

BEFORE THE COURT-APPOINTED REFEREE

IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION

DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 22008-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:

DEPOSITION OF DEBORAH J. DEPAOLI, ESQ.

Phoenix, Arizona
January 12, 2009

BY: SANDRA L. MUNTER, RPR/CSR

Certified Reporter 50348

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WITNESS:

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DEBORAH J. DEPAOLI, ESQ.

Examination by Mr. O'Connor

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EXHIBIT

DESCRIPTION

MARKED

(All Exhibits Retained By Mr. O'Connor.)

NO. 4 Affidavit of Deborah J. DePaoli
(10 pages)

20

1 DEPOSITION OF DEBORAH J. DEPAOLI, ESQ.
2 was taken on January 12, 2009, commencing at 10:27
3 a.m., at the Viad Corp, 1850 North Central Avenue,
4 Ninth Floor, Phoenix, Arizona 85004, before
5 Sandra L. Munter, Certified Reporter No. 50348 for
6 the State of Arizona.
7

8 APPEARANCES

9 For Home Insurance Company:

10 BY: JOHN F. O'CONNOR, ESQ.
11 STEPTOE & JOHNSON, LLP
12 1330 Connecticut Avenue, NW
Washington, DC 20036-1795

13 For the Viad Corp:

14 BY: DAVID H. SIMMONS, ESQ.
15 De BEAUBIEN, KNIGHT, SIMMONS, MANTZARIS &
NEAL, LLP
16 332 North Magnolia Avenue
P.O. Box 87
17 Orlando, Florida 32802-0087

18 Also Present:

19 Stuart Meislik, Esq.
20
21
22
23
24
25

1 DEBORAH J. DEPAOLI, ESQ.,
2 the witness herein, having been first duly sworn
3 to speak the truth and nothing but the truth, was
4 examined and testified as follows:

5
6 MR. O'CONNOR: Before we get going with
7 questions, I'll just put on the record what
8 counsel and the court reporter discussed off
9 record that will pertain both to Ms. DePaoli's
10 deposition and to the deposition of Mr. Ries,
11 which we just concluded.

12 Counsel for both parties are releasing
13 the court reporter from any obligations to obtain
14 original signatures from the deponents for their
15 deposition transcripts. She's going to E-Tran the
16 transcripts to counsel and we'll deal with
17 anything dealing with original transcripts.
18 Mr. Ries and, I presume, Ms. DePaoli are going to
19 read and sign but I --

20 MR. SIMMONS: They are going to read
21 and sign and so, therefore, when you send us the
22 transcripts by Wednesday, I believe, is what we're
23 looking at, we're talking Wednesday, January the
24 14th, that we will then get any errata sheets or
25 anything like that to correct anything for

1 whatever reason they want to correct, any
2 testimony or find some error in the transcription.
3 And so we'll go ahead and get any errata sheet to
4 you or certainly the signed depositions to you.

5 MR. O'CONNOR: Good enough.

7 EXAMINATION

8 BY MR. O'CONNOR:

9 Q Ms. DePaoli, I know you're a lawyer,
10 and you were present during Mr. Ries's deposition,
11 so I'm not going to repeat all the instruction
12 that I gave Mr. Ries in the beginning of his
13 deposition. If you have questions as we go along,
14 just let me know, and we'll make sure that we're
15 all on the same page.

16 I'm going to hand you what we marked at
17 Mr. Ries's deposition as Exhibit 1, which is the
18 disclosures from Viad's attorneys concerning
19 likely affidavit testimony for you, Mr. Ries, and
20 for a third witness. And I will state that
21 Mr. Simmons gave me, on one of the breaks today, a
22 draft of the DePaoli affidavit that I may ask some
23 questions from as well.

24 In Paragraph 1a of Exhibit 1, it
25 indicates that you will testify in your affidavit

1 concerning your position with Viad, education,
2 experience, personal knowledge about the facts
3 upon which you will testify, your expertise in
4 these areas, competency to so testify, and that
5 any opinions are within a reasonable degree of
6 professional responsibility or certainty.

7 You are assistant secretary and
8 assistant general counsel for Viad; is that right?

9 A Yes, I am.

10 Q How long have you been employed by
11 Viad?

12 A I began work at Viad in September of
13 2000.

14 Q Where did you work before Viad?

15 A Before that I was general counsel for a
16 company called Outings on the Links from
17 January 1995 until I took office, took over the
18 position at Viad.

19 Actually, it was January '96, excuse
20 me.

21 Q You are a member of the Arizona bar?

22 A I am.

23 Q And how long have you been a member of
24 the Arizona bar?

25 A I have been a member since 1991.

1 Q Are you a member of the bar of any
2 other states?

3 A No, I'm not.

4 Q Have you ever been?

5 A No, I have not.

6 Q What was your first job position as a
7 lawyer?

8 A First job position was a commercial
9 litigator with the firm of Gallagher & Kennedy in
10 Phoenix, Arizona. I was with them as an associate
11 and then senior associate until I left for my
12 position with Outings on the Links.

13 Q What sort of commercial litigation did
14 you do?

15 A I defended -- It was all defense work.
16 I defended companies who were sued on commercial
17 contract disputes, also worked on insurance
18 defense work. I represented companies that were
19 sued for general liability, any kind of general
20 liability. I also represented insurance carriers
21 for bad faith claims.

22 Q When you became general counsel of
23 Outings on the Links, what were your job duties?

24 A My job duties were to be responsible
25 for drafting contracts, negotiating contracts,

1 procuring the regular type of operational
2 contracts, such as licensing and insurance
3 policies.

4 Q What sort of business is Outings on the
5 Links?

6 A Outings on the Links put on corporate
7 golf events around the county, and it worked in
8 corporate golf events associated with the LPGA,
9 the PGA, or a side corporate event for them or did
10 large, charitable golf outing functions.

11 Q And did you say that one of your
12 responsibilities was procuring insurance for the
13 company?

14 A That's just operational. It's a minor
15 role, but yes. That's just general liability, any
16 kind of property damage liability insurance.

17 Q Did Outings on the Links have a risk
18 management department?

19 A No. It did not. I took on that role
20 of risk manage. Exactly.

21 Q You work directly with a broker?

22 A Yes.

23 Q And in 2000, you joined Viad?

24 A Yeah, September 2000.

25 Q What have your job duties been with

1 Viad?

2 A When I first joined, I was responsible
3 for interacting with the insurance department,
4 helping them to prepare applications, insurance
5 applications, as well as reviewing policies. I
6 was also responsible for contract negotiation,
7 contract drafting, contract reviewing. Those were
8 my main job functions.

9 I also shortly thereafter, about a year
10 later, I was transitioned to also work on
11 securities work to help prepare the 10K, the proxy
12 statement of our company.

13 Then in June of 2004, we had a spin-off
14 of one of our large entities and the downsizing in
15 a lot of departments, so I took on the
16 responsibilities of dealing with our litigation
17 management, as well as environmental management.

18 Q In your role of taking on environmental
19 management, what sort of things have you been
20 doing?

21 A I directly oversee Ken Ries, who was
22 responsible for managing our environmental
23 matters. I represent the company in any kind of a
24 hearing that would happen, if I do not use outside
25 counsel.

1 Q So sometimes you appear in court as
2 counsel for Viad?

3 A I have not appeared in court solely as
4 counsel, but I appeared at hearings, when you're
5 dealing with the state regulators. There might be
6 a hearing regarding an abatement order or hearing
7 regarding a corrective action plan.

8 Q Do you have any certifications in areas
9 of insurance?

10 A I don't.

11 Q In Paragraph 1c of Exhibit 1, it
12 indicates that your affidavit may involve your
13 interpretation of the policies.

14 Do you have any specialized expertise
15 in interpreting insurance policies beyond what a
16 lawyer who deals with insurance might have?

17 A I have expertise to the extent that I
18 have been dealing with insurance policies since I
19 became a lawyer, looking at insurance policies,
20 representing the insured, also dealing with bad
21 faith claims, where there was allegations of
22 breach of the contract by the carrier.

23 Q And you're, in the course of your work
24 as a lawyer and interpreting insurance policies,
25 it starts with looking at what the policy says?

1 A Yes.

2 Q And maybe being familiar with some case
3 law that might provide additional information
4 concerning what the policy might provide?

5 A There's a lot of different factors,
6 but, yes, you look at the policy. You have an
7 understanding of what the case law is, as well as
8 statutory law.

9 Q So your ability to interpret insurance
10 policies derives from your ability to read the
11 policy and then know what case law or at least be
12 able to research what case law says and know what
13 the statutory requirements are?

14 A It derives from 17 years of experience
15 of reviewing policies. So through my experience
16 and knowledge of how policies are interpreted by
17 the time courts, as well as by legislatures who
18 create statutes in response to interpretations of
19 the time courts, as well as my experience in
20 reviewing them.

21 Q Do you hold yourself out as an expert
22 on California law?

23 A No, I do not.

24 Q In Paragraph 1d of Exhibit 1, it
25 indicates that you may testify concerning the

1 facts surrounding Viad's application for
2 assistance from the State of California, including
3 its agencies or departments, for payment regarding
4 this site, the timing of payments received from
5 the State, and ownership of the property
6 contaminated.

7 What do you know about the facts
8 surrounding Viad's application for assistance from
9 the State of California for payment regarding this
10 site?

11 A I know that in 2001, we filed our first
12 request for reimbursement with the Regional Water
13 Control Board for reimbursement under the
14 Underground Storage Tank Reimbursement Fund.

15 In 2004 I'm aware, through looking at
16 records, that we resubmitted our application with
17 additional information.

18 In June of 2004, I took over
19 responsibility of managing the environmental
20 department, the environmental -- it wasn't a
21 department anymore; the environmental section.

22 And I'm aware that in 2006, under my
23 direction, we filed an application for
24 reimbursement number two. That was in response to
25 an, in October of 2006, we did receive a check for

1 about \$315,000 for our claim.

2 They rejected a number of our
3 submissions. There was still a number of our
4 submissions that were pending. Some were deemed
5 ineligible, and through this process we discovered
6 more claims that we should have made. So under my
7 direction we filed, in 2006, reimbursement number
8 two.

9 It was rejected due to some
10 formalities, so we refiled reimbursement number
11 two under my signature in December of 2007,
12 sending voluminous boxes of documents and invoices
13 and canceled checks, which we had to reconcile
14 with each other in order to submit our claim.

15 Q You were not with Viad at the time that
16 it entered into the remediation agreement for this
17 site, were you?

18 A I was not. I am aware of the
19 remediation agreement, however, though, because I
20 was involved in 2000. I was here, so I was aware
21 of the remediation project.

22 Q But you weren't involved on a firsthand
23 basis with the decisions whether to enter into
24 that agreement?

25 A No. Only aware of them through my

1 review of records.

2 Q When did Viad first give notice to the
3 Home Insurance Company concerning environmental
4 remediation at the San Diego site?

5 A To my knowledge, it was in as part of
6 submitting a proof of claim.

7 Q That would have been in 2003?

8 A I think it was in 2004 that we
9 submitted the proof of claim.

10 Q Were you involved in any discussions
11 prior to that where the decision was made not to
12 give notice to the Home?

13 A I'm aware of discussions, as working
14 with the insurance department that in the late
15 '90s, we submitted claims with and gave notices of
16 claims to Home Insurance.

17 Those claims were essentially denied or
18 denied by very long form letters that gave all the
19 reasons why they weren't going to cover the
20 matter. We sent, and I'm aware of this, we sent a
21 number of documents to them. I'm also aware that
22 we gave them history on, corporate history, as
23 well as history of the site.

24 And in response to that, a couple years
25 later, we got basically a form letter that

1 outlined all the reasons why there wasn't
2 coverage.

3 Q To go back to my question, you weren't
4 involved in any of those things because you
5 weren't even at the company yet?

6 A No. I'm aware of them.

7 Q You've just seen documents?

8 A I've seen documents, yes. And I've
9 talked to people in the insurance department.

10 Q You've seen documents and you've been
11 told things by other people?

12 A Yes.

13 Q Isn't it true that with respect to
14 these other sites, the reservation of rights
15 letter asked for additional information from Viad?

16 A What is true and what I do know from
17 talking to people in the insurance department, as
18 well as the litigation department, is that we sent
19 a lot of documents to Home Insurance.

20 And our response back was basically,
21 "We don't have sufficient information." There
22 wasn't a delineation of what they needed. And
23 when they first responded to us, they didn't have
24 their own policies, so we had to supply Home
25 Insurance with the policy.

1 And we went through and explained
2 corporate history of why Viad should be the
3 successor in interest for those matters. We also
4 explained what the site was, what happened. We
5 sent invoices. So we did send documentation to
6 Home Insurance.

7 Q And your knowledge of that is just from
8 seeing documents or being told that by other
9 people?

10 A Yes.

11 MR. SIMMONS: Well, the documents
12 include the letter that Home sent back, going
13 through and acknowledging they had received huge
14 amounts of documents.

15 MR. O'CONNOR: Should I swear you in
16 or --

17 MR. SIMMONS: No. I'm just telling
18 you, you know, if you're going to ask questions
19 about that, John, it's right there.

20 Sorry. I just couldn't help it. I
21 won't do that again.

22 Q (By Mr. O'Connor) It's a matter of
23 written record, the correspondence back and forth
24 between the two companies, right?

25 A Yes, it is.

1 MR. SIMMONS: But it was just too
2 humorous to pass up. I'm sorry. Every once in
3 awhile, I try to provide a little levity to these
4 proceedings.

5 Q (By Mr. O'Connor) And have you
6 personally had any communications with anybody
7 representing the Home Insurance Company?

8 A I have not.

9 Q In Paragraph 1e of the Exhibit 1, one
10 of the things that it indicates that you may
11 testify concerning is the fact that Home is
12 estopped from denying coverage to Viad based on
13 Home's conduct.

14 What's the basis of your knowledge on
15 that?

16 A The basis of my knowledge on that is
17 that we filed claims for environmental matters
18 that were very similar to the San Diego site. We
19 provided documentation to Home Insurance on those
20 sites.

21 What we got back was something that was
22 called a quote/unquote reservation of rights
23 letter, but it was tantamount to a denial because
24 Home Insurance laid out the reasons why there
25 wasn't coverage.

1 Home Insurance also made it very clear
2 that they had no duty to defend, and they were not
3 asking to get involved at all in the investigation
4 of the matter. So they left us hanging, which is
5 tantamount, as far as we're concerned, with a
6 denial.

7 Q But these were in 1999?

8 A Right. 1999 was about the time that,
9 was the time when we realized that there was going
10 to be much greater cost dealing with the San Diego
11 site than we had expected.

12 Our initial anticipation was that there
13 was not going to be large costs because we could
14 remove free product, do vaporization remediation
15 efforts.

16 In 1999 we had a directive -- and I
17 called it a directive when a director calls you
18 into his office from Phoenix to fly over to San
19 Diego and tells you this is what you're going to
20 do. You don't fight with that. That is a
21 directive, if you want to have closure on the
22 site.

23 So that's when we knew the costs were
24 jumping because of excavation. Immediately when
25 you do, not only a dig and haul, but a dig and

1 haul and a soil, wash of soil.

2 Q Did somebody at Viad have a discussion
3 where it was said Home is not going to cover these
4 other sites, so don't tell them about San Diego?

5 A What I do know, when I took over in
6 June of 2004 dealing with the application, because
7 I had to fill out the application to review it,
8 was that at the time that the initial applications
9 for reimbursement with the State were filled out,
10 there was no belief that there was any coverage
11 from anywhere, including Home Insurance. And that
12 was based on reactions of Home Insurance in prior
13 environmental matters.

14 Q Did Viad have other insurance companies
15 that provided coverage during the relevant time
16 frames for property damage?

17 A I am not aware of any, any kind of
18 coverage.

19 Q Is Viad just self-insured?

20 A Viad has had, over the years, multiple
21 different policies. I am not aware of any other
22 coverage for this particular site.

23 Q Do you know if Viad ever gave notice to
24 any other insurance company relating to this site?

25 A To my knowledge, no, there was no

1 notice.

2 (Deposition Exhibit No. 4 was marked
3 for identification.)

4 Q (By Mr. O'Connor) Ms. DePaoli, I've
5 marked as Exhibit 4 the direct affidavit of you
6 that I was handed a few minutes ago, and I'm going
7 to ask you a couple questions about it.

8 MR. SIMMONS: Here.

9 MR. O'CONNOR: Do you have another
10 copy?

11 MR. SIMMONS: Yeah, yeah.

12 MR. O'CONNOR: Why don't I give you the
13 one that's marked, and I'll take one that's not.
14 That was my problem, that I only had one.

15 Q (By Mr. O'Connor) If you turn to Page 2,
16 on Paragraph 7, it indicates that during the time
17 that the Home policies were issued, that Greyhound
18 was located and headquartered in Delaware or
19 Arizona.

20 Wasn't Greyhound's headquarters in New
21 York for the first two Home policies?

22 A Well, located or headquartered, I mean
23 Greyhound is, was, and Viad is a Delaware
24 corporation.

25 Q Incorporated in Delaware?

1 A Incorporated.

2 Q But the physical headquarters was in
3 New York, wasn't it?

4 A In Illinois.

5 Q Oh, it was not in --

6 A Illinois. And beginning, New York. I
7 think the initial --

8 Viad was always in -- the initial part
9 of Greyhound was, there was part in New York, but
10 it was Chicago also.

11 Q Okay. The three Home policies that are
12 at issue here were issued to Greyhound; is that
13 right?

14 A Yes. Well, they were issued to
15 Greyhound and its subsidiaries.

16 Q Sure. And Greyhound, for the first two
17 policies, had its corporate headquarters where?

18 A If my memory is correct, and that dates
19 back a long time ago, I believe it was in, I
20 believe it was in New York.

21 Q Okay.

22 A But then that was a long time ago.

23 Q Sure.

24 MR. SIMMONS: Tell you what we'll do.
25 We'll look at it and get back with you on it.

1 THE WITNESS: Yeah. We can certainly
2 go to the corporate secretary's department and
3 find that out very quickly on a break.

4 MR. SIMMONS: I think we dealt with all
5 of this in our briefs, didn't we? Didn't you take
6 the position they were headquartered in New York?

7 MR. O'CONNOR: I don't think anyone has
8 disputed they were headquartered in New York until
9 I saw Paragraph 7 of the affidavit, which I was
10 surprised to see Delaware because --

11 Instead of me testifying...

12 Q (By Mr. O'Connor) You're not aware of
13 Greyhound having a physical headquarters in the
14 State of Delaware, are you?

15 A I am not.

16 MR. SIMMONS: It's a typo.

17 THE WITNESS: Yeah.

18 MR. SIMMONS: Typo. Sorry.

19 MR. O'CONNOR: I thought that might be
20 right.

21 MR. SIMMONS: We'll correct that.

22 THE WITNESS: Yeah. That should be New
23 York.

24 MR. SIMMONS: That's just a typo.
25

1 Q (By Mr. O'Connor) You'll forgive me.
2 There was one more thing that I wanted to ask you
3 about in your affidavit. I've got to find it
4 again.

5 Let's turn to Page 4, Paragraph 14.
6 The first sentence says the abatement order was a
7 judgment that required Viad to remediate the
8 property and, as such, Viad entered in a
9 remediation agreement with the California Regional
10 Water Quality Control board to clean up this site.

11 What's the basis for your conclusion
12 that the abatement order was a judgment?

13 A By what we do and why we treat it. I
14 mean, from a practical standpoint, we treat
15 abatement orders as judgments, something you have
16 to follow.

17 From a legal perspective, they are
18 judgments. They are an order that you have to
19 comply with. If you do not comply with it by the
20 time specified in the order, you will immediately
21 start incurring penalties. So it is an order and
22 a final judgment that you have to act upon.

23 Q There's no judge involved?

24 A There is no judge involved.

25 Q And there's no court involved?

1 A No court involved. There is statutory
2 regulations that govern it. And based on those,
3 the state regulators basically become the judge.
4 They are the body, the governing body that tells
5 you what you must do.

6 Q But you're not claiming to be an expert
7 on how California laws treat judgments, are you?

8 A I'm not claiming to be a expert on
9 California law. I do have experience dealing with
10 abatement orders and knowledge of abatement
11 orders. And they are something you have to treat
12 as if they are a judgment. You have to treat them
13 as if they are something final that you have to
14 act upon, otherwise, you will incur penalties.

15 Q You can go to court to challenge an
16 abatement order, can't you?

17 A You can appeal the abatement order,
18 yes. That's why it's a judgment until you appeal
19 it.

20 Q You can take it to a court?

21 A You can appeal an order, yes.

22 Q You can appeal an order to where?

23 A To the courts.

24 Q You're not aware of any court order
25 that relates to the San Diego site?

1 A I am aware of the abatement order --

2 Q That's it?

3 A -- directing Viad to remediate.

4 Q Okay.

5 A That is the only thing I'm aware of.

6 MR. O'CONNOR: Ms. DePaoli, I have no
7 further questions. Thank you.

8 THE WITNESS: Okay. Thank you.

9 MR. SIMMONS: All right.

10

11 EXAMINATION

12 BY MR. SIMMONS:

13 Q Ms. DePaoli, I want to ask you a few
14 questions and follow up with some of the things
15 that Mr. O'Connor asked you about.

16 And first and foremost, the policies
17 that we have that are the subject matter of this
18 claim to Home in liquidation, these are policies
19 that I understand are owned by Viad now?

20 A Yes.

21 Q And Viad believes that it is entitled
22 to coverage under those policies?

23 A Yes. Viad does believe it's entitled
24 to coverage.

25 Q And one of the things that generated

1 this was, as I understand it, the experts, for a
2 period of ten years, did not believe that the cost
3 of this remediation would be significant enough to
4 implicate insurance; is that right?

5 MR. O'CONNOR: Objection to form.

6 MR. SIMMONS: I'll rephrase the
7 question.

8 Q (By Mr. Simmons) Was there a period of
9 time in which there was any belief that the cost
10 of remediation would be low enough so that
11 insurance would not be implicated?

12 MR. O'CONNOR: Objection to form.

13 THE WITNESS: Yes. It wasn't until
14 1999, when the director of the Regional Water
15 Quality Control Board directed Viad to do an
16 excavation, which is a dig and haul, of the soil
17 to remediate the groundwater contamination.

18 It wasn't until that time that we
19 realized the cost would well exceed what would be
20 reimbursed under the Underground Storage Tank
21 Reimbursement Fund of the State of California.

22 Q (By Mr. Simmons) All right. And was
23 there this period of time that, when the dig and
24 haul was not required in order to remediate the
25 groundwater, that the cost was such that because

1 of expected reimbursement and just the cost in
2 general was low enough so that insurance would not
3 be implicated?

4 MR. O'CONNOR: Objection to form.

5 Q (By Mr. Simmons) Go ahead and answer it.

6 A Yes. Initially, and I believe that's
7 what Mr. Ries testified to, the calculation of the
8 remediation was not going to be very large. We
9 were doing free product removal, which requires
10 using wells and removing the free product and
11 vaporization, both which do not require that much
12 money. So we always thought we could manage it on
13 a very low scale level.

14 Q Since he keeps objecting to this
15 question --

16 MR. O'CONNOR: I'll clarify for you.

17 I'm not sure that changing the
18 question -- mine is really a lack of personal
19 knowledge --

20 MR. SIMMONS: Okay.

21 MR. O'CONNOR: -- which I'm not sure
22 changing the way you ask it can fix. It either is
23 or isn't.

24 MR. SIMMONS: All right. I thought we
25 were looking at the form of the question that you

1 were objecting to, and I was going to say to
2 myself that we'll just keeping asking it until the
3 form of the question issue is resolved.

4 So it's not form of the question --

5 MR. O'CONNOR: You can ask it any way
6 you want. It's really --

7 MR. SIMMONS: But it's not form of the
8 question. What you're saying is she has no
9 personal knowledge.

10 MR. O'CONNOR: Right. She does or she
11 doesn't.

12 MR. SIMMONS: Okay.

13 Q (By Mr. Simmons) Did there come a time
14 that you were aware that Home Insurance was either
15 in liquidation or, prior to liquidation, was in
16 some other kind of governmental oversight?

17 A Yes. I was aware of that early on,
18 working for Viad, it was one of our insurance
19 carriers.

20 Q So in 2000 were you aware that Home was
21 not getting back to or responding adequately or
22 appropriately to Viad?

23 A I was aware of it --

24 MR. O'CONNOR: Objection; form.

25 THE WITNESS: I was aware of it either

1 in late 2000 or early 2001 based on my work with
2 the insurance department.

3 Q (By Mr. Simmons) Okay. Since he's
4 objected to the form, I'm going to ask you again:
5 Did there come a time in which Viad perceived
6 problems that occurred resulting from a failure of
7 Home to respond to Viad's claims --

8 MR. O'CONNOR: Objection to form.

9 Q (By Mr. Simmons) -- for insurance
10 coverage?

11 A I was aware either, again, in late 2000
12 or early 2001 that we had tried to seek coverage
13 from Home Insurance; that Home Insurance
14 essentially denied the claim by sending a form
15 reservation of rights letter that outlined all the
16 reasons why coverage wasn't available.

17 Q Ms. DePaoli, have you reviewed the
18 response from Home Insurance dated May 18th, 1999,
19 to Armour Corporation care of Viad, that covers
20 South Eighth Street, Memphis, Arizona -- I mean,
21 Arkansas, I guess; Monterey Park, Burns Scrap
22 Metals; Old Blue Chemical, Fairfax,
23 South Carolina, Chicago, Illinois, it says two
24 sites in Greensboro, North Carolina?

25 A Yes. I've reviewed that letter.

1 Q Now, in the first paragraph of the
2 letter it recites, to Mr. Twist, a large amount of
3 communication that went on between Viad and Home
4 Insurance, actually REM, which is Risk Enterprise
5 Management.

6 Have you had a chance to review that
7 paragraph?

8 A I have reviewed that paragraph.

9 Q Have you had a chance to talk with
10 other persons within Viad with respect to the
11 history of this and the documentation that was
12 supplied to Home Insurance?

13 A Yes, I have.

14 MR. O'CONNOR: Objection.

15 Q (By Mr. Simmons) Let me rephrase it.

16 To your knowledge, was significant
17 amounts of information provided to Home Insurance
18 with respect to these claims?

19 MR. O'CONNOR: Objection to form.

20 THE WITNESS: To my knowledge,
21 information and packages upon packages of
22 information was sent to Home Insurance about the
23 claims.

24 Q (By Mr. Simmons) Does this letter
25 constitute, after three years of efforts to get

1 Home Insurance to respond to these claims, does
2 this letter constitute a denial of the coverage?

3 MR. O'CONNOR: Objection.

4 THE WITNESS: Yes. Viad believed that
5 that was a denial of coverage.

6 Q (By Mr. Simmons) Okay. Are you aware
7 now of orders that were issued regarding Home
8 Insurance that limited its abilities to, in the
9 early parts of 2000, to even respond to claims?

10 A I am aware of them.

11 Q Okay. Would that be consistent,
12 Ms. DePaoli, with the lack of response that Viad
13 was getting from Home Insurance during the time
14 periods of the early 2000, 2001, 2002, 2003?

15 MR. O'CONNOR: Objection.

16 THE WITNESS: It did not surprise us
17 when we found out that they were having financial
18 issues. They were not paying on claims that we
19 were filing.

20 Q (By Mr. Simmons) Ms. DePaoli, is there,
21 in any of these claims that Viad made against Home
22 Insurance, was there ever any request made by Home
23 Insurance that it be involved in the investigation
24 of those claims?

25 A To my knowledge, no, there was no

1 request to be involved in the investigation.

2 Q Was there ever any request that Home
3 Insurance made with respect to demanding to be
4 involved in the payment of any of or the
5 negotiation of any claims with the entity, for
6 example, the governmental entity, making claims
7 against Viad?

8 A To my knowledge, there was no request
9 to defend. And, in fact, in the response letters
10 by Home Insurance, they made it very explicit that
11 they had no duty to defend. And that's consistent
12 with what's in the policies.

13 Q Ms. DePaoli, I'm going to ask that you
14 turn to the 1966 to 1969 policy. I've tabbed some
15 provisions. I'm going to ask you to --

16 I hope I've got all of it here.

17 MR. O'CONNOR: You're not really going
18 to have her read from the policy, are you? I
19 mean, that's --

20 MR. SIMMONS: I won't even have to
21 attach it. Fair enough? Let's just go ahead.
22 I'm going to ask her certain provisions.

23 MR. O'CONNOR: I'm going to object; the
24 document speaks for itself that you'll file and
25 she'll swear an affidavit to --

1 MR. SIMMONS: Okay.

2 MR. O'CONNOR: -- but you can ask her
3 to read whatever you want her to read.

4 MR. SIMMONS: Okay. So you're
5 objecting to --

6 MR. O'CONNOR: It's just a waste of
7 time. I mean, you're going to put the policy in.
8 It says what it says. I don't think we dispute
9 what the policy says.

10 MR. SIMMONS: Okay. Well, I'm going to
11 refer to certain language in it and deal with the
12 facts relating to that.

13 How is that?

14 MR. O'CONNOR: Do whatever you want.
15 I've got my objection stated.

16 Q (By Mr. Simmons) Turn to Page 4 of that
17 policy, which is the policy that goes from
18 August 31st, 1966, to August 31st, 1969, and HEC
19 95574 -- and I can't tell what the last --

20 A It should be 16.

21 Q 16?

22 A It's 16.

23 Q Okay. It says under Paragraph No. 8,
24 Claims and Appeals, it says, "The insured shall
25 give prompt notice to the company of any event or

1 development, which, in the judgment of the
2 insured, might result in a claim upon the company
3 hereunder."

4 Ms. DePaoli, within the judgment of
5 Viad, was the time period the appropriate time
6 period to give the claim in June of 2004?

7 MR. O'CONNOR: Objection to form; calls
8 for legal conclusion.

9 Q (By Mr. Simmons) Go ahead.

10 A The judgment of Viad initially was
11 there was no reason to give a Notice of Claim.
12 The amount was going to be covered by the
13 reimbursement fund.

14 At the point that we realized the cost
15 would be more than the reimbursement fund amount,
16 at that point we had already basically been denied
17 by Home Insurance on other claims. In our
18 judgment, there would be no reason to file with
19 them at this point because they would just deny it
20 again.

21 We also believed that we had the duty
22 under the policy to investigate and defend and
23 then submit our ultimate loss, net loss, to the
24 carrier, which is what we did in 2004, because we
25 really -- Well, actually in 2004 we had to file

1 proof of claim. That was required. That was the
2 deadline in order, it was part of liquidation.

3 But really it's not been until we
4 recovered from the fund that we realized that we,
5 how much our true, actual loss was.

6 Q When is the last time that you've
7 received any moneys from the State of California?

8 A The State of California, the last
9 amount was in the fall of 2008, October of 2008.
10 That was the last one. We basically received
11 almost the entire, 100 percent of the capped limit
12 on the fund. We were short 60,000.

13 Q Ms. DePaoli, do you believe that the
14 reference to the judgment here is the subjective
15 judgment of Viad?

16 A Yes.

17 MR. O'CONNOR: Objection to form; calls
18 for legal conclusion.

19 THE WITNESS: Yes, I do. If it meant
20 for us to be anything other than our subjective
21 judgment, it would have been simply put in that
22 sentence.

23 Q (By Mr. Simmons) Would have used the
24 word, in the "reasonable" judgment, right?

25 A Yes.

1 MR. O'CONNOR: Objection; form.

2 THE WITNESS: That would be the typical
3 use of the word.

4 Q (By Mr. Simmons) Okay. Now, with
5 respect to this provision that says, "The company
6 will not undertake to investigate claims or defend
7 suits or proceedings on behalf of the insured,"
8 did Viad take that at its word, that Home would
9 not undertake to investigate any claims or defend
10 any suits?

11 MR. O'CONNOR: Objection to form.

12 THE WITNESS: Yes. We interpreted that
13 to mean it was our duty to investigate and defend
14 claims. And that's consistent with Home
15 Insurance's policies in its response to other
16 claims.

17 Q (By Mr. Simmons) When you say response
18 to your other claims, the letter that was dated in
19 May of nineteen --

20 A It was 1999.

21 Q -- '99?

22 A Yes. The May 1999 letter.

23 Q That letter, May 18th, 1999,
24 Ms. DePaoli, did it use words saying that this
25 applies to all sites that Viad had?

1 MR. O'CONNOR: Objection; the document
2 speaks for itself.

3 THE WITNESS: Yes. That's my memory of
4 my review of the document.

5 Q (By Mr. Simmons) Okay. And with respect
6 to the idea of investigating the actual claims,
7 I'd like to read to you the provisions on Page 5,
8 first paragraph, and I ask you to comment on this.

9 "It is the intention of the parties
10 that under this contract, the insured will
11 investigate all occurrences and claims covered
12 hereby and defend all suits thereon, unless and
13 until the insured shall elect to effect settlement
14 thereof."

15 Do you see that?

16 A Yes, I do.

17 Q I note that it doesn't say that it's
18 unless and until the company shall elect to effect
19 settlement thereof. It says that the insured will
20 effect the settlement, if there is a settlement.

21 MR. O'CONNOR: Objection to form;
22 document speaks for itself.

23 THE WITNESS: That's correct. It's the
24 insured's duty to, based on my, very plain, this
25 is plain English. By my reading of this, it's the

1 duty of the insured to investigate and defend
2 until the insured intends to settle.

3 Q (By Mr. Simmons) In this case, there was
4 no settlement you testified, right?

5 A No, there isn't. There was one
6 reference during Mr. Ries's deposition on the
7 remediation agreement. That agreement, it's very
8 clear, and based on my other experience with
9 remediation agreements, it basically is agreement
10 to lay out the ground rules of how you were going
11 to comply with the abatement order. It is not any
12 kind of settlement on the order.

13 Just, for example, in the remediation
14 agreement, we decided who was going to be the
15 common consultant for the four parties that were
16 being held responsible for remediation.

17 Q All right. Looking at the last
18 sentence on Page No. 4 of this policy, it says,
19 "It is further understood that the insured shall
20 not make settlement of any claim or group of
21 claims, parens, unless compelled so to do by final
22 judgment of any court of competent jurisdiction
23 for an amount involving the interest of the
24 company under this contract without the consent of
25 the company thereto."

1 Now, did you have an order directing
2 you to pay and remediate?

3 MR. O'CONNOR: Objection to form.

4 THE WITNESS: Yes. We had a 1989
5 abatement order to remediate the San Diego site.

6 Q (By Mr. Simmons) Okay. And did you make
7 any settlement or were you just ordered to pay and
8 then pay in accordance with the order?

9 MR. O'CONNOR: Objection to form.

10 THE WITNESS: We were ordered to
11 remediate. And in response, we proceeded with
12 developing an assessment of the site and a
13 corrective action plan.

14 Q (By Mr. Simmons) All right. So did Viad
15 understand that this sentence even had any
16 applicability to the circumstances of this
17 matter --

18 MR. O'CONNOR: Objection.

19 Q (By Mr. Simmons) -- relating to the San
20 Diego site?

21 MR. O'CONNOR: Objection; lack of
22 personal knowledge; calls for legal conclusion.

23 THE WITNESS: Settlements usually
24 entail dispute with a third party, some kind of
25 settlement with a claim. We had an order that we

1 had to act upon.

2 Q (By Mr. Simmons) Ms. DePaoli, with
3 respect to your understanding of the experts'
4 opinions relating to the San Diego site, did you
5 as well understand this to be a groundwater
6 problem at the San Diego site?

7 MR. O'CONNOR: Objection; form.

8 THE WITNESS: Yes. The abatement order
9 made it clear that there was groundwater
10 contamination. It was Viad's responsibility to
11 remediate that groundwater contamination. And it
12 is very clear that the source of that groundwater
13 contamination was the soil that then migrated down
14 into the groundwater.

15 Q (By Mr. Simmons) All right. In order to
16 clean up the groundwater, it was necessary to
17 clean the soils, based on the order?

18 MR. O'CONNOR: Objection to form.

19 THE WITNESS: Yes. Based on my
20 discussions with Ken Ries, who is an expert in the
21 area, as well as our hired expert, ERC, we needed
22 to clean the ground, the soil in order to prevent
23 any further groundwater contamination. And to
24 remove the groundwater contamination, you had to
25 clean the soil.

1 Q (By Mr. Simmons) To your knowledge, did
2 Viad take the -- Well, what action did Viad take
3 in order to keep the cost down, to assure that if
4 any actions were taken, to remediate this site for
5 the least amount of money possible?

6 A Well, initially we undertook to do
7 remediation through removal of free product, as
8 well as vaporization remediation, until we were
9 ordered to excavate.

10 When we were ordered to excavate, we
11 had Ken Ries overseeing a project manager, who's
12 an expert in the area, ERC. ERC obtained bids for
13 the project, for the actual excavation work, and
14 picked one of those bids.

15 Ken, based on his 40 years of
16 experience, oversaw the project manager, who was
17 overseeing, and its role was to make sure that the
18 project was done properly and cost effectively.

19 So we had two layers of oversight to
20 make sure that the costs were kept at a minimum.
21 And that was important for a couple reasons. One,
22 if we wanted to get reimbursement from the fund,
23 we had to make sure we were cost effective. And,
24 two, we were going to end up paying the rest of
25 it, based on the denial of Home Insurance for

1 coverage, we were going to be paying the rest of
2 it ourselves.

3 Q Do you believe that the expenditure of
4 \$3,870,548, approximately, to remediate was a
5 reasonable expenditure on the part of Viad?

6 MR. O'CONNOR: Objection.

7 THE WITNESS: Based on my discussions
8 with Ken Ries, as well as the oversight of ERC,
9 yes, I do believe that.

10 Q (By Mr. Simmons) This affidavit was
11 shown to you as Exhibit No. 4.

12 Have you had a chance to review it?

13 A Yes, I have.

14 Q All right. Were you involved in the
15 preparation of that affidavit?

16 A Yes, I was.

17 Q And is that affidavit true and correct?

18 A Yes. Other than in Paragraph 7, we
19 need to change the Delaware reference.

20 Q Okay.

21 A And in paragraph, I noticed, 17,
22 there's a typo on the dollar amount.

23 Q Okay.

24 A It should be consistent with Paragraph
25 No. 28.

1 Q Now, Ms. DePaoli, as a person who's
2 been involved in this particular site, as a person
3 who has monitored this particular site, do you see
4 any prejudice that could have occurred to Home
5 Insurance based upon the timing of the notice that
6 was given by Viad to Home Insurance?

7 MR. O'CONNOR: Objection.

8 Q (By Mr. Simmons) Go ahead.

9 A No. I don't see a prejudice. I
10 believe that we kept costs at a minimum. I
11 believe that based on the policy and the
12 statements of Home Insurance on other claims, they
13 did not have a duty to defend or investigate.
14 That was the insured, Viad's, duty was to
15 investigate and defend. Our responsibility was,
16 then, to submit a claim to Home Insurance.

17 So if they didn't have a duty to
18 investigate or defend, they certainly wouldn't
19 have affected the outcome. I do believe with Ken
20 Ries's oversight and all his expertise, that we
21 kept costs at a minimum, which the State of
22 California would not have paid if we had not acted
23 properly in keeping costs at a minimum.

24 Q Does this also include the fact that,
25 during this time period, you were seeking to

1 obtain reimbursement from the State of California?

2 A That's correct. I mean, we were --
3 initially, we didn't, we thought we would have
4 reimbursement. We did not receive the
5 reimbursement until October of 2006, the initial
6 one, of which we basically had to appeal and file
7 another request for all the ineligible claims.
8 And we didn't receive payment until October of
9 2008.

10 Q Did you significantly -- Did Viad
11 significantly benefit Home Insurance in
12 liquidation by following through with so
13 determinatively and so strongly the reimbursement
14 from the State of California?

15 MR. O'CONNOR: Objection.

16 THE WITNESS: We actively pursued the
17 Underground Storage Tank Reimbursement Storage
18 Fund option. We continually, through the 2001
19 filing through December of 2007, in addition to
20 some submittals in early 2008, we continually
21 filed and gave additional information to the State
22 of California to ensure that we would receive
23 almost the entire reimbursement amount cap.

24 I think we were short, like I said, I
25 think short 60,000 out of 1.499 million that is

1 the cap.

2 Q (By Mr. Simmons) Did Viad use its best
3 efforts in order to, first, making the claim,
4 keeping its expenses as low as possible, and
5 ultimately obtaining recovery from the State of
6 California in order to minimize the amount that
7 would be claimed from Home Insurance?

8 A Yes. Viad diligently under -- I'm
9 personally aware of from June 2004 on and prior
10 know from discussions with Ken Ries and documents,
11 we actively pursued reimbursement, actively and
12 diligently pursued it.

13 We kept our costs down on remediation,
14 based on discussions with Ken Ries and others.

15 Q (By Mr. Simmons) All right. I'm going
16 to read to you a provision of the insurance
17 policies, the first two insurance policy. It's
18 under Paragraph No. 8, Claims and Appeals. I'm
19 going to ask you if Viad, even if there was some
20 inadvertent failure to notify, which I realize
21 that you deny that there was an inadvertent
22 failure to notify, I'm going to read you this and
23 see if you can testify about Viad's efforts.

24 It says, "Inadvertent failure to so
25 notify shall, however, not affect the liability of

1 the company. But the insured agrees to use its
2 best efforts to comply with the foregoing
3 stipulations with the view to affording the
4 company every possible opportunity of safeguarding
5 their interest in any claim in which they may be
6 involved."

7 Now, I realize that you deny that there
8 has been any failure to properly notify. I'm
9 going to move to this next issue that says even if
10 there was, it shall not affect the liability of
11 Home Insurance to Viad. But it says Viad agrees
12 to use its best efforts to comply with the
13 foregoing stipulations.

14 How has Viad used its best efforts to
15 look out for the interests in Home Insurance with
16 respect to this claim?

17 A Well, Viad initially hired, had Ken
18 Ries involved in overseeing the project and also
19 had hired a consultant to be the project manager,
20 so those were ways to make sure that we managed
21 the cost of the project --

22 Q And by the way, in all of the other
23 claims that were similar to the San Diego claims
24 that Viad made against Home Insurance, did they
25 ever object to Ken Ries as being the person who

1 handled those?

2 A No. They never objected to Ken Ries.
3 They actually never objected to any of the
4 remediation efforts that we did. We provided
5 information as to invoices on costs that were
6 incurred. They didn't object to those or didn't
7 comment on those.

8 Q All right. Let's continue on, then,
9 with -- I'm sorry I interrupted on that train of
10 thought -- but those things that constitute the
11 best efforts that Viad has made in order to look
12 out for the interests of Viad, as well as Home
13 Insurance?

14 A Well, when you receive an abatement
15 order, like Viad did, you do have an option to
16 file an appeal for that. You either have to act
17 upon it or file an appeal.

18 That would have been extremely costly.
19 We were fully aware there was groundwater
20 contamination and it was due to gasoline and
21 diesel fuel 1-D, so, therefore, we had to fact.
22 We ultimately would have failed on that. That
23 would have been a lot of money expended without
24 any kind of return.

25 In addition, we kept the cost down by

1 having, as I mentioned, Ken Ries, as an expert
2 project manager involved, who took bids on the
3 actual work to be performed by subcontractors.

4 So and, you know, the end result is the
5 State of California, who looks at all of this very
6 diligently, as part of the Underground Storage
7 Tank Cleanup Reimbursement Fund, paid almost the
8 entire amount of the cap to us on this project.

9 Q Is it fair to say that these
10 environmental matters take a significant amount of
11 time and that, in this particular instance, the
12 efforts that Viad made with respect to getting
13 reimbursement from the State of California took a
14 significant period of time so as to obviously
15 impact any notice given to Home Insurance?

16 MR. O'CONNOR: Objection to form.

17 THE WITNESS: Well, I personally know a
18 tremendous amount of time I expended on it in
19 supervising -- not only myself working on it but
20 supervising Ken Ries. We also had people in the
21 controller's department pulling old records, as
22 well as my assistant. So there was a tremendous
23 amount of time expended.

24 Q (By Mr. Simmons) And with respect to
25 following up on using best efforts, the insured,

1 namely Viad, using its best efforts in complying
2 with the foregoing stipulations with a view to
3 affording to company every possible opportunity to
4 safeguard their interests in a claim, do you
5 believe that Viad did do that, used its best
6 efforts?

7 A Yes. Viad investigated the matter,
8 handled the matter properly, basically defended
9 what would be, what was brought against us in
10 terms of making sure we kept, as best as possible,
11 the minimum amount of payments that would have to
12 be made, so yes.

13 The end result was, in the other
14 claims, if you review the records, it's very clear
15 that Home Insurance did not want to investigate
16 the matters or defend. That was left up to the
17 insured, which is Viad.

18 Q Would it have been potentially
19 premature for Viad to have made a claim against
20 Home Insurance with respect to the San Diego
21 matter without having the final determination of
22 the amount of money that was due, based upon the
23 fact that Viad was still waiting -- I'm talking
24 about due from Home Insurance Company, while Viad
25 was expecting to receive compensation from the

1 State of California?

2 MR. O'CONNOR: Objection; calls for
3 legal conclusion.

4 THE WITNESS: We would not have known
5 what our final actual loss would have been until
6 after we received the final payment from the State
7 of California.

8 Q (By Mr. Simmons) Ms. DePaoli, do you
9 believe that the best efforts that is referred to
10 here is the subjective best efforts of Viad, not
11 some standard that would be different than the
12 subjective best efforts of Viad?

13 MR. O'CONNOR: Objection; calls for
14 legal conclusion.

15 THE WITNESS: Based on my legal
16 experience, I would say yes.

17 Q (By Mr. Simmons) Yes, it would be the
18 subjective best efforts?

19 A It would be the subjective best efforts
20 of the insured, Viad.

21 Q What is your understanding of who owns
22 the groundwater in California?

23 MR. O'CONNOR: Objection; lack of
24 expertise.

25 THE WITNESS: Based on my experience on

1 this remediation site, as well as general
2 remediation efforts, the State of California owns
3 the groundwater.

4 Other states it's different. Some
5 other states, the groundwater is owned by the
6 actual property owner. But I do know that in the
7 State of California, the State of California owns
8 the groundwater.

9 MR. SIMMONS: We're going to step out
10 for a moment. I want to talk to her for a minute
11 and ask her if she has anything else that she
12 wants to cover.

13 MR. O'CONNOR: You're going to
14 privately ask the witness if there's anything you
15 want to ask her about in the deposition?

16 MR. SIMMONS: That's right. If there's
17 anything else we need to cover.

18 MR. O'CONNOR: You can take a break. I
19 object.

20 MR. SIMMONS: Okay. Let's take a break
21 and then --

22 MR. O'CONNOR: Before we go off, I'm
23 going to state my view that communications between
24 attorney and witness on a break in a deposition
25 are not privileged.

1 Go ahead.

2 MR. SIMMONS: Okay. Well, that's not
3 correct. There are cases directly dealing with
4 that.

5 MR. O'CONNOR: Yes, there are.

6 MR. SIMMONS: If there were a court
7 order that so stated, it would be unconstitutional
8 because this witness is a client.

9 MR. O'CONNOR: Thank you, Judge.

10 MR. SIMMONS: Okay.

11 (Recess was taken from 11:32 a.m. to
12 11:33 a.m.)

13 MR. SIMMONS: No further questions of
14 this witness at this time.

15 MR. O'CONNOR: I have no further
16 questions of the witness.

17 Thank you.

18 (11:34 a.m.)

19

20 _____
DEBORAH J. DePAOLI, ESQ.

21 SUBSCRIBED AND SWORN TO before me this _____ of
22 _____, 2009.

23

NOTARY PUBLIC

24 My Commission Expires:

25

1 STATE OF ARIZONA)

2) ss:

3 COUNTY OF MARICOPA)

4 BE IT KNOWN that the foregoing
5 deposition was taken before me, SANDRA L. MUNTER,
6 a Certified Reporter for the State of Arizona;
7 that the witness before testifying was duly sworn
8 by me to testify to the whole truth; that the
9 questions propounded by counsel and the answers of
10 the witness thereto were taken down by me in
11 shorthand and thereafter transcribed either by me
12 or under my direction; that the foregoing pages
13 are a true and accurate transcript of all
14 proceedings had upon the taking of said
15 deposition, all to the best of my skill and
16 ability.

17 (X) Pursuant to request, notification
18 was provided that the deposition is available for
19 review and signature.

20 () Review and signature was waived.

21 I FURTHER CERTIFY that I am in no way
22 related to any of the parties hereto, nor am I in
any way interested in the outcome hereof.

23 DATED at Phoenix, Arizona, this 13th
day of January, 2009.

24 _____
SANDRA L. MUNTER, RPR/CSR
25 Certified Reporter
Certificate No. 50348