

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

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| In Re Liquidator Number: | 2008-HICIL-35 |
| Proof of Claim Number: | EMTL 705271-01 |
| Claimant Name: | VIAD Corporation |
| Claimant Number: | Class II |
| Policy Numbers: | HEC 9557416 HEC 9304783 HEC 4344748 |
| Insured Name | VIAD Corporation (successor to The Greyhound Corporation) |

THE LIQUIDATOR'S POST HEARING SUBMISSION

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby submits the following post-hearing brief in response to the Referee's invitation to file any post-hearing materials by February 9, 2009.

While the Liquidator does not intend to repeat the parties' arguments from their voluminous briefs and lengthy oral argument, the Liquidator does believe that one point concerning the applicable law is appropriate for a post-hearing submission. VIAD Corp. ("VIAD") is the party that successfully urged the application of California law with respect to its claim for coverage for the San Diego site. Having achieved the result it sought, VIAD now repeatedly seeks to avoid inconvenient California case law in favor of decisions from other jurisdictions or even, in one case, implicitly arguing that the Referee should follow the *dissenting* opinion in a California Supreme Court case. California is a state with ample case law on insurance coverage issues. For the five principal coverage issues involved in this proceeding

(whether VIAD's remediation costs constitute "damages" under the *Powerine* trilogy, the application of consent provisions, trigger of coverage, the pollution exclusion, and the care, custody and control provision), there are published California appellate court decisions on *every single issue*. Therefore, it is simply irrelevant what the Supreme Court of Vermont, or the Florida intermediate appellate court, or the Maryland Court of Appeals would do with the various coverage issues if the law of *those states* applied to the San Diego site.

For example, VIAD filed a series of cases two days before the merits hearing, with some of those cases standing for the proposition that courts in *some other states* might treat administrative remediation costs as compensable "damages" under general liability policies.¹ But California has a multitude of decisions setting forth how the issue is analyzed under California law. *See Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94, 103 (Cal. 2001) ("*Powerine I*"); *Powerine Oil Co., Inc. v. Superior Court*, 118 P.3d 589, 594 (Cal. 2005) ("*Powerine II*"); *County of San Diego v. ACE Property & Casualty Ins. Co.*, 118 P.3d 607, 613 (Cal. 2005); *Aerojet-General Corp. v. Commercial Union Ins. Co.*, 65 Cal. Rptr. 3d 803, 811-12 (Cal. Ct. App. 2007) (settlement costs incurred, without insurer's consent, in course of lawsuit are not "damages"); *CDM Investors v. Travelers Casualty & Surety Co.*, 43 Cal. Rptr. 3d 669, 678-79 (Cal. Ct. App. 2006) (no coverage for administratively-ordered remediation costs where central insuring clause referenced policy's ultimate net loss definition but that definition did not expand coverage beyond "damages"). That law controls.

In short, VIAD cannot take the aspects of California law that are favorable to it, while simultaneously asking the Referee to ignore or reject California jurisprudence that is unfavorable

¹ *See, e.g., Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455 (S.C. 2004); *Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 869 A.2d 82 (Vt. 2004); *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md. 1993).

to it. VIAD, like any litigant, must take the good with the bad under the applicable state law, and reliance on non-California cases discussing coverage issues fully developed by the California courts cannot change the result.

Because the Referee has adopted California law to govern this proceeding, at VIAD's request and over the Liquidator's objection, the Referee should not credit VIAD's reliance on non-California cases when the law in California is unfavorable to VIAD's position. Because California law compels the conclusion that no coverage is available to VIAD, the Referee should affirm the disallowance of VIAD's claim for the San Diego site.

Respectfully submitted,

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

By his attorneys,



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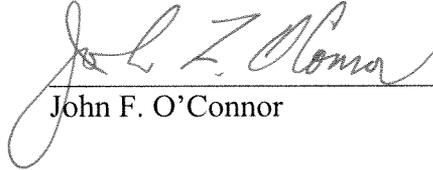
February 9, 2009

CERTIFICATE OF SERVICE

I certify on this 9th day of February, 2009, I served a copy of the foregoing by electronic delivery on the following counsel of record:

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