

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-106

IN THE MATTER OF THE LIQUIDATION
OF THE HOME INSURANCE COMPANY

**THE LIQUIDATOR'S OBJECTION TO VIAD CORP.'S MOTION FOR EVIDENTIARY
HEARING AND ORAL ARGUMENT ON VIAD CORP.'S MOTION TO RECOMMIT
AND OBJECTIONS TO ORDER ENTERED BY REFEREE ON APRIL 13, 2009**

On April 13, 2009, Referee Gehris issued an order denying the claim of VIAD Corp. ("VIAD") for coverage with respect to VIAD's San Diego site. In this Court, VIAD has filed a motion to recommit, which is fully briefed, and has now filed a motion seeking an evidentiary hearing and oral argument on its motion to recommit. There is no basis for either request and they should be denied.

First, the parties have already stipulated that there would be no evidentiary hearing on VIAD's claim:

*The parties stipulate that the hearings in this action are limited to coverage relating to the claim arising out of the loss in San Diego, California, and the matter will be decided upon the Parties' oral argument, the Case File, affidavits submitted, deposition testimony (if any), and the Parties' briefs, including any attachments or exhibits to the Parties' briefs. **The parties stipulate and agree that an evidentiary hearing in which live testimony is taken is not necessary in this matter.***

See Exhibit A at ¶ 1 (emphasis added). Indeed, the Court's Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation ("Claims Procedures Order") provides that any evidentiary hearing on VIAD's claim is to take place before the Referee. Claim Procedures Order at ¶¶ 10(a), 11. As set forth above,

VIAD stipulated that there would be no evidentiary hearing, and the parties proceeded on that basis. VIAD cannot now seek a “do over” before the Court and seek an evidentiary hearing that it expressly declined to seek before the Referee.

Second, the applicable standard of review makes clear that no evidentiary hearing is permissible on a motion to recommit. The Court’s role on a motion to recommit is to “review the report of the Referee,” Claims Procedures Order at ¶ 20(a), and “[t]he standard of judicial review for findings of fact made by a judicial referee is whether a reasonable person could reach the same conclusion *based on the evidence presented*.” *Bianco, P.A. v. Home Ins. Co.*, 147 N.H. 249, 253, 786 A.2d 829, 833 (2001) (emphasis added).¹ Therefore, the Court’s task is to review the Referee’s report and, with respect to the Referee’s findings of fact, determine whether a reasonable person could reach those findings based on the evidence submitted to the Referee. It would completely defeat the purpose of referral to a Referee if the Court on a motion to recommit started from scratch and conducted its own evidentiary hearing.²

Finally, oral argument on VIAD’s motion to recommit is neither necessary nor appropriate. The Court’s task is to “review the report of the Referee.” Claims Procedures Order at ¶ 20(a). That is a limited task, based on a discrete record and legal briefs. The Liquidator

¹ See also *Douglas’ Case*, 156 N.H. 613, 618, 937 A.2d 891, 896 (2007) (“We review the findings made by the referee to determine whether a reasonable person could reach the same conclusion based on the evidence presented.”); *In re Richmond’s Case*, 153 N.H. 729, 735, 904 A.2d 684, 689 (2006) (same).

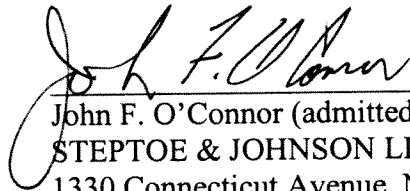
² VIAD now contends that the Referee made “errors of both law and fact.” VIAD Mot. for Evidentiary Hearing at ¶ 3. The Liquidator notes that VIAD erroneously contended in its motion to recommit that all of the Referee’s rulings were pure questions of law. VIAD Mot. to Recommit at 9. That, as VIAD now concedes, several of the Referee’s findings are determinations of questions of fact does not entitle VIAD to an evidentiary hearing. Rather, it simply requires that the Court apply the deferential standard applicable to review of a Referee’s findings of fact.

notes that the oral argument before the Referee, which did not involve an evidentiary hearing, lasted more than four hours.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER,
AS LIQUIDATOR OF THE HOME INSURANCE
COMPANY,

By his attorneys,



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May 29, 2009

**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

JOINT STIPULATION FOR STRUCTURING CONFERENCE

Pursuant to the Restated and Revised Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation, and New Hampshire Superior Court Rule 62, Viad Corp ("Viad") and the Liquidator, through their respective counsel, stipulate as follows:

1) **Trial/Oral Argument**

The parties stipulate that the hearings in this action are limited to coverage relating to the claim arising out of the loss in San Diego, California, and the matter will be decided upon on the Parties' oral argument, the Case File, affidavits submitted, deposition testimony (if any), and the Parties' briefs, including any attachments or exhibits to the Parties' briefs. The parties stipulate and agree that an evidentiary hearing in which live testimony is taken is not necessary in this matter. The hearing in this matter concerns only the Parties' dispute with respect to the San Diego site. Viad and the Liquidator reserve all rights, and waive no rights, concerning the availability of coverage for the other sites set out in Viad's proofs of claim in the Home liquidation.

2) **Discovery**

- a. By December 17, 2008, Viad will identify all persons who will submit affidavits as part of Viad's briefing of the coverage issues in this action, either by providing a copy of such affidavits or providing a short statement of the subjects on which the affiant will provide testimony by affidavit. The Liquidator will be entitled to take one deposition of the corporate representative of Viad as well as the deposition of any identified affiant. The Liquidator shall advise Viad by December 24, 2008 which, if any depositions he intends to take. With respect to any such depositions, the Parties shall agree upon a date and method (e.g., in person or via telephone) to conduct the deposition, and Viad shall make such deponents available at mutually agreeable dates in January 2009, but prior to January 15, 2009. While the Liquidator does not anticipate submitting any affidavits in this matter, he reserves the right to identify affiants if Viad's December 15, 2008 disclosures place at issue a disputed fact for which rebuttal by affidavit would be appropriate. In such a case, the Liquidator will promptly identify any such affiant and make that affiant available for deposition prior to January 15, 2009. *(Handwritten: SWS, 17, 9, SWS)*
- b. The Parties agree that mandatory disclosures have been exchanged, that the Liquidator has received approximately seven (7) boxes of documents as submitted by Viad in support of its proof of claim for the San Diego environmental site.

3) **Evidence**

- a. The Parties agree to the use of affidavits as evidence and the Parties' use of any depositions taken.
- b. The Parties agree to the authenticity and admissibility of documents produced to each other thus far in this matter, except for those documents subject to claims of privilege or confidentiality. The parties agree that various communications between Viad's counsel and Kevin Kelly, Ron Barta, and/or Jim Cahill on behalf of The Home Insurance Company in Liquidation in which the parties discussed potential settlement of this disputed claim shall not be admitted into evidence for the purpose of establishing liability or lack thereof. Should a dispute arise regarding authenticity and/or admissibility, the Parties shall submit the issue to the Referee.

4) **Merits Briefing and Hearing**

- a. The Parties shall file with the Liquidation Clerks, and serve on the other Party, merits briefs and any exhibits on which they intend to rely no later than January 19, 2009. *(Handwritten: 9, SWS)*

- b. The Parties shall file with the Liquidation Clerks, and serve on the other Party, any response to the other Party's merits brief no later than January 26, 2008. ⁹ ~~2008~~ ^{MS}
- c. The oral argument, which shall not be an evidentiary hearing at which live testimony is taken, shall take place on February 4, 2008, beginning at 9:00 a.m., or at such other date and time as the Referee may designate, at a place designated by the Referee. ⁹ ~~2008~~ ^{MS}

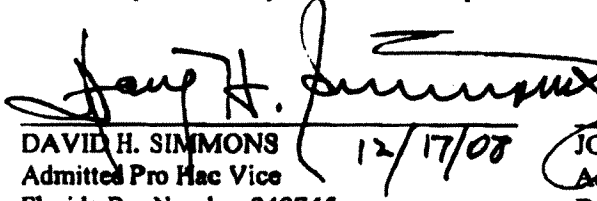
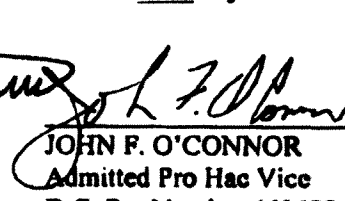
5) Claims, defenses, and primary issues

The Parties will comprehensively outline the issues and their respective positions regarding this disputed claim in their respective briefs that will be submitted to the Referee. In light of the Referee's interlocutory ruling that California law shall apply, the Parties will brief the coverage issues under California law, with the Liquidator reserving his right to seek judicial review of the Referee's choice of law determination upon the Referee's ultimate resolution of the disputed claim.

The Parties agree that the following three Home Insurance policies are at issue in this disputed claim:

<u>Policy Number</u>	<u>Policy Term</u>	<u>Policy Limits</u>
HEC 9557416	08/31/66 – 01/01/69	\$4.25 million
HEC 9304783	01/01/69 – 03/31/72	\$4.25 million
HEC 4344748	03/31/72 – 06/19/72	\$ 500,000

Stipulated to by counsel for the parties below this 16th day of December, 2008.

 
12/17/08

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Attorneys for The Liquidator

Attorneys for Viad Corp

CERTIFICATE OF SERVICE

I certify on this 29th day of May, 2009, I served a copy of the foregoing, along with the accompanying exhibit, by first class U.S. Mail, postage prepaid, and by electronic delivery on the following counsel of record:

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