

**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

**CLAIMANT VIAD CORP'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS
REQUEST FOR TELEPHONIC HEARING ON THE LIQUIDATOR'S OBJECTIONS
TO VIAD CORP'S PRODUCTION REQUESTS**

Claimant, VIAD CORP (hereinafter "Viad"), by and through their undersigned attorneys, and pursuant to Rule 14(c) of the Restated and Revised Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation and New Hampshire Super. Ct. Rule 35(b)(1), hereby files this Motion to Compel Production of Documents and Request for Telephonic Hearing on the Liquidator's Objection to Viad's Production Requests, and in support thereof states as follows:

1. On December 31, 2008, Viad served its first document production request on the Liquidator (hereinafter "Home" or the "Liquidator") seeking, among other things, copies of the proofs of claim filed by approximately 15 entities with which the Liquidator had made an allowance for environmental claims (both liquidated and unliquidated, contingent and non-contingent), and copies of the insurance policies associated with those claims. See Attached Exhibit A, paragraphs 33-46. On January 15, 2009, Viad served its second production request. See Attached Exhibit B, paragraphs 4-5.

2. On January 16, 2009, the Liquidator issued a letter refusing to provide any of the documentation requested by Viad. See Attached Exhibit C. In its letter, the Liquidator asserts that the documents requested are neither relevant nor material to Viad's San Diego, California, claim; that the request is unduly burdensome; and that the requests were requested merely as a means of creating busy work on the eve of the parties submitting their merits briefs and therefore are untimely. Nothing could be further from the truth. Viad disputes the Liquidator's position in all respects and asserts that the documents requested are necessary, timely, and relevant to Viad's claim. In fact, given that oral argument is scheduled in this matter for Wednesday, February 4, 2009, the Liquidator's January 16, 2009, objection is itself untimely leaving virtually little time to secure a hearing on the objection prior to the February 4, 2009, oral argument and provide any documents as may be ordered.

3. The *New Hampshire Superior Court Rules* regarding discovery, and in particular Rule 35(b)(1) are broadly interpreted¹ and allow for discovery of matters "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . . It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Decisions to allow pretrial discovery are within the sound discretion of the trial judge. See *Miller v. Basbas*, 131 N.H. 332,338, 553 A.2d 299 (1988).

4. The requested documents identified in paragraphs 33 through 46 of the first request, and paragraphs 4-5 of the second request, are relevant to Viad's multi-million dollar environmental claim because of the similarity in the types of claim (environmental), the similarity in the amounts of the claims (in excess of several million dollars), because of the

¹ See *Barry v. Horne*, 117 N.H. 693, 377 A.2d 623 (1977)(ordering disclosure of certain potential witness names given the new rule which, "like Rule 26(b)(1) of the Federal Rules of Civil Procedure allows *very broad discovery*")

timing of coverage and types of form policies that Home issued, and because the Liquidator has actually made a determination on a multitude of unliquidated and/or contingent claims on behalf of certain claimants, whereas here, the Liquidator has refused to make a determination and/or allowance on any of Viad's other 100+ claims. Instead, it has taken the Liquidator nearly four (4) years from the date Viad filed its claims to make a determination on just one site: the instant claim involving just the site in San Diego, California. To assess whether the instant claim (and Viad's other pending claims) is being handled fairly and equitably in comparison with similar or possibly identical environmental claims that have already been settled, Viad is entitled to review the Liquidator's documentation involving the settled claims, and more specifically, the relevant insurance policies and proofs of claim for each settlement.

5. The Liquidator's objection suggested that Viad review the settlement agreements in lieu of the Liquidator's obligation to produce the requested documents to obtain the information sought. What the Liquidator failed to acknowledge, however, is that Viad *has* obtained and reviewed all documents available to it from the on-line docket managed by the Liquidation Clerk, including all settlement agreements, and the information contained in those documents is wholly insufficient. Without any apparent exception, the settlement agreements (and the accompanying motions seeking court approval) are the only documents filed related to the cases cited in Viad's production request, and the settlement documents are nothing more than form agreements that contain virtually no information regarding the facts, insurance policy language, or proof of claim specifics as to the settled matters.

6. Viad is entitled to review the insurance policies to assess whether the same or similar language as in Viad's policies resulted in an allowance in any of the settled matters, to review the proofs of claim to identify any factual similarities between the instant claim and those

already settled, and to determine whether Viad's claim(s) is being handled fairly and equitably in comparison with other claims already settled.

7. Furthermore, Viad does not share the Liquidator's overreaching position that the settled claims do not involve sites in California or matters subject to interpretation under California law. Many of the settled matters cited in Viad's production requests involve multi-state and/or multi-national entities, with multiple policies and multiple risks, and as such, some of the settled claims may very well include claims arising in California or implicating California law. Unless Viad reviews the proofs of claim and the specific language of the insurance policies from each of those other matters, however, Viad has no way of determining whether any of the settled matters involved policies and/or sites where California law may have been implicated. Viad will not simply assume that the Liquidator's position in that regard is correct.

8. Regardless of whether, as the Liquidator asserts, the issues raised in the present matter have been addressed by the California courts, Viad is entitled to assess and determine whether its claim is being handled fairly and equitably as compared to other claimants whose policies and claims may likewise have involved California law. If the Liquidator made concessions on prior claims involving sites in California and policies containing similar or identical language to that at issue, then Viad is certainly entitled to this information and to assess its impact on Viad's present coverage arguments.

9. Additionally, Viad's production request is not unduly burdensome. A request for insurance policies and proofs of claim from these recently settled matters should be relatively simple to collate and produce in electronic form. There is no reason to believe that those documents are not readily available or would take undue amounts of time to collate and simply compile them onto a disk for production.

10. Nor are the documents requested in paragraphs 33 through 46 (first request) and 4-5 (second request) untimely, particularly in light of the fact that until the Liquidator filed its Merits Brief, it had asserted a lack of notice as a primary defense, and argued the present coverage defenses only as tertiary positions. Thus, the Liquidator's recent tactical change now requires Viad to obtain the requested documents to demonstrate a potential bias against Viad that was not previously anticipated.

11. Moreover, on March 6, 2006, Viad requested of a Home claims adjuster, copies of the insurance policies and proofs of claim related to the AK Steel settlement. A similar request was made to Home on July 13, 2007, regarding the settlements with PSE, Aeromotive, and Crown Central. Had Home provided these documents when requested several years ago the instant request may not seem as foreboding as Home now suggests.

12. Pursuant to *N. H. Super. Ct. Rule 35(b)(1)* production of the documents requested by Viad are relevant, material, and discoverable. Viad is entitled to review not only the prior settlement agreements, which it has, but also the insurance policies and proofs of claim accompanying the policies that led to the settlements identified in paragraphs 33 through 46 of Viad's First Request to Produce, and paragraphs 4 and 5 of Viad's Second Request to Produce. Such review is necessary to assess whether the insurance policies and the claims made against those policies are similar to the claim at issue here, whether Viad's claim has been treated fairly and equitably as compared with other like claimants, and whether the Liquidator's challenge to coverage on the San Diego matter is prejudicial under the circumstances. *See Mariner's Cove Site B. Assoc. v. Travelers Indem. Co.*, 2005 WL 1075400 (S.D.N.Y. 2005)(finding that "to properly interpret an insurance policy it is necessary to discern how that contract has been interpreted in the past. To this end, documents regarding similar claims of other insured, the

drafting history of a policy, and claims manuals are relevant and discoverable in actions to recover insurance reimbursement”).

13. Inasmuch as the Liquidator has refused to make determinations/allowances as to any of Viad’s claims, evidence of prejudice or bias in the handling of Viad’s claims is clearly at issue in the San Diego and may directly belie and undermine the Liquidator’s coverage positions if inconsistent with prior settlements.

14. Pursuant to *N.H. Super. Ct. Rules 35(g) and 57A*, counsel for Viad conferred telephonically with Mr. O’Connor, counsel for the Liquidator, on January 26, 2009, and despite a good faith effort to resolve the discovery dispute, the parties have not been able to resolve their differences regarding this discovery issue.

15. Should Referee Gehris have time available this week for the requested hearing, the parties are available for a telephonic hearing on Wednesday, January 28, 2009 or Thursday, January 29, 2009, at a time to be determined by the Referee.

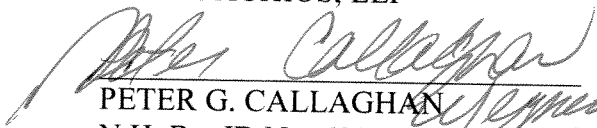
WHEREFORE, Viad respectfully requests a hearing on either Wednesday or Thursday, January 28 or 29, 2009, on Viad’s Motion to Compel and respectfully requests that the Liquidator be compelled to provide to Viad, no later than Monday, February 2, 2009, at least the requested insurance policies and proofs of claim.

CERTIFICATE OF SERVICE

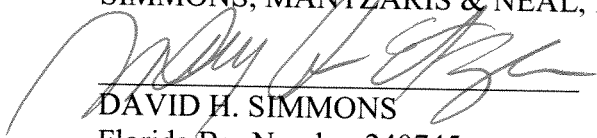
I hereby certify that on January 26, 2008, a true and correct copy of the foregoing was provided by U.S. Mail to Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator of the Home Insurance Company c/o J. David Leslie, Esquire and Eric A. Smith, Esquire, Rackemann, Sawyer & Brewster, P.C., 160 Federal Street, Boston, MA,

02110-1700, and Liquidation Clerk, The Home Insurance Company in Liquidation, c/o Merrimack Supreme Court, 163 N. Main Street, Concord, NH 03302-2880, and also via e-mail to John O'Connor, Esq., Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, DC, 20036-1795 and Christopher Marshall, Esquire, counsel for the Liquidator.

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