

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

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

I. INTRODUCTION

VIAD Corp. ("VIAD") has filed a motion to compel production of documents nine days before the scheduled February 4, 2009 hearing on the merits of VIAD's disputed claim, and in disregard of the parties' Joint Stipulation concerning pre-hearing discovery. VIAD's motion to compel seeks an order requiring the Liquidator to produce to VIAD proofs of claim, insurance policies, and claims correspondence regarding sixteen other policyholders that have filed claims in The Home Insurance Company's ("Home") liquidation proceedings. There are multiple reasons why the referee should deny VIAD's motion.

First, while VIAD does not cite to it, there is a New Hampshire Supreme Court decision directly on point. That case holds that a policyholder is not entitled to discovery regarding

claims asserted by others for purposes of determining coverage because an insurer's treatment of other claims cannot change the coverage available under the policyholder's insurance contracts.

Second, the parties entered into a Joint Stipulation that set forth the discovery that would be permitted in the period immediately prior to the parties' merits hearing. That stipulation permitted limited deposition discovery but did not allow the parties to propound document requests.

Third, VIAD has created its own emergency by waiting until the last minute to seek document discovery and to file its motion.

For all of these reasons, the Referee should deny VIAD's motion to compel.

II. ANALYSIS

A. "Other Policyholder" Information Is Not Discoverable

VIAD's motion correctly notes that the scope of permissible discovery is a procedural matter that is governed by forum law. *See Ferren v. Gen. Motors Corp.*, 137 N.H. 423, 427, 628 A.2d 265, 268 (1993) (forum law governs procedural matters); *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 12, 549 A.2d 1187, 1190-91 (1988) (same); *Jarvis v. Prudential Ins. Co. of Am.*, 122 N.H. 648, 654, 448 A.2d 407, 411 (1982) (discovery is a procedural matter). While VIAD argues that the New Hampshire Superior Court Rules allow for "broad" discovery, VIAD Mot. at ¶ 3, the New Hampshire Supreme Court has held that "open-ended 'fishing expeditions' are not permitted." *Robbins v. Kalwall Corp.*, 120 N.H. 451, 453, 417 A.2d 4, 5 (1980).

VIAD argues that it needs to review claim information – such as proofs of claim, policies, and claim correspondence – from other policyholders' liquidation claims for the following reason:

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.

VIAD Mot. at ¶ 12. However, although VIAD's brief does not disclose it, the New Hampshire Supreme Court has directly addressed whether other policyholders' claim information is discoverable for purposes of policy construction and has held that it is not. *Ross v. Home Insurance Company*, 146 N.H. 468, 773 A.2d 654 (2001).

In *Ross*, the policyholder under a professional liability policy issued by The Home Insurance Company sought discovery of Home's handling of claims by other policyholders on the grounds asserted by VIAD here: that this discovery would be relevant in determining whether his claim was covered. The New Hampshire Supreme squarely rejected this argument and affirmed the trial court's denial of "other policyholder" discovery:

The plaintiff argues that Home's past practices relative to similar claims would be relevant toward determining coverage in this case. We disagree. As noted above, the determination of the scope of insurance coverage is a question of law determined according to the reasonable person's reading of the contract language. Thus, coverage in other insurance cases is not necessarily relevant.

Id. at 473, 773 A.2d at 658. Indeed, this holding is consistent with a number of other courts that have rejected the notion that other policyholder information is discoverable on the issue of coverage.¹

¹ See, e.g., *Cunningham v. Standard Fire Ins. Co.*, No. 07-CV-02538, 2008 WL 2902621, at *9 (D. Colo. July 24, 2008) (court found that policyholder's request for information on other similar claims was irrelevant and not likely to lead to admissible evidence); *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co.*, No. 2:06-CV-443, 2007 WL 3376831 (S.D. Ohio Nov. 8, 2007) (court found that request for files from similar claims were irrelevant, overly broad and unduly burdensome); *St. Paul Reins. Co., Ltd. v. Comm. Financial Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000) (court rejected request by policyholder for prior bad faith claims because even if requested information could be considered "marginally relevant," producing information would be unduly burdensome); *Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55 (N.D. Ga. 1984) (court found that insurer's conduct regarding the insurance claims of others is of no consequence to this case").

The New Hampshire Supreme Court's ruling is also consistent with the contract interpretation rules applicable to this proceeding. The Referee has ruled that California law will govern construction of the Home policies with respect to VIAD's San Diego claim. Under California law, an insurance policy "must be construed from the language used." *Everett v. State Farm Gen. Ins. Co.*, 162 Cal. App. 4th 649, 656 (Cal. Ct. App. 2008). Moreover, doctrines such as waiver and estoppel cannot enlarge the coverage provided under an insurance policy.² Therefore, as the New Hampshire Supreme Court held in *Ross*, discovery into the Liquidator's handling, analysis, and resolution of other policyholders' claims has no bearing on the extent of coverage available to VIAD under VIAD's policies because such discovery cannot change the meaning of VIAD's policies. Therefore, *Ross* controls the resolution of VIAD's motion and requires that the motion be denied.

In addition, the Liquidator notes that VIAD's discovery request could lead to unending satellite litigation, as this proceeding would quickly devolve into argument over whether, and to what extent, other policyholders' claims and policies are similar or dissimilar to VIAD's claim and policies. This would be a considerable waste of time and resources given that VIAD's claim must rise and fall based on the actual language of VIAD's policies, as construed under California law, and the specific facts concerning VIAD's claim. Moreover, in the context of a liquidation proceeding, requiring burdensome discovery into matters that cannot change the result would detract from the orderly administration of the estate, diverting limited resources intended to be devoted to all creditors' interests, to no beneficial end for this particular claimant. In addition,

² *R&B Auto Ctr., Inc. v. Farmers Group, Inc.*, 44 Cal. Rptr. 3d 426, 447 (Cal. Ct. App. 2006) ("The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom . . ."); *Manneck v. Lawyers Title Ins. Co.*, 33 Cal. Rptr. 2d 771, 777 (Cal. Ct. App. 1994) (same).

because one of the Liquidator's principal tasks is to analyze and resolve claims, *see* N.H. Rev. Stat. Ann. 402-C:38, 45, requiring production of claim evaluation materials from other claimants could become a continuing burden (one that policyholders might regularly demand) that would divert the Liquidator from his statutory function of resolving claims.

B. The Joint Stipulation Applicable to the Parties' Merits Hearing Limits Further Discovery to Depositions of the Parties and Their Affiants

Even if there were not a New Hampshire Supreme Court case directly on point, holding that the discovery sought by VIAD is not permissible, VIAD would not be entitled to document discovery at this late date because such discovery is outside the scope of discovery allowed by the parties' Joint Stipulation. The parties had their Structuring Conference before Referee Rogers on October 21, 2008. The next day, Referee Rogers issued an order directing the parties to stipulate as to the procedures relating to their merits hearing. The order provides in pertinent part:

Notice of the date and time selected [for the merits hearing] shall be provided to the Liquidation Clerk, along with a stipulation outlining agreed upon procedures.

Oct. 22, 2008 Order at 1.

Pursuant to Referee Rogers' direction, the parties executed and submitted a Joint Stipulation that established hearing procedures and, more importantly, addressed the discovery that would take place. With respect to discovery, the Joint Stipulation provides as follows:

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 17, 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.

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.

Exhibit 1 at ¶ 2.

Thus, the parties stipulated that there would be two types of discovery in the 1 ½ months leading up to the parties' merits hearing. VIAD would make disclosures regarding any affidavit testimony it would submit with its merits brief, and the Liquidator would be entitled to take the depositions of any such affiants as well as VIAD's corporate representative.³ If the Liquidator decided to submit affidavits with his merits brief – which he ultimately did not – the Joint Stipulation required the Liquidator to provide advance notice and give VIAD an opportunity to take such affiants' depositions. With respect to the exchange of documents, the parties agreed that all mandatory disclosures had already taken place. The parties' stipulation regarding discovery did not permit the parties to serve document requests while the parties were engaged in the intensive process of preparing merits briefs for the parties' February 4, 2009 hearing. Thus, VIAD's document requests are contrary to the parties' Joint Stipulation concerning what discovery would be permitted in the days leading up to the parties' hearing, and the Referee should deny VIAD's motion to compel on that basis.

³ The Liquidator took the depositions of two VIAD affiants, but elected not to take a corporate deposition of VIAD.

C. VIAD Has Created Its Own Emergency Here

Even if VIAD ordinarily would be permitted the “other policyholder” discovery they seek, and the parties’ Joint Stipulation did not apply, VIAD’s motion remains untimely, and it would be unreasonable to require the Liquidator to engage in the eleventh-hour document production VIAD seeks. VIAD objected to the Liquidator’s Notice of determination on March 25, 2008. The structuring conference was held on October 21, 2008, but VIAD did not seek documents. When VIAD served document requests on December 31, 2008, and January 15, 2009, the Liquidator responded to VIAD’s discovery requests on shortened time, on January 16, 2009. See VIAD Mot., Ex. C. VIAD then inexplicably waited a full ten days to attempt to meet and confer with the Liquidator’s counsel.

Presumably because of the time pressures created by VIAD’s delay, VIAD then filed its motion to compel three hours after the initial meet and confer session even though the parties had agreed to continue their discussions the next day.⁴ The upshot of VIAD’s conduct is that they filed a motion to compel discovery nine days before the parties’ scheduled merits hearing, and sought a discovery hearing two or three days after VIAD filed its motion to compel. This left the Liquidator with one or two days to draft an objection, and diverted the Liquidator’s counsel away from drafting its merits reply.

Thus, to the extent that the timing of VIAD’s motion has created a fire drill immediately before the parties’ merits hearing, this is a fire drill of VIAD’s own creation. VIAD should not be permitted to impose a burdensome document production exercise on the Liquidator and his

⁴ VIAD’s filing of its motion to compel violates 57-A and 35(g)(1)(f), which require a party to engage in a good-faith meet and confer process before filing a motion to compel discovery. The parties ended their meet and confer session on January 26, 2008 with the Liquidator’s counsel agreeing to confer with his client and report back the next day. Despite this agreement, VIAD filed its motion to compel *three hours later*, while the parties’ negotiations were ongoing.

counsel in the week prior to the merits hearing. This would be true even if the law were not clear, for the reasons discussed in Sections II.A and II.B above, that VIAD has no entitlement to the document discovery it now seeks.

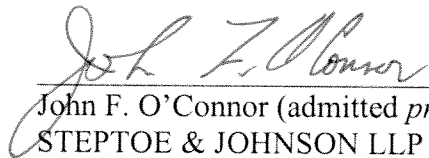
III. CONCLUSION

For the foregoing reasons, the Referee should deny VIAD's motion to compel discovery.

Respectfully submitted,

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

By his attorneys,


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January 27, 2009

Exhibit 1

**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. *AMS* (17) 9 *AMS*
- 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, 2008. *AMS* (9)

- 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) [initials]
- 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) [initials]

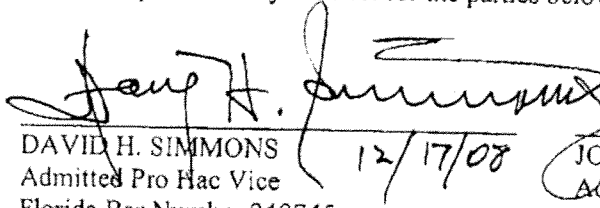
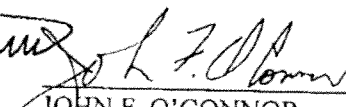
5) Claims, defenses, and primary issues

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 27th day of January, 2009, I served a copy of the foregoing, along with all accompanying exhibits by electronic delivery, on the following counsel of record:

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