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
Claimant Name:	VIAD Corp
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:	

VIAD'S MEMORANDUM OF LAW IN OPPOSITION TO BIFURCATING COVERAGE ISSUES AND VIAD'S POSITION AS TO THE APPLICABLE CHOICE OF LAW

Claimant, Viad Corp ("Viad"), by and through its undersigned counsel files this Memorandum in Opposition to Bifurcating Coverage Issues and Viad's Position as to the Applicable Choice of Law, and in support thereof states as follows:

On October 21, 2008, the parties telephonically attended a Structuring Conference held before the Honorable Paula T. Rogers, Referee. During the Structuring Conference The Home Insurance Company in Liquidation ("Home") requested that coverage issues be bifurcated by deciding the choice of law issue first, and later addressing the other coverage issues. Viad objected to this request and Referee directed both parties to submit briefs outlining their respective positions on the bifurcation issue, as well as argument regarding the applicable choice of law.

Background

The present dispute involves Viad's[1] claim for insurance coverage arising from environmental contamination at a bus terminal and vehicle maintenance operation located in San

[1] Viad, as referenced herein, includes its predecessor in interest, The Greyhound Corporation/Transportation Leasing Company,

Diego, California. Viad timely submitted its Proof of Claim for the San Diego site on or about June 11, 2004, and provided Home with extensive documentation regarding the San Diego site.

On or about January 25, 2008, Home issued a Notice of Determination disallowing Viad's claim for the San Diego site. Home's primary argument supporting its denial of Viad's claim is that Viad allegedly failed to give timely notice to Home. According to Home, which argues for application of New York law, untimely notice absolves Home entirely from providing coverage. Additionally, Home has asserted a number of other coverage arguments opposing coverage of Viad's claim. Viad objected to Home's Notice of Determination and to Home's incorrect assertion that New York law applied to the interpretation of the policies at issue.

Viad asserts that California law applies to the instant coverage action, and when the policies are interpreted pursuant to California law, Home must provide coverage for the San Diego claim.[2] But, most importantly, regardless of which state's law applies, the specific language of each of the Home policies at issue mandates coverage. As such, Home's "untimely notice" defense is neither dispositive nor applicable. Thus, the parties disagree both on the choice of law that should govern the San Diego claim with respect to Home's "notice" defense, and also regarding the interpretation of the policy provisions relating to all of Home's coverage defenses, regardless of whether New York, California, or Illinois law applies.

I. THERE IS NO BASIS TO BIFURCATE THE "CHOICE OF LAW" ISSUE BECAUSE THE REFEREE IS DECIDING THE CHOICE OF LAW RIGHT NOW AND HAS DIRECTED THE PARTIES TO SET A HEARING DATE FOR ORAL ARGUMENT, WHICH THE PARTIES HAVE STIPULATED WILL BE FEBRUARY 4, 2009.

A. First and Foremost, the Choice of Law Issue Is Being Disposed of By the Referee Deciding this Issue Now. As such, The Bifurcation Issue is Moot.

[2] Alternatively, Viad argues that with respect to policy number HEC 4344748, since the policy was brokered by an Illinois insurance broker, if the Court finds that California law does not apply, then Illinois law should apply, not New York law, and as such, the "untimely notice" defense does not bar coverage. *See Zurich Ins. Co. v. Walsh Constr. Co. of Ill.,* 816 N.E.2d 801, 805 (Ill. App. 2004)(holding that passage of time is not a bar to coverage and that the court must consider the language of the policy's notice provision); *Northbrook Property & Cas. Ins. Co. v. Applied Systems, Inc.*, 729 N.E.2d 915, 921 (Ill. App. 2000)(holding that "an insured's duties are controlled by the terms and conditions of its insurance contract").

At the October 21, 2008, Structuring Conference, Referee Rogers directed that in addition to submitting memorandums of law regarding their positions on bifurcation, the parties fully brief the choice of law issue so that she might timely decide the issue and reduce the need for multiple hearings. Moreover, Referee Rogers explained that upon receipt of the parties' briefs she would rule on the bifurcation and choice of law issue within a very short time so that the parties would have sufficient time to complete their discovery. Because the parties are submitting their memorandums of law outlining their respective positions on the choice of law issue, and the Referee intends to rule on the choice of law issue without a hearing, the bifurcation Home requests is unnecessary, and for all practical purposes, moot.

B. Bifurcation is Inappropriate Under the Circumstances Whether the Court Applies Section 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation, New Hampshire Rules of Civil Procedure, or Federal Law.

Section 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation provides that a party "may request that *coverage* and *valuation* may be bifurcated." In the present case, however, Home does not seek bifurcation of coverage issues from the claim value; rather, it seeks a bifurcation of only coverage issues. As such, Section 15 is inapplicable and bifurcation of choice of law issues is not a procedure available to Home.

New Hampshire rules of civil procedure are no more availing as they do not directly address bifurcating or severing trials, althouth New Hampshire courts do recognize that "determinations of whether to bifurcate a case or sever the issues before the court are committed to the trial court's sound discretion." *Stewart v. Bader*, 907 A. 2d 931, 941-42 (N. H. 2006) (citing *Blevens v. Town of Bow*, 146 N.H. 67, 72 (2001)). Here, severing the choice of law issue from the coverage defenses provides no judicial economies because choice of law is not

dispositive of any issue regardless of which state law is applied. As noted in further detail in Section III herein, even if New York law was applied as Home requests, Home's "notice" defense does not preclude coverage.

Likewise application of the federal rules regarding bifurcation lies within the discretion of the trial court. Bifurcation, however, is the exception and not the rule. *See Agron v. Trustees of Columbia University in the City of New York*, 1997 WL 399667, *1 (July 15, 1997) (bifurcation is the exception, and the moving party bears burden of establishing bifurcation is warranted). Federal courts must consider five factors to determine whether bifurcation is appropriate, only two of which are relevant to the instant matter: (1) whether the issues are significantly different from one another; (2) whether the documentary and testimonial evidence on the issues overlap.[3] *Id*. (citing *Reading Indus., Inc. v. Kennecott Copper Corp*., 61 F.R.D. 662, 664 (S.D.N.Y. 1974); *Xerox Corp. v. Nashua Corp*., 57 F.R.D. 25, 26 (S.D.N.Y. 1972)). Here, because the choice of law issue and Home's various coverage arguments are not significantly different, the issues are interrelated and based upon overlapping facts,[4] and there is no jury trial, bifurcation is not warranted.

C. Common Sense Dictates that Bifurcating Choice of Law from the Coverage Issues is Neither Practical or Judicially Economical As Choice of Law is Not Dispositive in Resolving the Coverage Issues.

Finally, common sense and practical considerations demonstrate that there is no basis for arguing and deciding one non-dispositive legal issue at an oral argument and then separately hearing argument on other issues, as doing so provides no benefit and serves no purpose. First, contrary to Home's position, the choice of law issue is not dispositive and having bifurcated

[3] The other three are: (3) whether the issues are to be tried before a jury or the court; (4) whether the posture of discovery on the issues favors a single trial or bifurcation; and (5) whether the party opposing bifurcation will be prejudiced if it is granted.

[4] For example, the documentation related to the choice of law issue necessarily relates to and overlaps with the other issues regarding the policies' language; the policies' various terms and provisions; the interpretation of Home's

hearings will not assist in resolving the remaining coverage issues related to the San Diego claim, because regardless of whether New York law, California, or Illinois law applies, the Home policies provide coverage for the San Diego claim. Second, as explained further below, Home's reliance on purportedly delayed notice will not be resolved merely by the selection of applicable state law, because even if New York law is applied (as asserted by Home), Home's attempt to avoid coverage based on notice must fail.[5] Accordingly, even if the issues are bifurcated, the parties must still then litigate other coverage arguments under the law of the state the Referee determines applies. Third, because the "contracted for" policy language clearly must prevail over whichever state law is applied, regardless of what state law interprets the language, the contract language must, nonetheless, be given full force and effect.

II. NEW HAMPSHIRE'S CHOICE OF LAW REQUIRES THAT CALIFORNIA LAW APPLY TO THE SAN DIEGO CLAIM.

Since The Home Insurance Company in Liquidation action and the instant disputed claim are pending in New Hampshire, New Hampshire's choice of law rules determine which state's law will govern and apply to the Home policies at issue for the San Diego claim. In the absence of an express choice of law validly made by the parties, New Hampshire's choice of law holds that "the contract is to be governed, both as to validity and performance, by the law of the state with which the contract has its most significant relationship." *Consolidated Mut. Ins. Co. v. Radio Foods Corp.*, 240 A. 2d 47, 49, 108 N.H. 494, 496 (N.H. 1968) (adopting the Restatement of Conflicts doctrine and by so doing, abandoning the old *lex loci contractu* rule).

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policy terms, provisions and language; other cases applying or interpreting the same or similar insurance provisions or terms; and documents related to the San Diego claim.

[5] Home asserts that New York law applies and claims that New York law allows Home to completely avoid coverage. As such, Home's attempt to bifurcate the choice of law issue appears to be based on its conclusion that if New York law is applied then Home is exonerated from providing coverage. As explained herein, New York law does not provide such a broad exculpation of Home's coverage obligations. In one sense, the notice issue (but not the choice of law issue) is determinative: the courts hold that Home waives notice as a defense by raising other defenses to coverage.

In the context of insurance contracts, New Hampshire law is clear: the most significant relationship is defined by the principal location of the insured risk, and where the insured and the risk at issue are in different states, the law of the state where the risk is located governs. *Radio Foods*, supra. *Suburban Constr. Co. v. Sentry Ins.*, 1994 WL 263789, *3 (D.N.H. March 21, 1994). As recognized by the court in *Radio Foods*, "even though the policy also dealt with risks in [another state], where the principal office of the insured was located, the New Hampshire risk insured is to be treated as though it were insured by a separate policy and the validity of and rights under the multiple risk policy as to this risk are to be governed by the law of this state." *Radio Foods Corp.*, 240 A. 2d at 49, 108 N.H. at 497.

The rule recognized in *Radio Foods* was further confirmed in *Ellis v. Royal Ins. Co.*, 530 A.2d 303, 129 N.H. 326 (N.H. 1987). In *Ellis*, the court held that even though an insured was a New Jersey corporation, "the fact remains that the policy covered a multitude of risks located in various states . . . . [t]he risk at issue in this particular instance was located in New Hampshire. Therefore, New Hampshire law governs." *Id.* at 307 and 332. *Ellis*' clear holding is that when dealing with multiple risk policies, the applicable law is the location of the specific insured risk.

The holdings of *Radio Foods* and *Ellis* were also reinforced by the *Suburban Constr. Co.*, where the court, which held that:

> where the insured and the risk being insured are in different states, the law of the state where the risk is located governs. . . . Therefore, *even though Suburban is a Massachusetts corporation and the contracts were negotiated there*, the insurance policies must be construed under New Hampshire law *because* ***the particular risk*** *insured is that posed by the underground fuel storage tanks located* at the Hussey service station in Greenland, New Hampshire.

1994 WL 263789, *3 (D.N.H. March 21, 1994) (emphasis added) (recognizing that New Hampshire follows the Restatement (Second) of Conflict of Laws, which provides that in absence of an explicit choice by the parties, the law of the state with the most significant relationship to the contract governs). Like *Ellis* and *Suburban*, because the particular risk at

issue in the present case was a facility located in San Diego, California, California law governs the interpretation of and any questions regarding the validity and performance of the various contractual provisions at issue. *See Suburban Construction Co*., WL 263789 at 3.

Home, however, erroneously asserts that the location of the brokerage company and the insured's corporate headquarters should dictate which state's law applies.[6] In support of Home's assertion that New York law would likely apply to the claim for the San Diego site, Home relies upon *Cecere v. Aetna Ins. Co*., 766 A.2d 696, 145 N.H. 660 (N.H. 2001), and *K.J. Quinn & Co. v. Continental Casualty*, 806 F. Supp. 1037 (D.N.H. 1992). Notably, neither of these cases support Home's position; *K.J. Quinn* predates the cases cited by Viad, and *Cecere* does not involve a policy covering multiple risks in different states.

Cecere involved an uninsured motorist claim made under a garage liability policy for an accident that occurred in New Hampshire. New Hampshire was the residence state of the employee who was driving a dealer demonstration vehicle, while the insured business carrying the garage liability policy (H.J. Nassar motor Company) was located in Massachusetts. *Cecere v. Aetna Ins. Co*., 766 A.2d at 697-698, 145 N.H. at 661-62. In determining that Massachusetts, rather than New Hampshire law should apply to the interpretation of the policy, the court noted that the insured conducted business *only* in Massachusetts, and that the insurance policy was designed to insure activities located primarily upon the garage site in Massachusetts. *Id*. at 699 and 662. In fact, the *Cecere* court distinguished *Ellis*[7] finding that the location of the employee's residence (in New Hampshire) should not be considered the risk location for choice of law analysis because the employee's operation of a vehicle in New Hampshire was not the primary insured risk. *Id*.

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[6] If that were true, then at least as to policy # HEC 4344748, Illinois law would be applied to interpret the policy language before New York would be applied.

[7] *Ellis v. Royal Ins. Co*., 530 A. 2d 303, 306 (N.H. 1987).

The uninsured motorist claim involved in *Cecere*, where all of the insured's operations were in one state (Massachusetts), is not only distinguishable from the multiple risk-multiple state facts at bar, but *Cecere* actually supports Viad's position that the *location* of the particular insured risk is the operative factor for determining choice of law. Specifically, the *Cecere* court cited *Ellis* and recognized that "where a policy covers risks in multiple states, the risk of each individual state is 'to be treated as though it were insured by a separate policy and the validity of and rights under the multiple risk policy as to this risk are to be governed by the laws of [that] state.'" *Cecere*, 766 A.2d at 699, 145 N.H.. at 664 (citing *Ellis*, 530 A.2d at 331). Such is the case involving the San Diego site, and Home presents no facts that could take Viad's claim outside of the scope of the *Ellis* rule. Given that the insured location for the San Diego claim involved operations and damages arising at the San Diego, California, location, *Cecere* does not lend support to applying any state's law other than California. As such, California law will apply to the interpretation of the insurance policies at issue in the present claim.

K. J. Quinn, the other case Home cited, likewise further supports Viad's position that California law applies to the present claim. Home cites *K. J. Quinn* as "applying the law of the state where policy negotiations and issuance took place where the policyholder had nationwide operations, even thought the parties' dispute concerned environmental contamination solely in New Hampshire." January 25, 2008, letter from J. O'Conner, p. 3. While *K. J. Quinn* involved a claim for environmental contamination in New Hampshire, importantly, the contamination arose from hazardous waste that had been *generated* predominantly from operations at the insured's headquarters in Massachusetts, and later disposed of in New Hampshire. *K. J. Quinn*, 806 F. Supp. at 1041. Unlike the present case where the claim and damages arose or resulted from the insured's fixed business operations at one specific location, *K. J. Quinn* did not involve only one specific site. In fact, the *K.J. Quinn* court specifically noted that "[t]he logic of *Ellis*

might result in the application of New Hampshire law where **if the pollution had occurred at or resulted entirely from a fixed business risk or operation that was insured by CNA in New Hampshire**." *Id*. (emphasis added). Accordingly, the *K.J. Quinn* court recognized that its holding would likely be different if the facts had been similar to the instant claim.

Contrary to Home's position, New Hampshire's choice of law rules clearly require that the interpretation of an insurance policy's terms and conditions should be governed by the state law of the specific risk insured, not the place the insurance contract was issued, brokered, or executed. Home's assertion that Greyhound's New York headquarters must be considered the location of the insured risk in determining choice of law is likewise unsupported. Like *Ellis* and *Suburban*, the Home policies at issue insured multiple risk locations in various states, and the law of the state where the specific risk at issue was located would apply. Since the insured risk at issue was located in San Diego, California, and the loss arose from operations at that specific site, California law must govern.

Regardless of the application of state law, however, Home's policy provides for coverage in the present matter. Home cannot avoid coverage by asserting late notice as a defense because pursuant to the notice provisions in its policies Viad did not violate any duty under the policy. Viad, in exercising its reasonable judgment, believed that earlier notice was not justified regarding the San Diego site. Viad did previously give notice regarding nearly identical claims, which Home improperly denied, so Viad reasonably believed the Home would not provide coverage for the San Diego claim. In any event, Home disclaimed any duty to investigate or defend claims. As such, any state applying the rule allowing notice to serve as defense regardless of coverage would not apply under the circumstances and policy language at issue. Further, Home can not demonstrate any prejudice. Earlier notice to Home obviously would not have changed the outcome nor would it have changed Home's refusal to perform under the

policies, as is clearly evidenced by Home's continued refusal to honor the policies on additional grounds.

III. ALTHOUGH NEW YORK LAW SHOULD NOT APPLY TO THE SAN DIEGO CLAIM IN THE PRESENT MATTER,[8] UNDER THE CIRCUMSTANCES, EVEN UNDER NEW YORK LAW HOME IS NOT RELIEVED OF ITS OBLIGATION TO PROVIDE COVERAGE BASED ON HOME'S POLICY PROVISIONS.

For its principal coverage defense Home relies upon the assertion that Viad's notice under the circumstances was in contravention of the policy terms because notice was not "timely." According to Home, New York law completely bars coverage where notice is not timely. Home's blanket recitation of New York law, however, is not accurate, and regardless of whether Viad's notice was timely, the issue of timeliness must be first determined by the policy language, i.e., coverage must be determined by interpreting the language of the policy. Here, according to the policy terms and conditions (and regardless of which state's law is considered), Viad's notice of claim under the circumstances was timely, it was not a breach, and therefore the notice given was in full compliance each of the policies at issue.

New York courts apply and follow the "no prejudice" rule when an insured has violated a notice requirement and offered no reasonable explanation or excuse for the lack of or delay in notice where the policy requires prompt notice of a claim or occurrence. *See American Transit Ins. Co. v. B.O. Astra Management Corp*., 814 N.Y.S. 2d 849, 853 (Supr. Ct. 2006); *Brandon v. Nationwide Mut. Ins. Co*., 769 N.E. 2d 810, 812 (N.Y. 2002). This "no prejudice exception" or rule allows an insurer to deny coverage when an insured *fails to comply* with a notice provision, regardless of whether the insurer has shown any prejudice. *Id*. The rule was adopted and applied to notice provisions often contained in some primary liability policies simply requiring the insured to notify the insurer of an occurrence or claim immediately or "as soon as practicable." *See, e.g., Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc*.,

822 F.2d 267, 268 (N.Y. Ct. App. 1987) (finding insured breached policy provision providing that the insured give written notice to CU "as soon as practicable" of an "occurrence" relevant to the coverage which required notice as a condition to coverage); *Gardner-Denver Co. v. DIC-Underhill Construction Co.*, 416 F. Supp. 934, 936 (S.D.N.Y. 1976) (holding that the insurer need not show prejudice before asserting the defense of non-compliance with notice where the policy stated that the insured "shall as soon as practicable" report every loss, damage or occurrence which may give rise to a claim) (citing *Security Mutual Ins. Co. v. Acker-Fitzsimons Corp.*, 293 N.E. 2d 76 (N.Y. 1972)). For several reasons, however, this "no prejudice" rule has no application in the present case.

First and foremost, New York's rule can only apply once a court (or Referee) determines that the insured has violated the actual terms of the policies. In the present case, the clear language of the policies shows that Viad fully complied with the notice provisions.

Secondly, even under New York law, the rule that an insurer need not demonstrate prejudice when a policy condition requiring notice has been violated does not indiscriminately apply to each and every circumstance and insurance policy. Rather, it is a fact specific and limited exception. As explained by the Court of Appeals of New York:

> By allowing insurers to avoid their obligations to premium-paying clients without showing prejudice, *Security Mutual* created ***a limited exception*** to this general rule. The rationales for this limited exception include the insurer's need to protect itself from fraud by *investigation claims soon after the underlying events*; to set reserves; and *to take an active, early role in settlement discussions. Finding these factors inapposite* when a reinsurer asserts a late notice of claim defense against a primary insurer, we declined to extend the *Security Mutual* no-prejudice exception to the reinsurance context.
> *Brandon v. Nationwide Mutual Ins. Co.*, 769 N.E.2d 810, 813 (N.Y. 2002) (internal citations omitted) (emphasis added).[9]

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[8] As explained in Section II, under New Hampshire's choice of law rules California law should apply.

[9] The *Brandon* court also noted that New York is one of the only states that still applies the no-prejudice exception. Holding that late notice of legal action should not preclude coverage, the court also noted that "the issue of whether New York should continue to maintain the no-prejudice exception when insurers assert late notice of claim as a defense is not before us," but found it inapplicable under the circumstances. *Brandon*, 769 N.E. 2d at 813).

Security Mutual, the 1972 case creating the authority for this "no prejudice" rule in New York, was based on policy language requiring an insured to provide notice of an occurrence as soon as practicable[10] and also held that "[t]here may be circumstances, such as lack of knowledge that an accident has occurred, that will explain or excuse delay in giving notice and show it to be reasonable . . .and. . .[t]hen, too, a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice." *Security Mutual Ins. Co. v. Acker-Fitzsimons Corp*., 293 N.E. 2d 76 (N.Y. 1972). Accordingly, it is clear that *Security Mutual*, recognized as the seminal case on the issue,[11] requires that excuses such as a good-faith belief of non-liability preclude the application of the no-prejudice rule. *See also Reynolds Metal Co. v. Aetna Cas. And Surety Co*., 696 N.Y.S.2d 563, 568 (N.Y. 3d App. 1999); *Strand v. Pioneer Ins. Co*., 704 N.Y.S.2d 683, (N.Y. App. 3d 2000) (recognizing that a reasonable belief of non-liability may serve as a valid excuse for late notice of a claim or suit). In the present case, the evidence (to be presented on February 4, 2009) will clearly show that Viad believed that no notice should be given at the times that Home asserts such notice should have been given. This factual issue cannot be determined now without the evidence.

Further, in other circumstances courts have found that the no-prejudice rule should not apply, and that coverage cannot be avoided simply because the insurer asserts a notice provision was violated. *See, e.g*., *Brandon v. Nationwide Mutual Ins. Co*., 769 N.E. 2d 810, 813 (N.Y. 2002) (finding that the no-prejudice rule does not apply in a claim against a reinsurer or involving supplementary uninsured motorist coverage); *American Transit Ins. Co. v. B.O. Astra Management Corp*., 814 N.Y.S. 2d 849 (Supr. Ct. NY 2006) (holding that under the

[10] Importantly, the instant policies do not contain any such "as soon as practicable" language, thus, the no-prejudice exception does not apply.

[11] *See, e.g.,Utica Mut. Ins. Co. v. Fireman's Fund Ins. Companies*, 748 F.2d 118, 121 (Ct. App. 2d N.Y. 1984) ("compliance with the notice requirements set forth in an insurance contract is a condition precedent to recovery under New York law, and failure by the insured to comply with such requirements relieves the insurer of liability.

circumstances the no prejudice rule did not apply to the insurer's notice of lawsuit condition). Thus, it is clear that whether an insurer's assertion that an insured failed to provide proper notice may serve as a defense to coverage should be determined on a case-by-case basis depending on the facts presented and in accordance with the language of the specific policy at issue – something that cannot be done in a non-evidentiary hearing.

As stated above, in order to even consider application of the no-prejudice rule, there must be non-compliance with a policy provision. *See Security Mutual*, 340 N.Y.S.2d at 905 ("Absent a valid excuse, a ***failure to satisfy*** the notice requirement vitiates the policy.") (emphasis added); *U.S. Liability Ins. Co. v. Winchester Fine Arts Services, Inc.*, 337 F. Supp. 2d 435, 450 (S.D.N.Y. 2004)[12] ("Generally, an insurer is entitled to assert a defense of ***non-compliance*** with a notice provision as a basis to deny coverage and indemnification) (emphasis added). In the present case, there is no such non-compliance such that the "no prejudice" rule should even be considered. To the contrary, a review of the policy language shows that Viad has complied with all policy conditions, took action to reduce the amount of the claim, and acted to safeguard Home's interest. Accordingly, the no-prejudice rule has no application to the San Diego claim.

There are at least three Home policies at issue in the present claim. Copies of these policies are attached to this Brief as follows: policy number 9557416 (Exhibit A), 9304783 (Exhibit B), and 4344748 (Exhibit C). Two of these policies (9557416 and 9304783), Exhibits A and B, contain identical policy language. The two "notice" provisions at issue in these policies provide the following language:

> The Insured shall give prompt notice to the company of any event or development which, <u>in the judgment of the insured might result in a claim upon the Company</u> hereunder. <u>Inadvertent failure to so notify shall, however, not affect the liability of</u>

See Gardner-Denver Co. v. Dic-Underhill Constr. Co., 416 F.Supp. 934, 936 (S.D.N.Y.1976) (**citing *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.***, 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902, 905, 293 N.E.2d 76, 79 (1972)").

[12] The *U.S. Liability* court also points out that an insurer can waive the defense of non-compliance with a notice provision if it is unreasonably late in disclaiming liability. *U.S. Liability*, 337 F. Supp. 2d at 450 (S.D.N.Y. 2004).

> the Company, but the Insured agrees to use its best efforts to comply with the foregoing stipulations with a view to affording the company every possible opportunity of safeguarding their interest in any claim in which they may be involved. The insured shall forward promptly to the Company a copy of each claim, report, document, paper or pleading in connection with such case which might be required by the Company as adjustment proceeds.
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> ***
>
> The Company will not undertake to investigate claims or defend suits or proceedings on behalf of the Insured.
> Exhibit A, p. 4, Exhibit B, p.3 (emphasis added).

Further, the language in the third policy, Exhibit C, contains the following:

> G. NOTICE OF OCCURRENCE
> Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the Insured should be held liable, is likely to involve this policy, notice shall be sent to the Company as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claim.
>
> H. ASSISTANCE AND CO-OPERATION
> The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but The Company shall have the right and shall be given the opportunity to associate with the Insured . . . in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involve The Company. . . .
> Exhibit C, p. 4

According to the above-noted policy language, it is clear that the Home policies did not require Viad to immediately provide notice to Home regardless of the circumstances. As such, the "no prejudice" rule is completely inapplicable and provides Home absolutely no defense. As to the first two policies (Exhibits A & B), the insured was only required to report an "event or development" which *in its[insured's] judgment* might result in a claim to Home. This language did not require Viad (or its predecessor) to notice the insurer of each and every occurrence. Based on the language of these notice provisions Viad could not possibly have violated the policy provisions unless Home can demonstrate that the San Diego claim, in Viad's own

judgment, was reasonably likely to result in a claim to Home. Home cannot so demonstrate because no such facts exist.

Further, the policies go even further in not requiring notice when Home claims notice should be given. They specifically also state that *inadvertent failure shall not affect Home's liability*. These policies themselves require Home to prove prejudice in order to avoid liability. While in some circumstances New York courts find that notice provisions are conditions precedent to coverage under certain policies, the Home policies in this case require Home to prove prejudice and coverage simply is not conditioned upon timely notice. *See* 13 Couch on Ins. § 186:42 ("As a general rule, a notice or proof provision is not considered a condition precedent unless it explicitly makes forfeiture the consequence of breach, or uses language which otherwise clearly expresses the intention that the provision be treated as a condition precedent").

As to the third policy (Exhibit C), this policy likewise states that the insured is entitled to use its judgment, and report occurrences which it reasonably believes are covered. Further, this policy provision explicitly states that notice is not a condition precedent to coverage, in that failure to give notice where the occurrence did not appear it would involve Home's policy will not affect the claim. "A contract of insurance is no different from any other and must be construed in a fair and reasonable manner . . . ." *DeForte v. Allstate Ins. Co*., 442 N.Y. S. 2d 307, 309 (App. Div. 2 1981). Based on the language of Home's notice provision in this policy, Viad acted reasonably and in accordance with the policy provisions. The evidence will show that Viad did not notify Home of the San Diego claim earlier than 2004 because Viad reasonably believed that: 1) the matter would qualify for funding under the State of California Underground Storage Tank Clean Up Fund; and that 2) Home would not provide coverage for the claim because Home had previously denied nearly identical claims under the same or similar policies.

Finally, even if New York law were to apply, New York's no-prejudice rule does not apply here because the reason and purpose for the rule are not furthered or supported in the present case. "The rationales for this limited exception [to requiring an insurer show prejudice] include the insurer's need to protect itself from fraud by *investigating claims soon* after the underlying events; to set reserves; and to *take an active, early role in settlement* discussions." *Brandon*, 769 N.E.2d at 813 (emphasis added). *See also American Transit Ins. Co. v. B.O. Astra Management Corp.*, 814 N.Y.S. 2d 849, 853-54 (Supr. Ct. NY 2006) (quoting *Argo Corp. v. Greater N.Y. Ins.*, 827 N.E. 2d 762 (N.Y. 2005), regarding a notice of lawsuit provision, that "[a] liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able *to take an active, early role in the litigation process* and in any settlement discussions . . . .") (emphasis added). To the contrary, the policies at issue do not invoke or further these reasons.. Specifically, not only does Home not have a duty to defend, Home's policy states that Home "***will not*** undertake to ***investigate claims or defend*** suits. . . ." Accordingly, even if Home had been notified earlier, its policy provides that it will not investigate or become involved, and it would not take an early or active role in any settlement discussions. Because Home never intended to take any action regardless of whether and notice was received, the no-prejudice rule is completely inapplicable given the language of the policies at issue.

A. Regardless of Which State's Law Applies to the Claim, Home's Principal Defense Regarding Notice Does not Preclude Coverage Because Home's Policy Language Provides for Coverage Under the Circumstances.

A contract of insurance is no different from any other and must be construed in a fair and reasonable manner . . . . *De Forte v. Allstate Ins. Co.*, 442 N.Y.S. 2d 307, 309 (App. Div. 4 1981). Thus, while the state's law on interpreting the policy is relevant when analyzing coverage under an insurance policy, it will not change the terms of the policy and the language of the

contract controls. *See Stamm Theatres, Inc. v. Hartford Casualty Ins. Co.*, 113 Cal.Rptr.2d 300, 304 - 305 (Cal. App. 1 Dist. 2001) ("While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. . . . Thus, the mutual intention of the parties at the time the contract is formed governs interpretation.") (internal quotations omitted); *Folkman v. Quamme*, 665 N.W.2d 857, 864 (Wis. 2003) (The general rules of construction governing contracts are applied to the language in insurance polices).

In the present case, regardless of what state's law applies, the contract provides coverage for Viad's claim. Based upon the actual facts of this case, and pursuant to the express language of the policy, the notice provisions in Home's policy do not allow Home to deny coverage under the present circumstances.

1. Viad did not reasonably anticipate a claim and used its best judgment in anticipating whether a claim would likely be covered under Home's policy.

The evidence will show that Viad filed for and reasonably believed it would qualify for reimbursement from the State of California Underground Storage Tank Clean Up Fund. Pursuant to this clean up fund, the State would reimburse Viad for certain expenses it incurred in conducting the mandatory remediation at the San Diego site. Until Viad received notice that reimbursement might not be forthcoming, or until Viad received payment of any kind, Viad had no reason to believe that a claim would result. As such, pursuant to the policies' express language, Viad had no obligation to notify Home of an occurrence or possible claim, and Viad's notice to Home cannot be construed as late or delayed: Viad complied with the policy terms, used its best judgment, and provided notice only after it appeared that a claim might result due to the State of California's delayed, insufficient, or non-reimbursement of Viad's remediation costs. Since Viad did not receive any reimbursement from the State of California until October 2006 ($314,847.00) and November 2008 ($1,112,314.004), which was well after Viad's Proof of

Claim was filed in June 2004, Viad reasonably anticipated that a claim against Home would result. See e.g., copy of 2006 reimbursement checks attached as Exhibit D.

Additionally, Viad will present evidence demonstrating that Home denied coverage for at least six (6) nearly identical claims noticed to Home in 1996, and additional claims for which Viad provided notice to Home a few years later. See Composite Exhibit E. Those claims were each made pursuant to the same three policies (or nearly identical policies) as those at issue for the present claim and subject to the same notice provisions presently at issue. Further, the claims arose from similar if not identical environmental circumstances as those involving the San Diego site. In response to those prior claims, Home breached its policy(ies), took no action on behalf of Viad, and denied coverage for the claims based on the same policy provisions and/or exclusions as those outlined in Mr. O'Connor's June 7, 2007, letter referenced in Home's Notice of Determination. Therefore, Home waived any right to deny coverage based upon lack of notice. Home is likewise estopped from denying coverage based upon notice when Home has shown that it would deny the claims anyway. Further, Home breached the policies by such wrongful denials and has no right to claim lack of notice in the present case.

Finally, the language in the notice provisions outlined on pp. 13-14 herein, provide that the Viad should notify the company of an occurrence or event that *Viad believed would be covered or involve Home's policy*. Because Home previously denied several other identical or nearly identical claims, Viad did not reasonably anticipate that Home would provide coverage for the San Diego claim.

2. Viad Used Its Best Efforts to Safeguard Home's Interests and Therefore Complied with the Policies' Provisions.

The notice provisions at issue also provide that the "*Insured agrees to use its best efforts to afford the Company every possibility of safeguarding their interest in any claim.*" Viad chose to enter into a remediation agreement with California Regional Water Quality Control Board to

eliminate the possibility of expensive and unnecessary litigation, and to pursue state reimbursement for Viad's remediation expenses. In so doing, Viad clearly attempted to safeguard Home's interests by both eliminating the possibility of litigation[13] and by seeking to mitigate any damages through California's reimbursement program. Viad's efforts demonstrate that Viad was actively pursuing a course of action that was inherently designed to protect Home's interests and that Viad had no reason to anticipate that a claim might later result. As such, Viad properly complied with the policy provisions and Home has failed to assert any facts to the contrary.

3. Since Home's Policies Specifically Provide That Delayed Notice Shall Not Preclude Coverage, Home's notice provision Cannot in Any Way Operate as a Condition Precedent to Coverage nor Preclude Coverage, Especially when Home Suffered no Prejudice From Viad's Claim Notice.

Timely notice of a claim is not a condition precedent to an insurer's liability, and there is no presumption of prejudice based solely on delayed notice. *Campbell v. Allstate Ins. Co.*, 384 P.2d 155, 157 (Cal. 1963). Here, even according to the policy language at issue, timely notice is not a condition precedent to coverage. Further, an insurer (Home) bears the burden of showing that it has been actually and substantially prejudiced by any allegedly delayed notice before it can raise the "breach of a notice condition" defense. *Campbell*, 384 P.2d at 160; *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098, 1106-07 (Cal. 2d Dist. Ct. App. 1949); *Billington v. Interinsurance Exchange*, 456 P.2d 982, 71 Cal. 2d 728, 737-8 (Cal. 1969); *Select Ins. Co. v. Superior Court*, 226 Cal. App. 3d 631, 636-7, (Cal. 4th Dist. Ct. App. 1990). Even if New York law were to apply, it cannot override the express language of the insurance policies, which

[13] Pursuant to *Ho by Ho v. San Francisco Unified School Dist*., 956 F. Supp. 1316 (N.D. Cal. 1997), once parties enter into a consent agreement or order, litigation of that matter is precluded under California law. Here, the terms of the remediation agreement render it the functional equivalent of a consent agreement, and as such, litigation will be precluded.

clearly do not make notice a condition precedent. As such, Home would have to show demonstrable prejudice, which it cannot.

To demonstrate actual, substantial prejudice arising from lack of timely notice, an insurer must show that through the passage of time it lost something that would have changed the way the underlying claim was handled. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 12 Cal. App. 4th 715, 763 (Cal. 1 Dist. Ct. App. 1993). Otherwise stated, establishing actual prejudice requires that Home show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability. *Id*. Home has made no such allegation, and cannot assert any facts that would suggest such a scenario. In fact, Viad has provided Home all of the documentation available to Viad related to the claim, all of which is substantially the same as existed at or near the time of the remediation of the site. Home has not shown and cannot show any prejudice, much less "actual and substantial prejudice."

Further, the language of the policies at issue specifically provides that late notice does not preclude coverage. While the notice provisions in the first two Home policies refer to "prompt notice" of an anticipated claim, that provision must be read *in pari materia* with, and subject to, the entire paragraph which includes that "which in the judgment of the Insured a claim might result," and further provides that "[i]nadvertent failure to so notify shall, however, not affect the liability of the Company." See Exhibit A, at 4, and Exhibit B at 5. Likewise, the notice provision in the third policy which states that "notice shall be sent to the Company as soon as practicable," must also be read in conjunction with, and subject to, the rest of the paragraph which states that "*failure to give notice of* any occurrence which at the time of its happening did

not appear to involve this policy but which, at a later date would appear to give rise to claims hereunder, *shall not prejudice such claim.*" See Exhibit C at 4.

Accordingly, even if notice to Home was delayed, the policies provide that the delay does not preclude coverage, and mere delay of notice does not affect Home's liability; ;even if Viad violated the notice provisions, Home must demonstrate both actual and substantial prejudice before delayed notice might preclude coverage. Home cannot demonstrate any prejudice, or grounds for delay precluding coverage under the circumstances.

B. Home's Policy Provisions Clearly Disclaim any Duty to Defend or Even Investigate Claims and Required Viad to Resolve the Claim First Before Home had any Liability. Viad did not Fully Resolve the Claim Until 2006, Well After Notice was Given in this Liquidation Proceeding.

It is inconsistent and wholly inequitable for Home to assert that it is relieved of its obligation to provide coverage after the insured has not promptly notified it of a claim, when the policy clearly states Home will not investigate and has no obligation until the insured has resolved the claim.

The first two Home policies identified (Exhibits A and B) provide that "[t]he Company will not undertake to investigate claims or defend suits or proceedings on behalf of the insured," and that "The Company's limit of liability under . . . Coverage 1(b) [damage to property], . . . shall only be for the *ultimate net loss* excess of $750,000. . . . The term Ultimate Net Loss as used in this Contract shall be deemed to mean the actual sum or sums paid or payable to any person or persons. . . (as determined by settlement or adjustment of claim or . . . *by final judgment).* . . . "(emphasis added). This language clearly contemplates that not only did Home expect that its insured would be responsible for investigating, defending, and resolving its own claims, Home also anticipated that any and all claims would first be fully resolved by the Insured before payment would be considered. This expectation clearly belies the need for any notice to Home because even if noticed, Home would have taken no action.

The third policy (Exhibit C) even more clearly demonstrates that Home contemplated that the insured would resolve or compromise a claim before payment would be made on the claim. Specifically, the third policy provides that "[t]he Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the insured . . . ." Further, "The Company shall only be liable for the ultimate net loss," with ultimate net loss being defined as "*the total sum which the Insured,* or any company as his insurer, or both, *become obligated to pay* by reason of . . . property damage liability claims, . . . *either through adjudication or compromise*. . . ." (emphasis added). Finally, the policy states that "Liability under this policy with respect to any occurrence *shall not attach* unless and until the Insured, or the Insured's underlying insurer *shall have paid the amount of the underlying limits* on account of such occurrence. "(emphasis added).

By requiring Viad to "pay the amount of the underlying limits" before liability attached to Home, and plainly refusing to undertake any investigation of claims, Home unequivocally evidenced its expectations that its insured (Viad or Greyhound) would *undertake the investigation and defense of claims* at its own expense, and that the insured would *resolve* those claims at its own expense before Home would become obligated to make a payment. Home's repudiation of any duty to investigate, defend, or to pay claims until the claims were fully resolved, renders any delay in notice to Home of the San Diego claim effectively moot, because Home would not have taken any action on the claim even if it had been noticed earlier.

Because Home previously denied coverage to similar if not identical claims/occurrences, and Home has disclaimed any duty to defend or investigate Viad's claim, the only result of earlier notice to Home for the claim at the San Diego site would have been an earlier denial of coverage. Home's history of prior improper and wide-ranging denials of coverage on similar environmental claims, coupled with the California regulatory agency's orders that Viad

remediate the San Diego site, render Viad's actions in undertaking remediation not only reasonable, but clearly in compliance with all notice provisions of Home's policies. Viad's actions were reasonably calculated to safeguard Home's interests, and Home has not been actually or substantially prejudiced. Moreover, Home's denial of coverage based on specific policy provisions and/or exclusions effectively waives Home's right, if any, to assert a lack of notice defense.

IV. HOME'S RELIANCE ON NOTICE DEFENSE PRECLUDES IT FROM RAISING OTHER COVERAGE DEFENSES AS THE TWO POSITIONS ARE WHOLLY INCONSISTENT AND CONTRADICTORY.

Where an insurer denies a claim based on specific policy provisions or exclusions, such as Home's position in the present case, as a matter of law Home is not prejudiced by alleged "late notice," and it is estopped from denying coverage based on the notice provision. *See Bay Electric Supply, Inc. v. The Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611, 620 (S.D. Tex. 1999) (holding that "where [an] . . . insurer would not have adjusted or defended the action regardless of the timing of notice there is no reason to require a forfeiture of coverage merely upon a technicality"). *See also Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 842 (Cal. 1st Dist. Ct. App. 1993) (quoting *Select Ins. Co. v. Superior Court,* 226 Cal. App. 3d 631, 637, and noting that "an insurer is not allowed to rely on an insured's failure to perform a condition of a policy when the insurer has denied coverage because the insurer has, by denying coverage, demonstrated performance of the condition would not have altered its response to the claim").

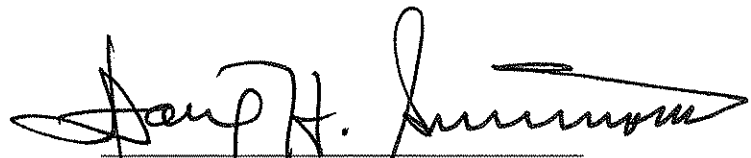
Further, Home's wide-ranging denial of coverage on the prior similarly-situated claims waived Home's right (assuming arguendo that any such right may have existed) to assert that Home may have acted differently had it received earlier notice of the San Diego claim. *Shell Oil Co.*, 15 Cal. Rptr. 2d 815, 846, 12 Cal. App. 4th 715, 762 (holding that an insurer's wide-ranging

denial of coverage waives an insurer's claimed defense based on an insured's failure to comply with the notice provision) (quoting *CNA Casualty of California v. Seaboard Surety Co*., 176 Cal. App. 3d 598, 617 (1986)).

Accordingly, Viad had no obligation to provide additional, futile notices to Home for the same types of claims that had previously been denied, and where Viad had no expectation that resolution of its San Diego claim would have resulted differently. *See DeForte v. Allstate Ins. Co*., 81 A.D. 2d 465, 471 (App. Div. 4 1981) (rejecting insurer's argument that coverage is barred for insured's failure to immediately forward suit papers to insurer where it "would have been a useless act."). In light of the many previously-denied similar claims, Viad's notice to Home in 2004 was neither unreasonable nor untimely under the circumstances. Viad's notice did not prejudice Home and by its assertion of other coverage defenses, Home waived any right that it may have had to deny coverage based on alleged untimely notice. Further, because the claims would have been denied anyway, the timing of the notice is moot, and demanding compliance with a notice provision when Home had no intention of providing coverage for the claim intentionally creates an untenable and contradictory dilemma for its insured.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided by U.S. Mail on November 3, 2008, 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; Liquidation Clerk, The Home Insurance Company in Liquidation, c/o Merrimack Supreme Court, 163 N. Main Street, Concord, NH 03302-2880; and John O'Connor, Esq., Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, DC, 20036-1795.



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