

**BEFORE THE SUPERIOR COURT
MERRIMACK COUNTY, NEW HAMPSHIRE
IN RE THE LIQUIDATION OF HOME INSURANCE COMPANY**

DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2008-HICIL-41

Proof of Claim Number: CLMN712396-01

Claimant: *Harry L. Bowles*

**CLAIMANT'S RESPONSE AND MOTION TO CANCEL HEARING SCHEDULED
DECEMBER 2, 2011 HEARING IN CONCORD, NEW HAMPSHIRE**

Comes Claimant Harry L. Bowles in objection to Superior Court's Notice of Motion Hearing set for December 2, 2011. Bowles' motions the Court for cancellation of the scheduled hearing on the basis lack of this Court's lack of jurisdiction to take judicial notice of litigation in Texas and for insurance fraud in the disputed-claim procedure. Bowles continues:

FOREWORD

1. This motion is filed in the context that all parties and individuals in this disputed claim proceeding are aware that the proceeding is an integral part a 16½-year kangaroo court¹ operation originally initiated against Bowles by ex-attorney George M. Bishop and co-conspirators on April 10, 1995 in the 190th District Court in Harris County, Texas in Cause No. 1991-25939. Bowles, charging conspiracy and receivership fraud, had properly withdrawn from a Settlement Agreement in that litigation on March 31, 1995. This required return of the case to its state prior

¹ Defined in Black's Fifth Edition as a sham legal proceeding in which a person's rights are totally disregarded and in which the result is a foregone conclusion because of the bias of the tribunal.

*Posted
11-21-11*

to the October 1993 Settlement. However, in angry retribution, Bishop and the conspiring lawyers and judges acted criminally to proceed with the litigation in disregard of Texas law and **without plaintiff Bowles' participation**. They proceeded even after Bowles' successful appeal to the 14th Court of Appeals voided their *ex parte* proceedings. The consequence was the illegal expropriation of Bowles' property valued in excess of one million dollars. Bishop's betrayal of his client Bowles resulted in an award to him and his law firm of \$226,000 in undeserved attorney fees.

2. Bishop is a convicted felon and former Republican Party power broker in Texas in the style of former Congressman Tom DeLay.² His spouse is a Harris County District Judge. This case of insurance fraud testifies to Bishop's continuing ability to suborn public officials to maintain the 16½ -year Bishop-orchestrated disfranchisement of Bowles from access to justice in Texas courts. Bishop is virtually immune from prosecution for civil and criminal professional misconduct in all venues, federal and state.³

3. The present notice of a proposed hearing in Concord is a case in point. This is another kangaroo court proceeding designed to put a stamp of finality on the Bishop scheme of insurance fraud, with the aid and support of the Liquidator and in violation of this Court's June 13, 2003 Order of Liquidation. It is obvious that the Court will approve a Referee's order resulting from a sham proceeding that was carefully controlled by the Liquidator's attorney in Boston to follow the Liquidator's determination that Bowles is prohibited by *res judicata* from challenging the authority of TPCIGA and HICIL to intervene in Bowles' malpractice lawsuit in Texas.

² See Bishop's End Game by Steven Long, Houston Press newspaper, December 2, 1999

³ The list of courts and administrative agencies in which Bowles has vainly applied for relief from fraud and official oppression includes numerous Texas state district courts and two Texas appellate courts, two federal district courts, the U.S. Department of Justice, the State Bar of Texas, the Fraud Unit of the Texas Insurance Department, the Texas Attorney General, the Harris County District Attorney, the New Hampshire Department of Justice, and, presently, this Superior Court and the office of the Deputy Liquidator of The Home Insurance Company in Manchester, New Hampshire.

4. The Liquidator's rejection of the subject October 22, 2008 Proof of Claim (see copy attached as **EXHIBIT A**) on the basis of *res judicata* implies Liquidator approval of his agents' unauthorized interference with a judicial proceeding in Texas and constitutes cover up of known insurance fraud against Bowles and the Home Estate. Bowles demands cancellation of the hearing and demands the Court act to immediately grant Bowles' Second Motion to Recommit in exercise of its mandated duty to carry out the terms of its own Order of Liquidation.

PRE-ARRANGED SUMMARY JUDGMENT IN TEXAS FOR TPCIGA

5. In August, 2005 Claimant Bowles was the plaintiff in a legal malpractice lawsuit against George M. Bishop and the former law firm Bishop, Peterson & Sharp, P.C. ("BPS") in the 151st District Court in Houston. Bowles suit was filed in August 1995. Bowles' discovery requests to Bishop in 2002 and thereafter revealed that there was no Lawyers Professional Liability Insurance in place to cover Bowles' lawsuit. No third-party defendant appeared and defendants employed no legal counsel to answer the suit. The court finally set a March 2006 trial date.

6. On August 23, 2005 a Houston law firm, Marshall & McCracken, P.C. ("M&M") gave notice of its appearance as counsel solely for defendant BPS. The notice included a pleading for reimbursement of fees by the Texas Property and Casualty Insurance Guaranty Association ("TPCIGA"), indicating that an unnamed insurance company was involved.

7. In view of Bishop's previous failure to produce insurance information, Bowles made a discovery request to M&M on November 1, 2005. The answer stated that BPS was formerly insured by Home Insurance, and that TPCIGA was required to provide coverage after Home's liquidation. The implication was that Home had issued a "covered claim" certificate to BPS concerning an alleged claim by an insured party against an alleged Home policy.

8. Litigation continued with discovery and opposing Motions for Summary Judgment – Bowles with a sworn motion, BPS with an unsworn motion. Discovery answers and deemed admissions precluded summary judgment. Nevertheless, M&M (now TPCIGA) was granted a prearranged summary judgment from the 151st District Court on June 27, 2006. Bowles’ lawsuit was dismissed without a trial. Bowles filed a Motion for Rehearing.

9. Immediately thereafter, on June 28, 2006, M&M (now TPCIGA) filed a Motion for Summary Judgment (identical to the first) in the name of uninsured defendant George M. Bishop, an unregistered sole proprietorship aka George M. Bishop & Associates. Bowles filed a sworn counter-motion. The Court granted the Bishop motion on April 12, 2007 without considering precluding facts.

**THE UNMASKING OF THE FELONY CRIMINAL CONSPIRACY TO COMMIT
INSURANCE FRAUD**

10. Home Insurance Company in Liquidation (“HICIL”) and the Liquidator became implicated in the Texas litigation as a result of Bowles’ discovery requests to M&M in 2005. Subsequently there was extended cross-correspondence between Bowles and TPCIGA about Bowles’ demand for a copy of the alleged Home Insurance Company insurance policy being defended by TPCIGA.

11. M&M and TPCIGA responded with a series of incredibly bizarre arguments and hot-tempered letters to Bowles’ attorney in their effort to avoid producing the alleged BPS insurance policy. Their rhetoric to resist production became frantic after August 29, 2006 when Bowles filed a Motion to Show Authority per Rule 12, T.R.C.P. **TPCIGA’s and M&M’s reluctance to produce an insurance policy was entirely consistent with their knowledge that they were engaged in insurance fraud and that they were being unwillingly forced to commit a serious**

felony offense under the Texas Penal Code by filing a false document with intent to affect the course and outcome of a judicial proceeding.

12. In apparent fear TPCIGA's Senior Claims Attorney Amber A. Walker sent letters dated August 11, 2006 and September 11, 2006 stating that, "TPCIGA is not a party to this litigation", and that "TPCIGA is not authorized to provide a copy of the policy". She did so knowing that days earlier she had committed perjury in a sworn affidavit filed by M&M in which she claimed authority to defend a "**possible covered claim**" submitted to TPCIGA by the Liquidator.

13. On September 11, 2006 TPCIGA's attorney (M&M) filed a supplemental pleading in opposition to Bowles' motion stating, "Suing the insured law firm invoked the policy, but solely in the insured's behalf. Bowles had no standing to make a "claim" directly under the policy". This was testimony that the alleged policy was not a third-party liability policy but, instead, a first-party policy where claims are only between the insured and the insurer and where no damages are paid directly by the insurance company to a third party.

14. At hearing on September 18, 2006 the Court "suggested" production of a copy of the alleged Home insurance policy authorizing M&M's appearance and M&M complied on September 19, 2006. **A copy of Home Policy No. LPL-F871578 was filed showing an expiration date of January 24, 1994.**

15. Bowles instantly recognized that the policy had expired long ago and that TPCIGA's attorney therefore had no authority to appear in the court. On September 26, 2006 Bowles filed a demand that the Motion to Show Authority be granted, that all pleadings and orders be stricken and that his malpractice litigation be reinstated. **The judge never reviewed the policy and summarily denied the motion on September 27, 2006.⁴**

⁴ It seems significant that the M&M law firm dissolved and vacated its offices shortly thereafter without notice.

**TPCIGA AND HICIL ADMITTED THEY WERE NEVER PARTIES TO THE
LITIGATION IN TEXAS, PROVING THERE WAS NO PRIVITY BETWEEN
BOWLES AND THE LIQUIDATOR IN THE LITIGATION IN TEXAS TO PERMIT
INTERVENTION IN THE LEGAL MALPRACTICE LAWSUIT**

16. The September 11, 2006 letter from TPCIGA official Amber A. Walker to Bowles' attorney James Farmer staunchly asserted that TPCIGA was not a party to the legal malpractice litigation. This claim was made despite her admission that M&M was employed by TPCIGA to defend a Home policy. Ms. Walker stated that neither Home nor TPCIGA were "initially" involved in the defense of the claim against the policy "because the policy was subject to a deductible". However, in her perjurious sworn affidavit filed with M&M's September 12, 2006 response to Bowles' Motion to Show Authority, Ms. Walker contradicted this statement, asserting that Home had contracted with Bishop to provide pro se representation until the deductible was satisfied (see copy of affidavit attached as **EXHIBIT B**).

17. On October 11, 2006 a letter from Mr. Ronald F. Barta to Mr. Farmer echoed Ms. Walker's claim of non-party status in declaring, " **This will confirm that The Home Insurance Company in Liquidation ("Home") is not now and never has been a party to Cause No, 1995-43235 in Texas and, accordingly, will not be responding to . . . filings**".

**LACK OF PRIVITY DESTROYED LIQUIDATOR'S AND TPCIGA'S
RIGHT TO INTERVENE IN TEXAS LITIGATION AND REFEREE'S
JURISDICTION TO TAKE JUDICIAL NOTICE OF OR RULE RES
JUDICATA ON PROCEEDINGS IN TEXAS COURTS**

18. The Referee's Order on the Merits against Bowles in this Proof of Claim proceeding was

issued on basis of the Referee's taking judicial notice of litigation in Texas involving Bishop and Bowles spanning some 15 years. Referee Gehris and counsel for the Liquidator simply ignored Bowles' challenges to the Referee's jurisdiction to hear and consider matters of fact and law in Texas. These objections were fully laid out, not only in the motions to recommit, but in responses to the Liquidator's "briefs" that dwelled ad nauseam on the results of 15 years of illegal kangaroo court proceedings against Bowles in Texas courts (orchestrated by convicted felon George M. Bishop).

19. TPCIGA and HICIL disclaimed being third-party defendants in Cause No. 1995-43235. They also agreed that Bowles had no insurable interest in Home Policy No. LPL-F871578. Under those circumstances, there was never any privity between Bowles and Home. Thus, it is obvious that the Liquidator, the Referee and this Court had and have no jurisdiction to issue *res judicata* rulings based on litigation involving Bowles in Texas. The Order on the Merits issued by Referee Gehris does exactly that and the Order must be ruled a nullity. Bowles' Motion to Recommit must therefore be granted.

20. The explanation given (*res judicata*) by the Liquidator for rejection of the subject Proof of Claim must be vacated to eliminate the implied approval by the Liquidator of his agents' intervention in the litigation in Texas. The Liquidator's explanation is a cover up of the insurance fraud perpetrated against Bowles and the Home Estate. It evidences the Liquidator's repudiation of his fiduciary duty to recognize and strictly implement the terms of the Order of Liquidation.

21. Further, regarding privity, without joinder of TPCIGA and HICIL as third-party defendants, the resulting lack of privity nullified the Texas court's jurisdiction to rule on the issue of M&M's authority to appear in defense of Home Policy No. LPL-F871578. The Texas court's order denying Bowles' Motion to Show Authority was issued without that court's jurisdiction of

indispensable parties. That order must be considered void; it cannot be cited for its *res judicata* effect against Bowles by the Liquidator, the Referee or this Court.

**THE REFEREE'S ORDER ON THE MERITS MUST BE CONDEMNED AND
CANCELLED FOR ITS CONTEMPT OF THIS COURT'S JUNE 2003 ORDER OF
LIQUIDATION AND ITS SUPPORT OF CRIMINAL INSURANCE FRAUD**

22. The sole jurisdiction of the Liquidator and the Referee and this Superior Court was, and continues to be, to dispose of **the fundamental issue of the authority of TPCIGA and HICIL to employ counsel to intervene in the Texas litigation in defense of Home Policy No. LPL-F871578.** And the sole consideration in resolution of this all-important issue can only be **whether or not the filing of the Home policy and initiation of a defense of the Home policy was in compliance with this Court's June 13, 2003 Order of Liquidation.**

23. The fundamental issue is not addressed in the Referee Melinda Gehris Order on the Merits (copy attached as **EXHIBIT C**) other than in the closing paragraph stating that, "Mr. Bowles has also filed two motions for summary judgment. The allegations in those motions are addressed in this Order and those motions are denied".

24. The fact is, the Referee's Order **did not** address Bowles' Motions for Summary Judgment, specifically with respect to Bowles' charge that TPCIGA and Home had intervened in Bowles' legal malpractice litigation in August 2005 in violation of Sections (m) and (e) of the Order of Liquidation. The facts clearly showing the violations required the Liquidator's counsel to resort to obfuscation in his rebuttal (attached as **EXHIBIT D**).

25. As shown, the Liquidator attempted to dispose of the Section (m) [RSA 402-C:28] violation issue by denying that the abatement and intervention provision was applicable because Bowles' lawsuit was not an action "against an insurer". He argued that an

intervention required participation by Home or the Liquidator as a party litigant. Denying Home's participation, he passed off the employment of defense counsel by TPCIGA as an obligation under the Texas Insurance Code.

25A. This argument is entirely false because, pursuant to the Order of Liquidation, TPCIGA had no authority to independently construe a "possible covered claim" against the Home policy to "covered claim" status. Further, there could be no intervention unless (1) the Liquidator saw fit to intervene and obtained leave of the Superior Court to do so, and (2) the intervention occurred within the Statute of Limitations 2-year limit after June 13, 2003.

25B. The Liquidator's argumentation is also false because sworn affidavits by two of the Liquidator's agents and officials (Mr. Barta and Ms. Walker) testified that Home Insurance undertook to provide a defense to Bowles' lawsuit prior to its liquidation by contracting for legal services with George M. Bishop. After liquidation it did so by and through TPCIGA, fully aware that any action taken by TPCIGA would be in the name of Home Insurance, because Texas law prohibits TPCIGA's acting as an insurance company.

25C. The Liquidator's argument that it was not a party litigant flies in the face of the Liquidator's Proof of Claim determination taking judicial notice of judgments in Texas courts against Bowles as *res judicata* to prohibit his challenging the authority of TPCIGA and Home to provide defense counsel for BPS. The Liquidator thereby claims the benefits of being a party litigant without assuming the serious liabilities created by the filing of false documents and perjurious affidavits in the court in Texas.

26. The most absurd and revealing argument advanced by the Liquidator in response to Bowles' Motion for Summary Judgment concerns the applicability of RSA 402-C:22 [Section (e)] of this Court's June 2003 Order of Liquidation. The section reads: "The liquidator shall

cancel all in-force contracts of insurance and bonds effective as of 30 days after the date of this Order”.

26A. The Liquidator’s response to Bowles’ allegation that the defense of the Home policy by Home and TPCIGA was in violation of this section of the Order is that the cancellation of all Home policies had no bearing on the policy issued to BPS. The Liquidator asserts that RSA 402-C:22 does not apply to policies whose policy periods expired before the liquidation; that coverage those policies provided in the past continued without cancellation, subject to policy terms, deadlines and other provisions of RSA 402-C.

26B. Amazingly, by this response, the Liquidator admitted that Home Policy No. LPL-F871578 was a cancelled policy in June 2003 and subject to all provisions of the Order of Liquidation, which, of course, included sections (j), (k), (m), and (o) thereof. Applying these four sections to the action taken by Home and TPCIGA officials in defense of the cancelled Home policy highlights the Liquidator’s approval of the intervention in Texas and his renunciation of the Order of Liquidation and abdication of responsibility to act in aid of this Court to carry out the terms of the Order of Liquidation.

26C. It is beyond ludicrous to suggest, as the Liquidator has, that coverage provided by cancelled Home policy LPL-F871578 remained in place and was unaffected by the June 13, 2003 Order of Liquidation. The revelation that the Liquidator defended the fraud inherent in the filing of a void Home policy in the Texas court case suggests serious official malfeasance and conspiratorial conduct by the Liquidator to cover up criminal misconduct by his agents.

TPCIGA FRAUD ON THE COURT IN VIOLATION OF
TEXAS INSURANCE CODE

27. Ms. Walker’s affidavit that Article 21.28-C made it TPCIGA’s duty to construe the

alleged “possible covered claim” as an actual covered claim and to mount a defense constitutes aggravated perjury because it violates all of the following Sections of the statute:

- Under Section 5(8) of the Article a “covered claim” means one for which an assumption certificate has been issued by a Texas-licensed insurance company. *Home never issued an assumption certificate to BPS. Home had ceased insurance operations months prior to Bowles’ malpractice lawsuit was filed. Home had no employees, having been placed in the hands of REM, a third-party administrator (TPA) for run-out of claims. REM was a subsidiary of Zurich, the Swiss company.*
- Under Section 8 (a) & (d), the Association’s liability is limited to the payment of covered claims and it has a duty to deny all other claims. *Ms. Walker admitted there was no covered claim against the Home policy, but only a “possible covered claim”. Accordingly, TPCIGA had a statutory duty to deny the claim. TPCIGA’s failure to do so constituted deliberate insurance fraud designed to benefit an uninsured party.*
- Under Section 8 (b), the Association, in performing its statutory obligations, shall not be considered to be in the business of insurance, shall not be considered to have assumed or succeeded to any liabilities of the impaired insurer, and shall not be considered to otherwise stand in the shoes of the insurer for any purpose. *Ms. Walker admitted to having acted as an insurance company by assuming the liabilities of the impaired insurer and standing in Home’s place to fraudulently construe an alleged “possible covered claim” by Bishop as a true covered claim against Home Policy No.LPL-F871578.*

CONCLUSION

28. After more than six years of kangaroo court proceedings related to Home Insurance

Policy No. LPL-F871578, this Court is obviously determined to extricate the Liquidator from the dilemma posed by the his duty to execute the terms of this Court's Order of Liquidation and the secret, independent and unauthorized actions by HICIL and TPCIGA officials in August 2005 in violation of the Order and in violation of the Texas Penal Code.

29. The scheduled hearing in Concord is a scheme to finesse the Court's duty to rule on the fundamental issue, namely, TPCIGA's authority to intervene. This Court, assuming of jurisdiction where none exists, intends to summarily approve the Liquidator's *res judicata* defense as described in the Referee's Order on the Merits.

30. As asserted above, privity never existed between Bowles and the Liquidator in the litigation in Texas, either before or after the issuance of the June 13, 2005 Order of Liquidation. The Order of Liquidation prohibited creation of privity by way of an intervention. Accordingly, the intervention by HICIL and TPCIGA in defense of a null and void insurance policy was absolutely unauthorized and constituted civil and criminal insurance fraud. The Liquidator's decision to refuse to condemn the intervention and, instead, to defend the fraudfeasors at enormous cost constitutes fiduciary misconduct and conspiracy to cover up the malfeasance by the Liquidator.

31. Bowles will not appear at the hearing on the basis that the Liquidator, the Referee and this Court, with one exception, have no jurisdiction to consider or rule on matters of law and fact regarding litigation involving Bowles in the State of Texas. The exception is Bowles' Motion to Show Authority filed in the 151st District Court in Texas in August 2006.

32. Bowles denies that privity exists between him and the Liquidator and the Referee to establish a common interest in any litigation in Texas concerning Bowles and BPS or George M. Bishop other than with regard to the TPCIGA intervention in August 2005.

33. Bowles will not appear at the scheduled hearing on the basis that the disputed claim proceeding before Referee Melinda Gehris was a sham steeped in bias, fraud and deceit; in violation of New Hampshire Rules of Civil Procedure; and in breach of a contractual agreement with the Liquidator that the proceeding would conform to said Rules and be in observance of constitutional due process of law.⁵

REQUEST FOR RELIEF

34. Bowles Motion the Court for cancellation of the hearing scheduled for December 2, 2011 due to the Court's lack of jurisdiction to hear and rule on matters of fact and law in dispute in the State of Texas.

35. Bowles requests the Court overrule the Referee's Order on the Merits and rule that the intervention by TPCIGA and HICIL in Bowles' malpractice litigation in Texas in August 2005 was a blatant violation of, and in contempt of, this Court's June 2003 Order of Liquidation.

36. Bowles requests the Liquidator modify the Notice of Determination issued to Bowles dated October 22, 2008 to reflect the fact that Bowles had no insurable interest in Home Policy No. LPL-F871578 and that therefore the Proof of Claim had no validity.

37. Bowles requests damages be assessed against the Liquidator, HICIL officials and TPCIGA officials for fraud, conspiracy, and tortious interference in an ongoing legal proceeding in which they had no legal right to interfere.

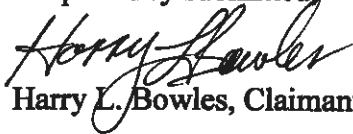
38. Bowles requests the Court order the Liquidator honorably settle the subject disputed claim in good faith negotiations or by non-binding mediation at Liquidator's expense before a

⁵ Bowles at all times objected to the Referee Gehris's jurisdiction and to the *ex parte* procedure by which the Liquidator's counsel was in total control. The Liquidator was blindsided by Bowles' demand for an evidentiary hearing per Superior Court Rule 14 c. He refused to litigate in good faith – he at all times asserted that “briefing” rather than factfinding was paramount. The Referee agreed. The capstone to this farce came when the Liquidator requested and received cut-off of discovery to prevent disclosure of primary evidence and disallowance of interrogatories, requests for admissions and depositions. Thus TPCIGA and HICIL officials were excluded from the “evidentiary hearing” before the Referee. The Referee failed and refused to follow the published procedures regarding claim filings mandating application of New Hampshire court rules and court practice..

competent and unbiased mediator in the State of Texas.

38. Bowles requests all other and further relief to which this Court may deem him justly entitled.

Respectfully submitted,



Harry L. Bowles, Claimant, Pro Se

306 Big Hollow Lane

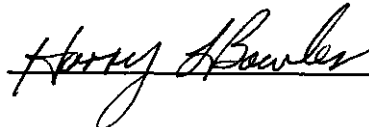
Houston, Texas 77042

Tel. 713-983-8556 Fax 713-983-6722

Attachments: Exhibits A-D

CERTIFICATE OF SERVICE

I, Harry L. Bowles, hereby certify that on this **19th Day of November, 2011** a true and correct copy of the foregoing was sent by U.S. Mail to the Liquidation Clerk, Merrimack County Superior Court P.O. 2880, Concord, NH, 03301; to Mr. Eric A Smith, Rackemann, Sawyer and Brewster, 160 Federal St., Boston, MA 02110-1700; to J. Christopher Marshall, NH Dept. of Justice, 33 Capitol St., Concord, NH 03301-6397; to Mr. Marvin Kelly, Exec. Dir., TPCIGA, 9120 Burnet Road, Austin, TX 78758; to U.S. Dept. of Justice, Houston Division, FBI Field Office, Special Agent in Charge, 1 Justice Park Drive, Houston, TX 77092; to Mr. Gregg Abbott, Attorney General of Texas, Insurance Practices Section, P O Box 12548, Austin, TX 78711-2548; to Mr. Dennis A. Pompa, TDI Fraud Unit, Att Jack Hall, Mail Code 109-3A, P O Box 149336, Austin, TX 78714-93336; to Ms. Paricia Lykos, Harris County District Attorney, Attention R. Renee Magee, Criminal Justice Center, Houston, TX 77002-1901; to Mr. Craig L. Reese, Fletcher & Springer, LLP, 8750 North Central Expressway, 16th Floor, Dallas, Texas 75231; to Ms. Maryalyce W. Cox, MehaffyWeber, 500 Dallas Street, Ste 1200, Houston, TX 77002 ; to Ms. Melinda S. Gehris, 501 Hall Street, Bow, NH 03304.



THE HOME INSURANCE COMPANY IN LIQUIDATION

P.O. Box 1720

Manchester, New Hampshire 03105-1720

Tel: (800) 347-0014

Date: 10/22/2008

Class: II

Harry L Bowles
306 Big Hollow Lane
Houston, TX 77042

RE: NOTICE OF DETERMINATION
Proof of Claim No.: CLMN712396-01

Determination Summary

| | |
|-------------------------------|-------------------|
| Gross Amount of Claim | : \$ 3,100,000.00 |
| Amount Allowed by Liquidation | : \$ 0 |

Explanation: Your Proof of Claim seeks an allowance for damages you allege you sustained as a result of alleged professional misconduct by Bishop, Peterson & Sharp P. C. and George M. Bishop pursuant to a professional liability policy The Home Insurance Company n/k/a The Home Insurance Company in Liquidation issued to the firm and its individual partners. You made these allegations in law suits you brought against the firm and Mr. Bishop. The suits have been subject to dismissal and summary judgment in the insureds' favor. Because your claims have been previously adjudicated and you have not been awarded any damages against the insureds, this Proof of Claim has been disallowed.

You have filed another Proof of Claim CLMN380570. You will be receiving a separate Notice of Determination with respect to that Proof of Claim.

Dear Claimant :

The purpose of this letter is to provide you with a determination set forth above of claims you have presented to The Home Insurance Company in Liquidation ("The Home"), under the Proof(s) of Claim specified above. The Home expects to present notice of this determination to the Superior Court for Merrimack County, New Hampshire (the "Court") for approval in accordance with New Hampshire Revised Statute, RSA 402-C:45. Read this Notice of Determination carefully as it sets forth your rights and obligations in detail.

EXHIBIT A

The Home has now made a Determination on the claims as set forth above in accordance with The Home Claim Procedures (the "Procedures")* approved by the Court. If the claim has been allowed, in whole or in part, it has been assigned a Class II priority as a "policy related claim" pursuant to the Order of Distribution set forth in RSA 402-C:44 and will be placed in line for payment as directed by the Court from the assets of The Home. The first \$50 of the amount allowed on each claim in this class shall be deducted from the amount distributed as specified in RSA 402-C:44.

You may have other claims against The Home for which you may receive other Notices of Determination. You will have a separate right to dispute each Notice of Determination. If your claim has been allowed in whole or in part, this Notice of Determination does not mean that your claim will immediately be paid, or that it will be paid in full or at all. Pursuant to order of the Court, The Home may make distributions of its assets as a percentage of all allowed claims in a particular priority class in The Home estate as approved by the Court. The amount of the final payment for allowed claims will be determined by the final ratio of assets to liabilities and the applicable priority. Please be advised that the final percentage of payment you receive from The Home, at the time The Home estate is finally closed, is the total payment amount that you will be entitled to for this claim.

The Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II.

Any and all distributions of assets may be affected and/or reduced by any payments you have received on this claim from any other sources not listed on the Notice of Distribution. Any such distributions by The Home are based on The Home's knowledge and/or understanding of the amounts you have received in settlement and/or reimbursement of this claim from all other sources at the time of the allowance or thereafter. Should The Home subsequently become aware of prior recoveries from other sources The Home has the right to reduce its future distribution payments to you to the extent of such other recoveries or to seek and obtain repayment from you with respect to any previous distributions that were made to you.

Further, if you seek or receive any future payment from any other source on this claim after you receive a distribution payment from The Home you must notify The Home at the address below and The Home has the right to recover from you the distribution payments in whole or in part, to the extent of any such other future recoveries.

As a condition to receipt of any distributions, The Home shall be entitled to any rights to subrogation you may have against any third party and you shall be deemed to have assigned to The Home such rights upon receipt of any distributions. You shall also be obliged to reimburse The Home for any legal fees or other costs associated with The Home recovering from you any distribution payments to which you are not entitled.

*A copy of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation may be obtained from the website of the Office of the Liquidation Clerk for The Home Insurance Company in Liquidation and US International Reinsurance Company in Liquidation, www.hicilclerk.org

The following instructions apply to this Notice of Determination:

Claim Allowed

1. If this claim has been allowed in whole or in part and you agree with the determination, sign and date the enclosed Acknowledgment of Receipt of the Notice of Determination and mail the completed Acknowledgment to The Home.

Claim Disallowed

2. A. If all or part of your claim has been disallowed or you wish to dispute the determination or creditor classification for any reason, you may file a Request for Review with the Liquidator. The Request for Review is the first of two steps in the process of disputing a claim determination. The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination.

REQUEST FOR REVIEW FILING REQUIREMENTS:

- (a) Sign and return the attached Acknowledgment of Receipt form.
- (b) On a separate page, state specifically the reasons(s) you believe that the determination is in error and how it should be modified. Please note the Proof of Claim number on that page and sign the page.
- (c) Mail the Request for Review to:
The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, NH 03105-1720

You should keep a copy of this Notice of Determination, Acknowledgment of Receipt and Request for Review, then mail the Original Request for Review to us by U.S. Certified Mail.

- (d) The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination. The Request for Review must be in writing.
- (e) The Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination.

IF A REQUEST FOR REVIEW IS NOT FILED WITH THE HOME WITHIN THE THIRTY (30) DAY PERIOD, YOU MAY NONETHELESS DIRECTLY FILE AN OBJECTION WITH THE COURT WITHIN SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE. You do not have to file the Request for Review as a prerequisite to dispute the Notice of Determination. Please see Section 2B (below) for the Objections to Denial of Claims.

B. If your claim is disallowed in whole or in part, you may file an Objection with the Court at

**Office of the Clerk, Merrimack County Superior Court
163 N. Main Street, P.O. Box 2880
Concord, New Hampshire 03301-2880
Attention: The Home Docket No. 03-E-0106**

within sixty (60) days from the mailing of the Notice of Determination and bypass the Request for Review procedures as noted in Section 2A (above). If the Request for Review is timely filed, as outlined in Section 2A, the Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination. If the redetermination is to disallow the claim, you may still file an Objection with the Court. You have sixty (60) days from the mailing of the Notice of Redetermination to file your Objection. Please also sign and return the Acknowledgment of Receipt form and mail a copy of the Objection to the Liquidator.

IF YOU DO NOT FILE AN OBJECTION WITH THE COURT WITHIN EITHER SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE OF DETERMINATION OR SIXTY (60) DAYS FROM THE MAILING OF ANY NOTICE OF REDETERMINATION, YOU MAY NOT FURTHER OBJECT TO THE DETERMINATION.

A timely filed Objection will be treated as a Disputed Claim and will be referred to the Liquidation Clerk's Office for adjudication by a Referee in accordance with the Procedures.

- 3. You must notify The Home of any changes in your mailing address. This will ensure your participation in future distributions, as applicable. For purposes of keeping The Home informed of your current address, please notify us at the address given on the letterhead above.**

Sincerely yours,

**Peter Bengelsdorf, Special Deputy Liquidator
For Roger A. Sevigny, Liquidator
of The Home Insurance Company in Liquidation**

If you wish to speak to someone regarding this Notice of Determination, please contact:

**Ron Barta
Senior Manager
Home Insurance Company in Liquidation
Phone : 212-530-4054**

AFFIDAVIT

THE STATE OF TEXAS

§
§
§
§

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, a Notary Public in and for the aforesaid jurisdiction, on this day personally appeared Amber A. Walker, known to me to be the person whose name is subscribed hereto, and who, being by me first duly sworn, on her oath deposes and says:

My name is Amber A. Walker. I am a licensed attorney in the State of Texas and am employed as a Senior Claims Attorney for the Texas Property and Casualty Insurance Guaranty Association ("TPCIGA"). I am over the age of twenty-one (21), have never been convicted of a felony or crime of moral turpitude, and am fully competent to testify. Except as otherwise specifically set forth herein, I have personal knowledge of the facts stated herein. All such facts are true and correct.

In my capacity as a Senior Claims Attorney for TPCIGA, I am well acquainted with Tex. Ins. Code art. 21.28-C (the "Guaranty Act") and the Guaranty Association. Moreover, I am familiar with the nature and history of Plaintiff's claim against Bishop, Peterson & Sharp, P.C.

Home Insurance Company ("Home") issued a legal liability policy to the law firm of Bishop, Peterson & Sharp, P.C. At some point after Mr. Bowles asserted his claim against Bishop, Peterson & Sharp, P.C. and related insureds, the insureds demanded a defense and indemnity from Home in accordance with the terms and conditions of the Home policy.

A New Hampshire court placed Home in liquidation on June 13, 2003. Thereafter, the Texas Commissioner of Insurance designated The Home Insurance Company an "impaired insurer" on June 26, 2003. In accordance with the provisions of Tex. Ins. Code Ann. art. 21.28-C, TPCIGA handles certain claims by and against insureds of impaired insurers.

Shortly after insolvency and the subsequent impairment, the Liquidator of Home Insurance Company forwarded this claim to TPCIGA for review as a possible "covered claim," as that term is defined in the Guaranty Act. The claim was assigned to claims examiner Barbara Marsh for handling. Ms. Marsh first reviewed the claim for TPCIGA on or about July 29, 2003. I first reviewed the claim for possible coverage issues on or about October 14, 2004. Because our investigation indicated that this claim might present a "covered claim," TPCIGA undertook to handle this claim on behalf of the now-dissolved insured law firm,

EXHIBIT B

while expressly reserving its rights to assert and rely upon any policy provisions or terms in the Guaranty Act that might limit coverage.


Prior to its insolvency, the Home Insurance Company had an agreement with George M. Bishop, a former partner of Bishop, Peterson & Sharp, P.C., that he would represent the named insured and related insureds in *Bowles v. George M. Bishop, et al.* until the amount of the policy deductible had been met. Once the insured's deductible had been met, TPCIGA secured the services of counsel in the Houston area to assume the defense of Bishop, Peterson & Sharp, P.C. Accordingly, TPCIGA retained the firm of Marshall & McCracken, P.C. to represent the named insured in this litigation.

By letter of August 11, 2006, I advised attorney James D. Farmer, counsel of record for Harry Bowles in the above-styled suit, that TPCIGA had been aware of Mr. Bowles' claim since shortly after the Home Insurance Company's demise and that it had retained Marshall & McCracken, P.C. to defend the Bishop, Peterson & Sharp, P.C. In that same letter, I also attempted to correct and explain a variety of other misstatements and/or misunderstandings apparent in correspondence received from Mr. Farmer, Mr. Bowles' attorney. A copy of that four-page letter is attached hereto as Exhibit "A."


Furthermore, any suggestion by Plaintiff that he was denied the opportunity to file a proof of claim is incorrect (see Exhibit E to Motion to Show Authority). A representative of Home Insurance Company, in liquidation, advised me on September 1, 2006 that the Liquidator sent Mr. Bowles notice of his right to file a proof of claim with the liquidation estate. Indeed, Mr. Bowles filed a proof of claim with the estate, although it referenced a shooting incident that was apparently unrelated to The Home Insurance Company and Bishop, Peterson & Sharp, P.C. Please note that a claim against the assets of the liquidation estate and a "covered claim" under the Guaranty Act are separate and distinct claims against separate entities.

Like most liability policies, the Home policy provided that Home Insurance Company had the right and duty to defend claims that fell within the coverage of the policy. Section 8(b) of the Guaranty Act provides that TPCIGA "shall undertake to discharge the policy obligations of the impaired insurer, including the duty to defend insureds under a liability policy, to the extent that the policy obligations are covered claims under the Act." Accordingly, pursuant to the terms and conditions of the policy and the Guaranty Act, Marshall & McCracken, P.C. has complete and full authority to represent Defendant Bishop, Peterson & Sharp, P.C. in the above-captioned lawsuit.

Further affiant sayeth not.


Amber A. Walker

SUBSCRIBED and SWORN TO, before me, on this the 7th day of September, 2006, to certify which witness my hand and seal of office.


Notary Public in and for the
State of Texas

My Commission Expires:



THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2008-HICIL-41
Proof of Claim Number: CLMN712396
Claimant Name: Harry L. Bowles
Policyholder Account: Class II

ORDER ON THE MERITS

This dispute arises out of a claim by Mr. Bowles against his counsel, Bishop, Peterson & Sharp, P.C. ("BPS"). Mr. Bowles has filed a Proof of Claim asserting a third party claim for alleged professional malpractice on the part of BPS and Attorney George Bishop. In addition, Mr. Bowles also asserts that Home and Texas Property and Casualty Insurance Guaranty Association ("TPCIGA") improperly provided a defense to BPS and its shareholders in the malpractice action Mr. Bowles brought against them in the Texas state courts. Mr. Bowles alleges first that the Home professional liability policy does not allow for defense of BPS or its attorneys. His argument is that he did not sue BPS until after the policy period, that Attorney Bishop was not an insured during the Home policy period and that the intentional acts exclusion bars coverage for BPS. Mr. Bowles argues that res judicata and collateral estoppel do not apply to his claims against Home and he is entitled to recovery both in the Texas courts and in this dispute.

The Liquidator asserts that Mr. Bowles is not entitled to recover on his malpractice claims because they were compulsory counterclaims that he did not assert in the underlying 1991 litigation in the Texas state courts. Therefore, the Liquidator argues Mr. Bowles is precluded by res judicata from asserting these claims as a third party in the Home liquidation. In addition, the Liquidator argues that collateral estoppel also bars Mr. Bowles from challenging the res judicata effect of the judgments in the 1991 litigation because Mr. Bowles litigated those issues in his 1995 malpractice action and suffered an adverse judgment. Finally, the Liquidator asserts Mr. Bowles cannot recover from Home on his improper provisions of a defense claim because he fails to state any such claim against Home, and, in addition, the claims made against the Home's insureds are potentially covered and therefore triggered a duty to defend under the Home professional liability policy.

RELEVANT FACTS

The Home Policy

Home issued to BPS a professional liability insurance policy LPL-F871578-1 (hereinafter "the Policy") which was in effect for the period January 24, 1993 to January 24, 1994. The insureds under the policy included BPS and its shareholders George M. Bishop and David E. Sharp.

The Home policy stated that Home agreed:

To pay on behalf of the Insured all sums...which the Insured shall become legally obligated to pay as damages as a result of claims first made against the Insured during the policy period and reported to the company during the policy period caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.

The policy also provides for a defense. The pertinent clause states that Home:

...shall defend any claim against the Insured including the appeal thereof seeking damages to which this insurance applies even if any of the allegations of the suit are groundless, false or fraudulent.

The policy provides coverage for any suits brought against the Insured that are based on circumstances about which the Insured notifies Home during the policy period. The policy specifically states:

If, during the policy or any optional Reporting Period purchased hereunder, the Insured first becomes aware that an Insured has committed a specific act, error or omission in professional services for which coverage is otherwise provided hereunder, and if the Insured shall during the policy period or the optional Reporting Period purchased hereunder give notice to [Home] of:

- (a) The specific act, error or omission; and
- (b) The injury or damage which has or may result from such act, error or omission; and
- (c) The circumstances by which the Insured first becomes aware of such act, error or omission

then any claim that may subsequently be made against the Insured arising out of such act, error or omission shall be deemed for the purposes of this insurance to have been made during the policy period.

In December 1993, Home informed BPS that the Policy would be cancelled due to "recent claims activity and past claim frequency." That policy cancellation was effective February 6, 1994.

Notification to Home by BPS

Prior to the cancellation of the policy, by letter dated December 29, 1993, Attorney Bishop informed Home, on his own behalf and that of BPS, that Mr. Bowles might file a claim against him or the firm based on the allegations of fraud and deceit. By letter dated January 10, 1994, Home Insurance informed Attorney Bishop that Home acknowledged receipt of the notice of a potential claim.

The Prior Litigation in the Texas State Courts

The 1991 Litigation In 1991, Mr. Bowles brought suit against his former business partners in the District Court of Harris County, Texas, entitled Bowles et al v. Schwartz et al., Cause No. 1991-25939 (later together with Cause 1991-25939-A). Mr. Bowles hired the law firm BPS and specifically Attorney Bishop to represent him in this litigation. Apparently, during the course of the 1991 litigation, BPS dissolved. Attorney Bishop continued to represent Mr. Bowles. Also during the course of the 1991 litigation, by letter dated December 22, 1993, Mr. Bowles accused Attorney Bishop of conspiracy and fraud.

On April 8, 1994, Attorney Bishop moved to withdraw as counsel of record for Mr. Bowles. The court granted that motion to withdraw on April 11, 1994. On April 18, 1994, Attorney Bishop and BPS intervened in the 1991 litigation seeking attorneys' fees relating to Attorney Bishop's representation of Mr. Bowles in this action. Mr. Bowles objected to the motion.

On May 27, 1994, Attorney Bishop and BPS moved for summary judgment on their claims for attorney's fees. The motion was granted on July 18, 1994. Attorney Bishop and BPS then moved to sever their claim from the original 1991 litigation and for entry of final judgment. The Court granted the motion on April 10, 1995 and the severed action was designated Cause 1991-25939-A. On May 15, 1995, the Court set aside the April 10, 1995 severance order. By order dated February 12, 1996, the Court granted final summary judgment in the 1991 litigation. On April 26, 1996, the Court reinstated the severance order for the claims for attorney's fees by Attorney Bishop and BPS by vacating the May 15, 1995 order. On August 30, 1996, the District Court ordered the disbursement of funds in the 1991 litigation to BPS and Attorney Bishop, with specific instructions on the disbursement. On March 21, 2005, the District Court barred Mr. Bowles from making any further filings in the 1991 litigation.

The 1995 Action On August 31, 1995, Mr. Bowles filed a malpractice suit against BPS, Attorney Bishop, Attorney Peterson, and Attorney Sharp, alleging malpractice in representing him in the 1991 litigation. This action was filed in the District Court of Harris County Texas 151st Judicial District and captioned Bowles v. Bishop, et al., Cause 95-043235.

In January 2006, BPS moved for summary judgment. The Court requested additional briefing on the issue of whether the February 12, 1996 order in the 1991 litigation was a final judgment as to that litigation, and what, if any, effect that order had on Mr. Bowles' malpractice claim filed on August 31, 1995, since the claims in the 1995 action were not made as compulsory counterclaims in the main lawsuit. The Court granted BPS' motion for summary judgment by order on June 27, 2006. The Court ruled that final judgments had been entered in the underlying cases, Causes 1991-25939 and 1991-35939-A and therefore, the Court held that Mr. Bowles' cause of action for legal malpractice was barred by res judicata. The Court specifically stated that because Mr. Bowles' cause of action for legal malpractice was a compulsory counterclaim that he failed to assert, he was barred by res judicata from asserting that claim in the 1995 action.

Mr. Bowles moved for rehearing on the issues. On August 30, 2006, the Court rejected the motion for rehearing and severed the claims against BPS from the remainder of the 1995 litigation.

Attorney Bishop filed a motion for summary judgment. The Court granted that motion on April 12, 2007, again ruling that because Mr. Bowles' cause of action for legal malpractice was a compulsory counterclaim that he failed to assert, he is now barred by res judicata from asserting it.

Attorney Sharp moved for summary judgment in the 1995 litigation on June 19, 2009 based on the statute of limitations, res judicata, the absence of any duty running from Attorney Sharp as a shareholder of BPS to Mr. Bowles, and waiver due to the fourteen year delay between filing of the 1995 litigation and service on Attorney Sharp. On July 21, 2009, Attorney Sharp's motion was granted. Attorney Sharp then moved to sever the claims against him and the Court granted that motion on September 29, 2009.

Mr. Bowles challenged the authority of TPCIGA to provide Attorney Sharp with a defense in the course of the 1995 litigation. The Court rejected Mr. Bowles' argument that TPCIGA could not provide Attorney Sharp with a defense on October 12, 2009.

The Federal Litigation Mr. Bowles has also filed and dismissed two actions against Home and TPCIGA in the United States District Court for the Western District of Texas, numbered 07-cv-00740 and 08-cv-00808. Ronald Barta of Home and Amber Walker of TPCIGA filed affidavits in those proceedings. Those affidavits have been referenced by Mr. Bowles in this litigation.

The Liquidation Proceeding Home was declared insolvent and on June 13, 2003, an Order of Liquidation was entered by the Merrimack County Superior Court. On June 26, 2003, the Commissioner of Insurance of the State of Texas officially designated Home as an impaired insurer under Texas Insurance Code based upon the Order of Liquidation. Immediately, the Liquidator transferred claim files that would likely be subject to guaranty association protection to the appropriate guaranty associations for handling. By the time the Liquidator filed its second report dated August 14, 2003, Home's claims file on the 1995 Litigation, referenced above, was shipped to TPCIGA.

The Liquidator received Mr. Bowles' Proof of Claim in the Liquidation on February 7, 2008.

LEGAL ANALYSIS

Now before the Referee are the following issues:

- A. Whether the disallowance of Mr. Bowles' claim by the Liquidator was proper based on the language of the Home policy issued to Bishop, Peterson and Sharp, P.C.;
- B. Whether Mr. Bowles is entitled to recovery on his claim that Home improperly provided a defense to Bishop, Peterson and Sharp, P.C.; and
- C. Whether the principle of res judicata bars any claim by Mr. Bowles.

The Referee addresses the first two issues together.

- I. The disallowance of Mr. Bowles' claim by the Liquidator was proper based on the language of the Home professional malpractice policy and Mr. Bowles is not entitled to recover from Home.

Mr. Bowles alleges that Home should not have provided a defense to BPS in his claims against the firm and its attorneys for three reasons. First, Mr. Bowles argues he did not sue BPS until after the policy period. Second, Mr. Bowles argues that Attorney Bishop was not an insured during the policy period. Third, Mr. Bowles asserts that the intentional acts exclusion bars coverage for BPS.

The Home policy is a claims-made policy. It provides coverage for claims made during the policy period regardless of when the events out of which the claim arose occurred. In this case, as with most claims-made policies, the policy required not only that the claim be made, but also that it be reported to the insurer within the policy period. See 7 L. Russ & T. Segalla, Couch on Insurance 3d §102:20 at 102-45 to 102-46 (1997). It is common for insureds, when faced with the termination of a claims made policy, to inform the insurer of any and all facts or allegations which could potentially result in a claim in the future. In fact, the policy requires such notification by the insured.

The discovery clause of the Home policy is clear: where the insured first becomes aware of a potential claim and gives notice to Home during the policy period, any claim subsequently made against the insured arising out of the alleged acts reported to Home is deemed to have been reported during the policy period. Those are the circumstance here. Attorney Bishop reported a potential claim to Home by letter in December 1993. His report was based on allegations made by Mr. Bowles related to actions taken by Attorney Bishop during the Home policy period. In 1995, after the policy terminated, Mr. Bowles filed suit against BPS and its shareholders. The basis for the allegations were acts which took place during the policy period and were reported to Home during the policy period and therefore Home was required to defend the claim.

Between the time when Attorney Bishop put Home on notice of a potential claim and the time Mr. Bowles filed suit against BPS the Liquidation began. The Liquidator sent files of potential claims to various Guaranty Associations after the liquidation. In doing so, the Liquidator was complying with statutes and the Liquidation Order. Pursuant to statute, TPCIGA was required to act on Home's behalf once Home was placed in liquidation. Therefore, when the claims were filed by Mr. Bowles against BPS, it was TPCIGA which was required to, and did, provide a defense to BPS and its shareholders.¹

Mr. Bowles also argues that Attorney Bishop was not an insured under the policy for the purpose of the 1995 litigation because BPS was dissolved in the summer of 1993 and Attorney Bishop thereafter provided services to Mr. Bowles as representative of a different legal entity or law firm. Mr. Bowles apparently contends that the dissolution of the firm, and continued work as an attorney by Attorney Bishop, means that there was no coverage for Attorney Bishop under the Home policy. Regardless of when BPS dissolved, and what Attorney Bishop did after the dissolution of the firm, he was an insured under the Home policy, as was BPS itself, and any other lawyers who worked for BPS during the policy period, for actions taken during the policy

¹ In his Brief dated October 27, 2009, Mr. Bowles asserts that there was no defense owed because the policy does not define "potential covered claims." Mr. Bowles reviews again the language used by Ron Barta and Amber Walker in affidavits filed in the Texas suits referenced above. Mr. Bowles ignores the plain language of the policy, specifically the insuring agreement and discovery clause.

period and reported during the policy period, even if the claims related to those actions were made after termination of the policy. See infra.

Mr. Bowles' third claim is that the 1995 litigation and his claims against BPS are excluded from coverage because his allegations are that BPS engaged in false and fraudulent professional misconduct when acting as Mr. Bowles' legal counsel.

The terms of the policy make clear that Home had a duty to defend Attorney Bishop and BPS for those claims for false and fraudulent misconduct. First, even if Mr. Bowles made some allegations in the 1995 litigation that would not have been covered by the Home policy, where a complaint potentially includes at least one covered claim, the insurer is required to defend the entire suit. See Zurich America Ins. Co. v. Nokia, 268 S.W.3d 487, 490 (Tex.2008) and 14 Couch on Insurance, §200:1. Second, the terms of the policy are clear and unambiguous. The policy states that it does not apply to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the insured. (Emphasis added). The language of the exclusion makes clear that it does not operate until after a judgment or final adjudication in which there is a finding by the court that the potentially covered actions were undertaken dishonestly or were deliberately wrongful acts. In this case, there was no final adjudication or finding of such dishonest or deliberately wrongful acts. Therefore Home could not have relied upon the policy exclusion to deprive BPS of a defense for the 1995 litigation.

A defense was properly provided to BPS for the claims against it by Mr. Bowles. Therefore, the Liquidator properly disallowed Mr. Bowles' claim based on the terms of the policy. Mr. Bowles is not entitled to recover from Home or the Liquidator.

II. Res judicata Applies to Mr. Bowles' Claims in the Liquidation.

Mr. Bowles argues that res judicata does not apply to his claims because the decisions of the Texas Courts were based on fraud. Mr. Bowles also asserts that the order for summary judgment for BPS was not a final judgment on the merits and can't be the basis for a claim of res judicata.

The Liquidator argues that Mr. Bowles is barred from asserting malpractice claims against Home's insureds because of the res judicata effect of the judgment in the 1991 litigation. The Liquidator argues that malpractice claims are compulsory counterclaims to BPS' claims for attorney's fees and because Mr. Bowles did not make those claims in the 1991 litigation, they cannot provide a basis for a claim in the Home liquidation. Moreover, the Liquidator argues that Mr. Bowles is collaterally estopped from challenging the res judicata effect of the judgment of the 1991 litigation because he previously litigated and lost that issue in the 1995 litigation.

Texas law applies to determine the res judicata effect of a Texas judgment in this proceeding. *In Re Estate of Rupert*, 139 N.H. 273, 275 (1994). Texas law requires that a defendant bring as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the opposing party's suit. *State and County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693 (Tex. 2001). Under Texas law, a claim of attorney malpractice is a compulsory counterclaim to a claim for attorneys' fees so that if a client chooses not to counterclaim for these actions, all

claims are barred by res judicata. *Goggin v. Grimes*, 969 S.W.2d 135 (Ct.App.Tex. 14th Dist. 1998). Therefore, when BPS intervened in the 1991 litigation seeking attorneys' fees, Mr. Bowles' claims for malpractice became compulsory counterclaims. He was required to bring them in the 1991 litigation. While Mr. Bowles disputed the attorneys' fees, he did not allege malpractice. Therefore, he failed to assert his compulsory counterclaims. The Texas Court agreed in the 1995 litigation, reaching the same conclusion. *Order of the District Court for Harris County, Texas, Cause No. 1995-43235 dated April 12, 2007.*

Having determined that Mr. Bowles' claims for malpractice were compulsory counterclaims, the Referee turns to whether res judicata applies in this dispute. Under Texas law, res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. *Amstadt v. Kochie*, 919 S.W.2d 644 (Tex. 1996). Texas law contemplates three elements of res judicata: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of the parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *Id.* at 652, citations omitted.

As to the first element, there is a final judgment on the merits in the 1991 litigation. The claim for attorneys' fees was decided in favor of BPS and was severed. That judgment became final and appealable when the trial court signed the order severing into a separate case the claims for attorneys' fees between BPS and Mr. Bowles. *See Pilgrim Enters, Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488 (Ct. App.Tex. 1st Dist. 2000). Turning to the second elements, Mr. Bowles was a party to the litigation in the Texas state courts and he is the party here; the parties are the same. Third, in this action Mr. Bowles raises the claim of malpractice in his POC, therefore, the claims in this proceeding are the same claims Mr. Bowles could have raised, and was required to raise, in the 1991 litigation. Res judicata applies to preclude Mr. Bowles from proceeding on a claim against the Liquidator.

Mr. Bowles raises several other arguments contending he is entitled to proceed against the Liquidator. First, he claims there was not a final order in the 1991 litigation because the order severing the summary judgment on attorneys' fees was vacated, a final judgment was entered, and then the summary judgment was severed again. The Texas Court specifically recognized that the claim for attorneys' fees was resolved and the judgment was final. *Amended Order of the District Court of Harris County, Texas, Cause No. 1995-43235 dated June 27, 2006.*

Mr. Bowles also argues that he filed the 1995 litigation before there was a final judgment in the 1991 litigation. Regardless of the timing of the filing of the 1995 litigation, once final judgment was entered in the 1991 litigation, it had preclusive effect. *Ellis v. Amex Life Ins. Co.*, 211 F. 3d 935 (5th Cir. 2000) and Restatement (Second) of Judgments §14 (1982).

Finally, as to the actions of Attorney Bishop and BPS, Attorney Sharp and Attorney Peterson were shareholders in the firm and therefore in privity with both BPS and Bishop. Therefore, the final judgment in the 1991 litigation also bars claims against Attorneys Peterson and Sharp under the doctrine of res judicata as adopted by the Texas courts.

The Liquidator also asserts that the judgment in the 1991 litigation precludes Mr. Bowles from relitigating the preclusive effect of the 1991 litigation. In the 1995 litigation the Texas Court

determined that final judgment had been entered in the 1991 litigation and that the cause of action for malpractice was barred by res judicata.

In *Sysco Food Service v. Trapnell*, 890 S.W.2d 796 (Tex. 1994), the Court said that a party seeking to assert the bar of collateral estoppel must establish that: (1) the fact sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Id.* at 801, citations omitted. In this case, the Liquidator is asserting collateral estoppel against Mr. Bowles. The issue being litigated in this proceeding is that which Mr. Bowles litigated in the 1995 litigation, the preclusive effect of the 1991 litigation. In addition, the Texas Court ruled in the 1991 litigation that there was a final order in the 1991 litigation and therefore Mr. Bowles' claims for legal malpractice were barred by res judicata. This determination required the Court to have found that the subject matter of both the 1991 and 1995 litigation included Mr. Bowles' malpractice claims and that there had been a final determination in the 1991 litigation. Finally, Mr. Bowles was clearly an adversary of BPS and Attorney Bishop in the prior litigation. It is irrelevant that the Liquidator is not the same as the parties in the prior litigation, it is "only necessary that the party against whom the doctrine is asserted was a party or in privity with a party in the first action." *Id.*

III. Other Pending Motions And Pleadings

Mr. Bowles has filed Proposed Findings of Fact and Rulings of Law in this dispute. The Referee does not address them individually. To the extent they are relevant to this dispute and they are granted, the proposed findings of fact and rulings of law are incorporated into this Order.

Mr. Bowles has also filed two motions for summary judgment. The allegations and claims in those motions are addressed in this Order and those motions are denied.

CONCLUSION

For the reasons set forth above, the Referee finds that the Liquidator properly disallowed Mr. Bowles' claim based on the language of the Home policy issued to Bishop, Peterson and Sharp, P.C. In addition, Mr. Bowles is not entitled to recovery on his claim that Home improperly provided a defense to Bishop, Peterson and Sharp, P.C. Defense of BPS was proper. In addition, the principles of res judicata and collateral estoppel bar any claim by Mr. Bowles against BPS and the Liquidator.

Because the Liquidator properly disallowed Mr. Bowles' claims, there is no need for additional briefing on any other issues in this dispute. Any issues not decided by the Referee are moot.

So ordered.

Jan 4, 2010
Date

Melinda S. Gehris
Referee, Melinda S. Gehris

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2008-HICIL-41
Proof of Claim Number: CLMN712396-01
Claimant Name: Harry L. Bowles

LIQUIDATOR'S OBJECTION TO CLAIMANT'S MOTIONS FOR
APPOINTMENT OF AUDITOR AND FOR PARTIAL SUMMARY JUDGMENT

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motions filed by Claimant Harry L. Bowles ("Claimant") seeking (1) appointment of an auditor, and (2) partial summary judgment on the issue of coverage. As reasons therefor, the Liquidator states:

1. Claimant's motion for appointment of an auditor under RSA 519:1 should be denied for two independent reasons. First, the Superior Court has already appointed the Referee to hear disputed claim proceedings, including this one, pursuant to RSA 519:9 and :10 in the Claims Procedures Order. Where there is a Referee, there is no need for an auditor. Second, Claimant has no legally cognizable interest in whether Home's insured has satisfied the deductible under Home's policy. For the reasons set forth at pages 18-22 of the Liquidator's Section 15 Submission, Claimant has failed to state a viable claim regarding coverage, and his request for appointment of an auditor is merely another attempt to inquire where he has no legal basis for doing so.

2. Claimant's motion for partial summary judgment should also be denied. The Liquidator has previously addressed Claimant's contentions regarding the absence of coverage at pages 18-24 of the Liquidator's Section 15 Submission, and those arguments warrant denial of

EXHIBIT D

this new motion. Claimant, as a person bringing suit against Home's insured, has no legally cognizable interest in whether the insured has satisfied the deductible under Home's policy.¹

3. Claimant's two new arguments also lack merit. First, his contention that the Liquidator has somehow improperly "intervened" in the Texas action in violation of RSA 402-C:28 is incorrect. That statute, implemented by the abatement provision of the Order of Liquidation ¶ (m), only concerns actions "against the insurer." It governs when and how the Liquidator may "intervene" in such an action, which refers to participation by appearing as a party litigant. Claimant's suit against Home's insured is not such an action. It was not abated by the Order of Liquidation. Moreover, Home and the Liquidator never intervened in the action. An insurer does not intervene by providing a defense to a defendant insured. Certainly, TPCIGA's provision of a defense to the insured (pursuant to its own statutory obligations) does not constitute intervention by the Liquidator.

4. Second, the cancellation of policies 30 days after liquidation pursuant to RSA 402-C:22 and the Order of Liquidation ¶ (e) has no bearing on the policy issued to BPS. The statute concerns policies that are "in force," meaning that the policy period has not yet expired so the policy provides coverage for present events. The statute allows 30 days (unless the policy expires earlier) for the insured to seek replacement coverage from another insurer. RSA 402-C:22, I. It does not apply to policies whose policy periods expired before the liquidation. Whatever coverage those policies provided regarding events in their past policy periods continues, subject to the policy terms and the claim filing deadline and other provisions of RSA 402-C.


¹ The Liquidator notes that the deductible provision of the policy (Liq. Ex. B, Section E(III)) does not require that a claimant pay the deductible before Home provides a defense pursuant to Section B(II). The deductible provision does not contain language setting forth a condition precedent. Instead, it merely provides for reimbursement of claim expenses up to the deductible after "written demand" by Home. Further, by agreement, the deductible may be satisfied by an insured representing itself without compensation up to the amount of the deductible.

CONCLUSION

For the foregoing reasons and those set forth in the Liquidator's Section 15 Submission, the Referee should deny Claimant's motions.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,
By his attorneys,
MICHAEL A. DELANEY
ATTORNEY GENERAL

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
(617) 542-2300

November 24, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Objection to Claimant's Motions was emailed and sent by first class mail to the Claimant on November 24, 2009.


Eric A. Smith