

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

VIAD CORP'S MOTION FOR ORAL ARGUMENT ON VIAD CORP'S MOTION TO RECOMMIT; MOTION FOR ORDER COMPELLING LIQUIDATOR TO APPLY CHOICE OF LAW AS TO VIAD CORP'S OUTSTANDING DETERMINATIONS PURSUANT TO REFEREE'S UNOBJECTED-TO DECEMBER 4, 2008, RULING; AND/OR, IN THE ALTERNATIVE, MOTION FOR STATUS CONFERENCE.

COMES NOW VIAD CORP ("Viad"), by and through its undersigned counsel, and files this Motion for Oral Argument on Viad's Motion to Recommit; Motion for Order Compelling Liquidator to Apply Choice of Law Pursuant to Referee's Unobjected-to December 4, 2008, Ruling, and/or Motion for Status Conference; and in support thereof states as follows:

BACKGROUND

1. On February 4, 2009, an evidentiary hearing was held before the Honorable Referee M. Gehris regarding Viad's Proof of Claim, wherein Viad disputed the Liquidator's claim allowance and determination, as to Viad's claim relating to the San Diego, California Site. On December 4, 2008, Referee Rogers ruled on the choice of law applicable to Viad's claim relating to the San Diego, California, Site; Referee Rogers ruled that the law of the situs of the risk is the applicable law in interpreting the Home policies. This ruling should have binding effect on the Liquidator as to all of Viad's claims.

2. On April 13, 2009, Referee Gehris issued a ruling denying Viad an allowance for the San Diego Site. In so doing, Referee Gehris confirmed that the law of the situs of the risk is the controlling law in interpreting the Home policies.

3. Viad has numerous claims that remain outstanding and the Court's resolution of the matters pending in the Motion to Recommit will significantly help in the resolution of its multiple claims against the Liquidator. Additionally, this Court's confirmation that the ruling by Referee Rogers is necessarily binding on the parties will further assist in resolution of all of Viad's claims, including the San Diego claim.

4. On April 28, 2009, Viad filed its Motion to Recommit and Objections to Order Entered by Referee, and on May 27, 2009, Viad filed a Motion for Evidentiary Hearing and Oral Argument on Viad's Motion to Recommit and Objections to Order Entered by Referee.

5. On January 11, 2010, the Liquidator filed a motion requesting a status conference as to Viad's Motion to Recommit. On August 12, 2010, this Honorable Court granted that motion and the Liquidator scheduled a conference for September 16, 2010. Without the consent of Viad and without contacting Viad first, the Liquidator unilaterally cancelled the September 16, 2010, hearing.

6. As outlined more fully herein, Viad is entitled to a hearing with this court to address issues related to Viad's Motion to Recommit and, as such, hereby requests a hearing be set to conduct an oral argument as to the status and the substance of Viad's Motion to Recommit; confirming the applicable law is in accordance with Referees Rogers and Gehris's rulings; and/or setting a Status Conference in this matter.

7. While litigating the San Diego Proof of Claim the parties disagreed as to the choice of law to be applied to interpretation of the policies with respect to the San Diego,

California, Site. After briefing the issues in November 2008, Referee Paula Rogers, issued a report on December 4, 2008. Ms. Roger's report specifically found that pursuant to New Hampshire choice of law, because the site was located in California, California law must apply to the San Diego proof of claim.

8. The Liquidator never objected to or appealed the Referee's December 4, 2008, Report, thus, it has waived its right to do so. As such, pursuant to the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation, section 20, since no objection or motion to recommit was filed within 15 days of the December 4, 2008, Referee's report, "a judgment shall be entered in accordance with RSA 519:12."

9. By extension, this same rule of law, which now stands as the law of the case, must be applied to each of Viad's proofs of claim such that the applicable governing law to interpret the Home policies is the state in which the site is located.

10. The Liquidator, however, refuses to comply with this ruling, stating that it does not have to comply with or apply the choice of law as outlined in the Referee's December 4, 2008, report. See attached affidavit of David Simmons, Exhibit A. Such a view of the Referee's report would, however, render the illogical result of the parties having to litigate this same choice of law issue over and again, with respect to the 100+ proofs of claim filed by Viad. Clearly, the Revised and Restated Procedures do not contemplate such a waste of judicial time and resources, nor should money that is to be allocated to the claimants be wasted on such unnecessary litigation.

11. By these motions and for the reasons set forth below, this Court should grant Viad Corp's request for oral argument with respect to its Motion to Recommit the Referee's report of

April 13, 2009. Further, this Court should enter an order compelling the Liquidator to apply to all of Viad's other pending proofs of claim, the binding law of the case as established by the Referee's December 4, 2008, report, such that the controlling law in interpreting the policies is the state in which the site is located. This Court should also hold a Case Management Conference.

LEGAL MEMORANDUM

I. ORAL ARGUMENT WILL ASSIST THE COURT BY CLARIFYING THE LEGAL ISSUES BEFORE IT AND THE LAW RELATED TO VIAD'S MOTION TO RECOMMIT.

This case involves complicated legal arguments regarding coverage, and as outlined in Viad's Motion to Recommit, there are four reasons to set aside the Referee's report denying coverage and conducting a new evidentiary hearing. Abbreviated, those issues are:

- Whether the first two home policies provide coverage for Viad's expenses resulting from voluntary compliance with an environmental abatement order where "administrative order expenses" are part of the term "loss" as provided in the policies;
- Whether, according to California's continuous trigger law, Viad carried its burden of proof by presenting evidence of when the contamination began and ended, thus shifting the burden to Home to prove that no appreciable damage occurred during the Home's policy periods;
- Whether Viad carried its burden regarding the sudden and accidental discharge provision in the third policy by demonstrating that the contamination was the result of an accident or accidents; and
- Whether the "owned property" exclusion does not apply because Viad did not have any "care, custody, or control" of the contaminated groundwater

The parties have briefed these issues and as such, there is no need for further argument on the issues in this motion. An oral argument on those four issues, however, is appropriate under the circumstances, and would assist the Court in examining the unique and specific facts and law involving the San Diego, California, proof of claim. Oral argument would also allow the parties to provide the Court with any additional background information it may need and it would allow

the parties the opportunity to answer any questions this Court may have of the parties. As such, Viad requests the opportunity for oral argument regarding Viad's Motion to Recommit.

II. CONTRARY TO LAW, THE LIQUIDATOR OPENLY REFUSES TO COMPLY WITH THE REFEREE'S REPORT REGARDING CHOICE OF LAW, AND REFUSES TO APPLY THE LAW OF EACH SITE WITH RESPECT TO VIAD'S REMAINING PROOFS OF CLAIM.

Section 20 of The Restated and Revised Order Establishing Procedures Regarding Claims

Filed with The Home Insurance Company in Liquidation states in pertinent part that:

- a. Within fifteen (15) days from the date the Referee's report is filed with the Court, the Claimant or the Liquidator shall have the right to file a Motion to Recommit with the Clerk for the Liquidation Court at the address set forth in section 2(j) of these Procedures.

. . . .

- c. If no Motion to Recommit is filed within 15 days of the filing of the Referee's report, **the Court shall enter judgment thereon in accordance with RSA 519:12.** (Emphasis added)

Because the parties disputed which law should apply to the San Diego proof of claim and the interpretation of the Home policies at issue, before moving forward on the Liquidator's disputed allowance, a determination was made with respect to the choice of law that would govern the case. Importantly, after Viad and the Liquidator fully briefed the issue, Referee Paula Rogers filed a report declaring that California law (instead of the Liquidator's requested New York law) applied because "New Hampshire's choice of law principles require consideration be given to which state has the 'most significant relationship' to the insured risk." The Referee cited Consolidated Mut. Ins. Co. v. Radio Food Corp., 249 A.2d 47, 49, 108 N.H. 494, 496 (N.H. 1968) as support for that decision. Moreover, the Referee found that "in the absence of an explicit choice by the parties, the state with the most significant relationship to the contract is the state where the risk is located," and she cited as support the case of Ellis v. Royal Ins. Co., 530 A.2d, 303, 129 N.H. 326 (N.H. 1987). This means that the law of the state in which the site is located, governs.

Because the parties remain identical (Viad as the claimant and the Liquidator as the respondent), normal rules of res judicata and law of the case apply to all of the determinations and settlement negotiations as applied to each of Viad's outstanding proofs of claim. As noted above, if it did not, as the Liquidator claims, then the parties would have to re-litigate the choice of law issue as to each of the 100+ proofs of claim filed by Viad. This is an illogical result and a frivolous interpretation of the Referee's report. Clearly, the Revised and Restated Procedures do not contemplate such a waste of judicial time and resources, nor should money that is to be allocated to the claimants be wasted away on such unnecessary litigation.

Significantly, the Liquidator failed to timely object or move to recommit the Referee's report regarding choice of law. As such, the Liquidator has waived its right to assert such an objection now and Viad objects to any such attempt by the Liquidator. The Referee's report must, as provided for in RSA 519:12, become a judgment, which makes this the law of the case and res judicata.¹ As such, the governing law for each of Viad's proofs of claim must be the state in which the site is located, and the Liquidator's refusal to follow this law is meritless.

The Liquidator openly and undeniably has refused to abide by or comply with the Referee's December 2008, report, choosing instead, to apply Illinois law to each of Viad's outstanding proofs of claim for purposes of claim determination and settlement discussions. Specifically, the Liquidator has dramatically reduced the amounts payable to admitted damages (on the non-San Diego sites) because the Liquidator seeks to apply Illinois law instead of the law of the situs.

Despite the Referee's report that the law of the situs applies to control the computation of damages on Viad's claims, despite Viad's efforts to persuade the Liquidator to apply the law of the site, and despite the fact that the law of most of the states where the sites are located do not permit

¹ By virtue of the Restated and Revised Procedures and RSA 519:12, a judgment shall be rendered if there is no objection or motion to recommit the referee's report.

the reductions in Viad's claims, the Liquidator blatantly refuses to comply with this decree. Because the December 4, 2008, Referee's report is now the law of the case, Viad requests this Court enter an order compelling the Liquidator to apply the Referees' rulings in adjusting Viad's proofs of claim by applying the law of the state in which each site is located, find the Liquidator has violated its obligations as imposed by the Referees, and award attorneys' fees and costs to Viad for having to bring this motion before the court.


Respectfully submitted,

VIAD CORP

By its attorneys,

PRETI, FLAHERTY, BELIVEAU &
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Dated: October 8, 2010

By: 
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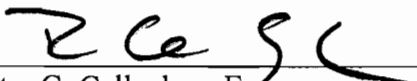
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion* was sent this 8th day of October 2010, by first class mail, postage prepaid and via email to:

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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

AFFIDAVIT OF DAVID H. SIMMONS

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared DAVID H. SIMMONS, who, after being duly sworn deposes and states as follows:

1. My name is David H. Simmons. I am over the age of 18, I have personal knowledge of each of the facts stated in this affidavit, and I am competent to testify to them.

2. As background for the court, I am an attorney representing Viad Corp ("Viad") in its claim against The Home Insurance Company in Liquidation ("Home") in over 100 proofs of claim that Viad filed against Home in 2004 for various environmental claims across the country and Canada.

3. While litigating Viad's San Diego, California, Proof of Claim the parties disagreed as to the choice of law to be applied to interpretation of the policies with respect to the San Diego, California, Site. Paula Rogers issued a report on December 4, 2008, ruling that the law of the situs of the risk is the applicable law in interpreting the Home policies. Specifically, Referee Rogers declared that California law (instead of the Liquidator's requested New York law) applied because "New Hampshire's choice of law principles require consideration be given to

which state has the 'most significant relationship' to the insured risk." The Referee cited Consolidated Mut. Ins. Co. v. Radio Food Corp., 249 A.2d 47, 49, 108 N.H. 494, 496 (N.H. 1968) as support for that decision. Moreover, the Referee found that " in the absence of an explicit choice by the parties, the state with the most significant relationship to the contract is the state where the risk is located," citing the case of Ellis v. Royal Ins. Co., 530 A.2d, 303, 129 N.H. 326 (N.H. 1987). The Liquidator never objected to or appealed the Referee's December 4, 2008, Report.

4. It is Viad's understanding that the Liquidator does not intend to consider as binding the Referee's existing rulings on choice of law.

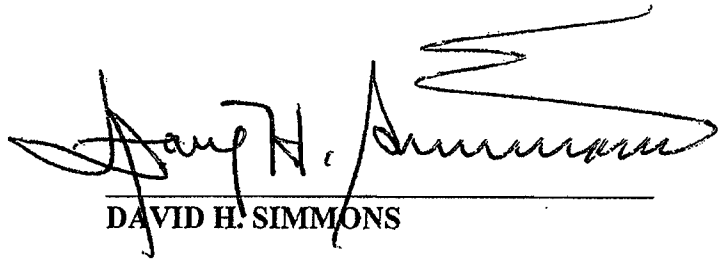
5. Principles of law of the case, *res judicata*, and collateral estoppel compel that the rulings on choice of law by the Referees are binding on the Liquidator in all of Viad's proofs of claim.

6. The Parties need resolution of this issue in order that the parties may effectively resolve, either by settlement or litigation, the remaining proofs of claim.

7. Resolution of this important issue of choice of law will result in saving both judicial time and effort.

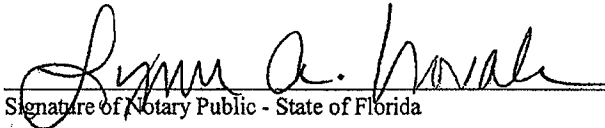
END OF AFFIDAVIT.

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DAVID H. SIMMONS

STATE OF FLORIDA
COUNTY OF Orange

The foregoing instrument was sworn to and acknowledged before me this 8th day of October 2010, by David H. Simmons, who is personally known to me or who has provided as identification, and who did take an oath.


Signature of Notary Public - State of Florida

Print, type or stamp commissioned name of Notary Public
Personally known to me _____ OR Produced Identification _____



LYNN A. NOVAK
MY COMMISSION # DD 817802
EXPIRES: November 5, 2012
Bonded thru Budget Notary Services

Type of Identification Produced