993).

Viad/Greyhound was not aware of any potential contamination at the San Diego site until the City of San Diego discovered a problem at an adjacent site during a redevelopment project. During the remediation environmental experts found evidence to support the conclusion that the contamination was most likely a result of accidental spills. So, like *Shell Oil* and *Montrose,*[16]

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[14] In or around 1954 Greyhound installed two 10,000 gallon underground storage tanks ("UST") at the Property which were used for storing gasoline (and later diesel fuel), and one 5,000 gallon UST used for storing waste oil. App. J, ¶11a. Between 1954 and 1963 the two 10,000 gallon tanks held leaded gasoline. Ries T. 25; App. J ¶11b] Between 1963 and 1973 the two tanks held #1 diesel fuel, and from 1974 to 1989 when the tanks were removed, they held #2 diesel fuel. Ries T. 26; App. J ¶11b] The predominant contaminants found at the San Diego site were gasoline and a liquid consistent with #1 diesel fuel. K. Ries Aff. P. 3 ¶5] Thus, Mr. Ries testified that occurrences (either events or damage) had to have taken place no earlier than 1954 and no later than 1973, he then concluded that the spills probably occurred throughout the 19 year period, and that the leakage most likely occurred during the last several years (because in the early years the ne pipes would probably not have leaked). [Ries T. 59]

[15] ERC found evidence of contamination below corroded pipelines that had previously carried the gasoline and diesel fuel, but could not conclude that the contamination resulted from these lines, as there was evidence of migration that may have begun at the fuel ports during an accidental spill, and then traveled along the pipeline as a conduit.

[16] *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 10 Cal. 4th 645, 673-674 (Cal. 1995).

though the San Diego contamination was not discovered at the time of the occurrence(s), the timing of Viad's discovery does not change the fact that the initial discharges and/or occurrences were sudden and accidental, nor does any alleged late discovery reduce Home's liability. The occurrences took place during Home's policy periods, and as such, it must provide coverage.

B. California Law Rejects Home's Position that Its Coverage Should be Limited by a Pro Rata Allocation Based on the Number of Years During Which Home Insured the Site.

Home has also asserted a position that even if its policies provide coverage, the damage amount should be limited by a "pro rata allocation" based on the number of years during which Home insured the San Diego site. Home's position is inconsistent with California law, however, which follows the joint and several liability theory. California courts have consistently held that while multiple liability policies may be triggered on a single claim, an apportionment between insurers' liability pursuant to "other insurance" clauses has no bearing upon the insurers' obligations to the policyholder, because a pro rata allocation among insurers does not reduce an insurer's (Home's) respective obligations to their insured (Greyhound/Viad). *Dart Industries, Inc. v. Commercial Union Ins. Co.*, 28 Cal.4th 1059, 52 P.3d 79 (Cal. 2002). Rather, the insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability up to the policy limits. *Id.*

Here, the damage at the San Diego site is covered by all of the Home policies that were in effect between 1954 and 1973, and Home has an independent obligation to indemnify Viad for its entire loss up to the policies' limits. *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 65 Cal. App. 4th 1279, 1297, 77 Cal. Rprt. 2d 296 (Cal. 1st Dist. Ct. App. 1998).

IV. THE POLLUTION EXCLUSION PROVISION, CONTAINED IN ONLY ONE OF HOME'S POLICIES, PROVIDES AN EXCEPTION FOR ANY SUDDEN AND ACCIDENTAL DISCHARGE, DISPERSAL, RELEASE OR ESCAPE OF

CONTAMINANTS, AND AS SUCH DOES NOT APPLY TO THE PRESENT CLAIM.

The first two Home policies do not contain a pollution exclusion so any claim by Home that Viad's claim is not covered based on a pollution exclusion, is unsupportable. Further, while the third policy contains a pollution exclusion, the exclusion by its own language expressly does not apply to contamination caused by sudden and accidental events or occurrences. App. P. Specifically, the third Home only the third Home policy states that the exclusion **does not** apply where a discharge, dispersal, release or escape is "sudden and accidental."

The insurer bears the burden of proving that an exclusion applies, and exclusionary language must be plain, clear, and conspicuous. *ML Direct, Inc. v. TIG Specialty Insurance Co.*, 79 Cal. 4th 137, 141-142, 93 Cal. Rptr. 2d 846, 850 (2d Dist. 2000).[17] Exceptions in coverage provision are construed broadly in favor of the insured, and in light of the insured's objectively reasonable expectations. See *Montrose Chemical Corp., supra. At 667.*[18] In the context of pollution exclusions, while courts vary in their interpretations of the meaning of the terms "sudden and accidental," an accidental event is considered an event that is unexpected and unintended. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. 4th 715, 15 Cal. Rptr. 2d 815.[19] An event is considered "unexpected" if the insured did not know or believe the event was substantially certain or highly likely to occur. *A-H Plating,* 57 Cal. 4th App. at 436.

The term "sudden" in pollution liability exclusions conveys the sense of an unexpected event that is abrupt. *Id.* at 435 (citing *Shell Oil Co. v. Winterthur Swiss Ins.*, 15 Cal. Rptr. 2d 815). This sudden event in the context of pollution claims, however, refers to the

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[17] S*ee also Intel Corp.*, 952 F. 2d at 1561-62 (affirming summary judgment in favor of the insured and holding that the insurer made no showing that the contamination fell within the exclusion in its policy).

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

[19] *See also A-H Plating, Inc. v. American Nat'l Fire Ins. Co.*, 57 Cal. 4th 427, Cal. Rptr. 2d (2d. App. 1997); *Intel* Corp. v. Hartford Accident & Indemnity Co., 952 F. 2d 1551, 1561-62 (9th Cir. 1991).

commencement of a pollution event and does not require that the event terminate quickly or have a limited duration. *Shell Oil, supra.* In fact, the "sudden and accidental discharge of a dangerous pollutant could continue unabated for some period because of a negligent failure to discover it, technical problems or a lack of resources that delay curtailment, or some other circumstance. Liability from such an event may well be covered." *Shell Oil, supra, at 756.*

The evidence here demonstrates that the contamination at the San Diego site in large part arose from sudden and accidental events and that Greyhound's business practices established that there were no leaking lines on a regular basis (Ries T. 28-29, lines 3-25, lines 1-8). As such, Home's exclusion in the third policy does not apply. See App. I and J, R. T. 18-19, lines 20-25, lines 1-25; T. 58-59, lines 19-25, lines 1-6). Further, Home produced no evidence that the releases occurred in any other fashion such that the sudden and accidental exclusion does not apply. *See Intel Corp.*, 952 F. 2d at 1561 (granting summary judgment in favor of insured where insurer provided no evidence showing that pollution claim fell within terms of a pollution exclusion). As such, the sudden and accidental character of the events is not diminished nor is Home's liability for contamination caused by those occurrences.

V. THE OWNED PROPERTY EXCLUSION DOES NOT APPLY BECAUSE THE CONTAMINATED GROUNDWATER IS OWNED BY THE PEOPLE OF THE STATE OF CALIFORNIA, NOT THE INDIVIDUAL PROPERTY OWNER.

California law is well-settled that an "owned property" exclusion in a commercial general liability policy, like those at issue here, does not affect coverage for environmental damages to the groundwater. *See A-H Plating, Inc. v. American National Fire Ins. Co.*, 57 Cal. App. 4th 427 (Cal. 2d Dist. Ct. App. 1997); *AIU Ins. Co.*, 51 Cal. 3d 807, 817, 799 P.2d 1253 (Calif. 1990).[20] The groundwater constitutes damages to third party property, and therefore the owned

[20] *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1565 (9th Cir.1991).

property exclusion does not apply because an individual property owner does not own the groundwater, rather, the State of California does.[21]

The evidence here demonstrates that the losses at the San Diego site involved both contaminated soil and groundwater remediation, and that both were inextricably intertwined. The State of California mandated the cleanup in order to clean-up, restore, and protect the groundwater, which was impossible without removing and treating the contaminated soil. "To remediate the groundwater it was necessary to remove and treat excavated soils as a source of contamination because the soil and groundwater contamination were inextricably intertwined with each other." [K. Ries, Aff. Page 4, Para. 8.] Since the damages were to third party property, the owned property exclusion that Home asserts has absolutely no application and does not bar coverage for the damages which Viad paid in compliance with a state mandated site remediation.

CONCLUSION

For the foregoing reasons, Viad requests that it be permitted to recover an allowed claim from Home in the amount of $2,291,739.00, which gives credit to Home for the monies collected up through October 2008 from the State of California in order to reduce the amount owed by Home.

[21] *California Water Code*, § 102; *See A-H Plating, Inc.* 57 Cal. App. 4th at 442; *AIU Ins. Co.*, 51 Cal. 3d at 818; *Intel Corp.*, 952 F.2d at 1565.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided by U.S. Mail on January 20, 2009, to: Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator of the Home Insurance Company c/o J. David Leslie, Esquire and Eric A. Smith, Esquire, Rackemann, Sawyer & Brewster, P.C., 160 Federal Street, Boston, MA, 02110-1700; Liquidation Clerk, The Home Insurance Company in Liquidation, c/o Merrimack Superior Court, 163 N. Main Street, Concord, NH 03302-2880; and John O'Connor, Esq., Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, DC, 20036-1795.

Respectfully submitted,

VIAD CORP

By its attorneys,

Dated: January 17, 2009

By: /s/ Peter G. Callaghan
Peter G. Callaghan, NH Bar #6811
Preti, Flaherty, Beliveau & Pachios, PLLP
57 N. Main Street
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500

/s/ David H. Simmons
David H. Simmons
admitted pro hac vice
de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, Fl 32801
(407) 422-2454