

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**Docket No. 03-E-0106**

**In the Matter of the Liquidation of  
The Home Insurance Company**

**Docket No. 03-E-0112**

**In the Matter of the Liquidation of  
US International Reinsurance Company**

**AFFIDAVIT OF PETER A. BENGELSDORF,  
SPECIAL DEPUTY LIQUIDATOR, IN SUPPORT OF  
MOTION FOR APPROVAL OF AGREEMENTS**

I, Peter A. Bengelsdorf, hereby depose and say:

1. I was appointed as Special Deputy Liquidator of The Home Insurance Company ("The Home") and US International Reinsurance Company ("USI Re") by Paula T. Rogers, Commissioner of Insurance, as Liquidator of The Home, effective June 11, 2003. I submit this affidavit in support of the Liquidator's Motion for Approval of (1) Short Term Transition Services Agreement and (2) Asset Transfer Agreement with Risk Enterprises Management (the "Motion").

2. The Liquidator has determined to create stand-alone liquidation operation for The Home and USI Re (collectively, the "Companies") in liquidation to achieve cost efficiency. As part of my duties as Special Deputy Liquidator, I have been charged with assembling a liquidation staff and preparing facilities, including computer systems, to conduct the liquidations.

**EXHIBIT F**

3. Risk Enterprise Management Limited ("REM") had administered the run-off of the Companies since 1995 pursuant to a Services Agreement with the Companies dated June 12, 1995, as amended. The Liquidator disavowed the Services Agreement by notice dated June 19, 2003.

4. REM has possession of many of the records and information of The Home and USI Re, including data contained on computer systems that have been operated and maintained by REM. The computer systems holding the Companies' financial, reinsurance, policy, claims and other operational information include intermingled data concerning both the Companies and other of REM's clients. REM has developed system enhancements and applications to handle and provide access to the Companies' data. Further, certain of the computer software and applications are owned by REM. Any "download" of the Companies' data from REM systems must be accomplished by the migration of that data to new software and hardware capable of accessing that data.

5. It will greatly assist in promptly establishing a cost-effective stand-alone liquidation operation, to acquire title to and interests in the computer software and applications, and other non-information processing related assets, owned by REM that have heretofore been used to administer the run-off of the Companies. In order to help her in valuing those assets the Liquidator engaged Cap Gemini Ernst & Young U.S. LLC ("CGE&Y"), consulting arm of Ernst & Young.

6. The transfer of the records and information of the Companies, in particular the data on the computer systems, to the new stand-alone facilities and computer systems is a complicated undertaking, and one that needs to be accomplished quickly and in an organized fashion. The Liquidator needs to have immediate access to the existing

computer systems and the data on those systems and to minimize any disruption in access to organize and run the liquidations. Access to the information and systems is important for a number of functions, including: (a) the processing of information concerning claims and other matters that continues to flow to the companies, (b) keeping records of the file transfers to guaranty associations, (c) billing and collecting reinsurance, (d) keeping records of proofs of claims as they are mailed and returned, (e) providing coverage and claims payment information to guaranty associations so they can handle claims, (f) processing vendor invoices, and (g) arranging for the transfer of the foregoing information to computer systems being established for the liquidations. The transfer of records and computer data would be more quickly and efficiently made with the assistance of the company that has been maintaining those records and operating the computer systems.

7. For these reasons, the Liquidator has negotiated two agreements with REM: (a) an Asset Transfer Agreement to acquire rights to software and applications, as well as other non-information processing related assets, to permit the stand-alone liquidation operation to readily maintain, access and process the Companies' financial, reinsurance, policy, claims and other operational information, and (b) a short-term Transition Services Agreement to provide a smooth transfer of records and computer data access and processing and quickly establish a functioning, stand-alone liquidation operation. Copies of the Asset Transfer Agreement and the Transition Services Agreement are attached to the Motion.

8. The Asset Transfer Agreement provides for REM to transfer to the Liquidator all right, title and interest in a number of technology assets, including among

other things the Assumed Reinsurance System, the modifications and enhancements to the Ceded Reinsurance System and Claims System made by REM, software rights to all systems used by REM for the business of the Companies, all data and databases developed for or used for the business of the Companies, and any and all other REM proprietary systems, links and applications used for the Companies (including financial, accounts payable, accounts receivable, and budget systems).

9. The Liquidator agrees to pay \$7.5 million for the assets. The Asset Transfer Agreement will only become effective when approved by the Court. The payment will be made within two business days of that approval, and title will be transferred to the Liquidator at that time. The payment is fair and reasonable based on the evaluation by CGE&Y. CGE&Y has estimated the total value of the assets to be acquired pursuant to the proposed Asset Transfer Agreement, excluding REM proprietary intellectual property and non-business related software, to fall between a range of \$6.8 to 9.17 million. A copy of CGE&Y evaluation letter is attached as Exhibit 1.

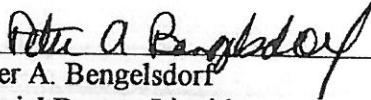
10. In order to facilitate and expedite the transition to an independent liquidation operation able to fully use the computer systems and information, the Liquidator entered into the short-term Transition Services Agreement. That Agreement provides that REM will perform a number of essential tasks, including providing support for follow-up mailings of notices to potential claimants, delivering an operational proof of claim system, assisting the Liquidator separating and transferring the Companies' data to the Liquidator's systems and accessing the data, upgrading personal computers and servers to be used by the liquidation operation, assisting the Liquidator in installing

computers and creating a separate data center and in transferring mainframe and related systems, and training liquidation staff to operate the systems.

11. The Liquidator will compensate REM for these services by paying fees consisting of (i) the employee compensation and benefits of REM personnel during the term of the Agreement multiplied by the portion of their time spent performing services for the Liquidator, (ii) an allocation of REM's costs relating to the provision of the Services, and (iii) the sum of \$295,000 for REM's extraordinary transition costs. The cost of the Agreement to the liquidation thus will depend on the amount of services called for by the Liquidator. The Liquidator also agrees to indemnify REM against claims and expenses arising from the services performed for the Liquidator. The Transition Services Agreement's term begins on the liquidation date, June 11, 2003, and ends 45 days after Court approval of the Agreement; however, the Agreement only becomes effective when approved by the Court. (Until that time, the Liquidator will pay REM on the basis of a letter dated June 20, 2003 providing for interim payments after disavowal of the prior Services Agreement.)

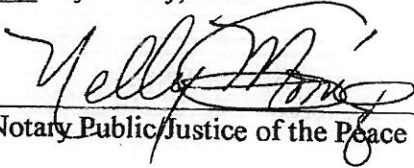
12. I believe that the Asset Transfer Agreement and the Transition Services Agreement will facilitate and expedite the establishment of an independent liquidation operation for a price that is fair and reasonable.

Signed under the penalties of perjury this 18<sup>th</sup> day of July, 2003.

  
Peter A. Bengelsdorf  
Special Deputy Liquidator

STATE OF NEW YORK  
COUNTY OF NEW YORK

Subscribed and sworn to, before me, this 18<sup>th</sup> day of July, 2003

  
Notary Public/Justice of the Peace

NELLY M GOMEZ  
Notary Public, State of New York  
No. ~~010~~ 5005271  
Qualified in ~~Delaware~~ County  
Certificate Filed in ~~N.Y.~~ County  
Commission Expires December 7, 2006

GEORGE M. BISHOP & ASSOCIATES

ATTORNEYS AT LAW

3000 SMITH

HOUSTON, TEXAS 77006

(713) 521-9797

FAX: (713) 521-3125

December 29, 1993

GEORGE M. BISHOP  
BOARD CERTIFIED - CIVIL TRIAL LAW  
BOARD CERTIFIED - CIVIL APPELLATE LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

Home Insurance Company  
Claim Department  
13th Floor  
10 Exchange Place  
Jersey City, NJ 07302

085-600-764-174  
DRP

JAN 04 1993

RE: Lawyer's Professional Liability Policy No. LPL-F871578-1  
insuring Bishop Peterson & Sharp, P.C.

RE: No. 91-025939; Harry L. Bowles and Quality Seal Company  
v. Charles N. Schwarz, Jr., Rosalie Schwarz and JoAnn  
Lane; In the 190th District Court of Harris County, Texas

Gentlemen:

Harry Bowles is a client of Bishop Peterson & Sharp, P.C. and whom I have been representing since the firm of Bishop Peterson & Sharp, P.C. was dissolved this past summer. We reached a settlement concerning Mr. Bowles' case and he is apparently now expressing some dissatisfaction with the settlement. The settlement has not yet been funded since the company involved in the settlement was turned over to a receiver so that it might be sold and the proceeds split pursuant to the settlement.

I enclose copies of letters I have received from Mr. Bowles recently concerning his demands that certain deductions be made from the fees due to either me or to Bishop Peterson & Sharp, P.C. I am not inclined to accept any of these offsets and intend to contest them. Mr. Bowles may file a claim for malpractice and I thought you should be on notice of this matter immediately.

Please call me at your convenience should you wish any further details concerning this matter. I will look forward to hearing from you in the near future.

Very truly yours,

*George M. Bishop*  
George M. Bishop *tr*

GMB:tr  
enclosure

EXHIBIT G

HARRY L. BOWLES,

Plaintiff

VS.

GEORGE M. BISHOP, CHARLES K. PETERSON, AND DAVID E. SHARP, EACH IN THEIR INDIVIDUAL CAPACITIES

and

GEORGE BISHOP AND ASSOCIATES, AND BISHOP, PETERSON AND SHARP, P.C., EACH A PROFESSIONAL LAW CORPORATION AND/OR AN ASSUMED NAME OF THE NAMED INDIVIDUALS AS A LAW FIRM, ET AL

Defendants

§ IN THE DISTRICT COURT OF

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§ HARRIS COUNTY, TEXAS

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§ 151<sup>ST</sup> JUDICIAL DISTRICT

§

**DEFENDANT DAVID E. SHARP'S MOTION FOR SUMMARY JUDGMENT**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, David E. Sharp, Defendant in the above-entitled and numbered cause (hereinafter referred to as "Defendant"), and respectfully requests this Honorable Court to render summary judgment in favor of said Defendant in accordance with Rule 166a of the Texas Rules of Civil Procedure, and as grounds therefore, Defendant would respectfully show unto the Court as follows:

**I.**

**INTRODUCTION**

This is a legal malpractice case filed in 1995, but Defendant was just served with the lawsuit in May 2009.<sup>1</sup> Defendant is entitled to summary judgment as a matter of law

<sup>1</sup> Defective purported service was received in April 2009, and quashed by this Court on May 27, 2009. Under Rule 122, service is deemed to have occurred, as this Court's Order reflects, so as to make



for several reasons: 1) plaintiff's claims are barred by the statute of limitations, because Plaintiff waited *14 years* to serve Defendant; 2) a claim of legal malpractice is a compulsory counterclaim to a claim for attorneys' fees, but as explained below, plaintiff failed to counterclaim for legal malpractice in the underlying action after Defendant's law firm intervened for its fees; 3) Defendant is sued because he practiced law with the law firm Defendant Bishop, Peterson & Sharp, P.C; however, because that firm has already received a final judgment in the case, Plaintiff's claims against Defendant David E. Sharp are barred by *res judicata*; 4) as a shareholder in a professional corporation Defendant David E. Sharp is not liable for any professional errors, omissions, negligence, incompetence or malfeasance on the part of others in the corporation; 5) plaintiff waived his right to seek recovery from Defendant David E. Sharp by waiting some *14 years* to serve him.

## II.

### BACKGROUND

This case has a long history before service of Defendant David E. Sharp. Plaintiff filed this lawsuit in 1995 alleging that the Defendant, two lawyers with whom he practiced law, and his former law firm, Bishop, Peterson & Sharp, P.C. were negligent in representing him in the lawsuit styled *Harry L. Bowles v. Charles N. Schwarz, Jr., et;* Cause No. 1991-25939 (the underlying action).<sup>2</sup> George Bishop, who was then practicing as George M. Bishop & Associates, filed a Motion to Withdraw as counsel for

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Defendant's appearance date by June 22, 2009, the Monday following 20 days after this Court's Order quashing the defective purported service.

<sup>2</sup> See Original Petition, on file with this Court.

Plaintiff in Cause No. 1991-25939 on April 8, 1994.<sup>3</sup> On April 11, 1994, the Court granted Mr. Bishop's Motion to Withdraw.<sup>4</sup> On April 19, 1994, Bishop, Peterson & Sharp, P.C. filed a Third-Party Intervention in the underlying cause for its attorney fees.<sup>5</sup> On May 6, 1994, Plaintiff responded to Bishop, Peterson & Sharp, P.C.'s Third-Party Intervention by filing his own Petition in Intervention.<sup>6</sup> In his Petition in Intervention, Plaintiff contested Bishop, Peterson & Sharp, P.C.'s legal costs, but wholly failed to counterclaim based on any alleged legal malpractice or negligence, as required by law. *See Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex.App.—Houston [14<sup>th</sup> Dist] 1998, no pet.). Finally, on August 31, 1995, Plaintiff brought this separate suit claiming legal malpractice, or negligence, in Bishop, Peterson & Sharp, P.C.'s handling of the underlying action (Cause No. 1991-25939).

### III.

#### SUMMARY JUDGMENT STANDARD

In a traditional summary judgment case, the issue is whether the movant has met its summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990); *City of Houston v. Clear Lake Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of the plaintiff's cause of action cannot be established, *See*

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<sup>3</sup> *See* Motion to Withdraw, attached as Exhibit A. George Bishop represented Plaintiff as a Shareholder with Bishop, Peterson & Sharp, P.C., and after attorneys Bishop, Peterson and Sharp ceased practicing law together, continued representing Plaintiff with his new firm, George M. Bishop & Associates.

<sup>4</sup> *See* Order Granting Motion to Withdraw, attached as Exhibit B.

<sup>5</sup> *See* Third-Party Intervention, attached as Exhibit C.

<sup>6</sup> *See* Plaintiff's Petition in Intervention, attached as Exhibit D.

*Corp.*, 464 S.W.2d 353, 357 (Tex.1971). Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. *Motor Vehicle Bd. v. El Paso Indep. Auto. Dealers Ass'n, Inc.*, 1 S.W.3d 108, 111 (Tex.1999). There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right. *Maryland Cas. Co. v. Palestine Fashions, Inc.*, 402 S.W.2d 883, 888 (Tex.1966). Waiver is ordinarily a question of fact, but when the surrounding facts and circumstances are undisputed, as in this case, the question becomes one of law. *Motor Vehicle Bd.*, 1 S.W.3d at 111.

In this case, clearly Plaintiff knew of his right to seek recovery against this Defendant, as shown by his filing of suit. It is also clear Plaintiff knew how to properly serve Defendants, as shown by service on codefendants. The Plaintiff made clear his intent to waive his right to seek recovery from Defendant when he served several codefendants and did not serve the Defendant. Furthermore, Plaintiff also showed a clear intent to waive his right to recovery from Defendant when he declined to serve Defendant with the suit for 14 years.

#### IV.

#### CONCLUSION AND PRAYER

For these reasons, Defendant David E. Sharp prays that this Court grant his Motion for Summary Judgment, and for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

MEHAFFYWEBER, P.C.

By: \_\_\_\_\_

*Arthur R. Almquist*  
Arthur R. Almquist

Texas Bar No. 01108800

Maryalyce W. Cox

Texas Bar No. 24009203

One Allen Center

500 Dallas, Suite 1200

Houston, Texas 77002

Telephone: (713) 655-1200

Facsimile: (713) 655-0222

**ATTORNEYS FOR DEFENDANT,  
DAVID E. SHARP**

**CERTIFICATE OF SERVICE**

This will certify that a copy of the forgoing document was furnished to all counsel of record on this the 19<sup>th</sup> day of June, 2009, pursuant to the Texas Rules of Civil Procedure.

\_\_\_\_\_  
Maryalyce W. Cox

GEORGE M. BISHOP & ASSOCIATES

ATTORNEYS AT LAW  
3000 SMITH  
HOUSTON, TEXAS 77006  
(713) 521-9797  
FAX: (713) 521-3125

January 17, 1994

GEORGE M. BISHOP  
"BOARD CERTIFIED - CIVIL TRIAL LAW  
BOARD CERTIFIED - CIVIL APPELLATE LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION"

085-600764  
JAN 20 1994  
HOME-HOUSTON

DAP

Mr. Oscar Allen  
Professional Liability Dept.  
The Home Insurance Company  
2925 Briarpark, Suite 800  
Houston, Texas 77042

RE: No. 91-025939; Harry L. Bowles and Quality Seal Company  
v. Charles N. Schwarz, Jr., Rosalie Schwarz and JoAnn  
Lane; In the 190th District Court of Harris County, Texas

Dear Mr. Allen:

Thank you for your letter of January 10 concerning the claim of Harry Bowles.

I represented Mr. Bowles in Cause No. 91-025939 in the 190th District Court. During the time I represented Mr. Bowles, I was employed on a contingent fee basis at 40 percent.

The Bowles case was settled in November right before trial, and part of the settlement agreement was that Mr. Bowles was to pay to the co-owner of National Parts Systems, a company that was the subject of the litigation, \$22,000.00. After the settlement agreements were signed, Mr. Bowles was of the opinion that the money should be paid to the corporation and not to Mr. Charles Schwarz, who was a 50-percent owner in the corporation along with Mr. Bowles. Mr. Bowles has now contended that I should pay the 50 percent of the \$22,000.00 that he would have received had the money been paid to the corporation. I am not inclined to pay this, as I do not believe I made a mistake or was negligent in the handling of Mr. Bowles' case.

Mr. Bowles has various other claims concerning this case, including the claim that a receiver with a "conflict of interest," Mr. Joe Reynolds, a distinguished attorney in Houston, was appointed by the court upon my recommendation to take over National Parts Systems, Inc. and sell the assets to the highest bidder. Those assets have not yet been sold, but I fully expect Mr. Bowles to complain about the way the sale took place and the amount received from the sale.

If you need any further information concerning this matter, please do not hesitate to contact me at your convenience.

Very truly yours,

*George Bishop*  
George M. Bishop

GMB:mjh

EXHIBIT I

GEORGE M. BISHOP & ASSOCIATES

ATTORNEYS AT LAW

3000 SMITH

HOUSTON, TEXAS 77006

(713) 521-9797

FAX: (713) 521-3125

March 23, 1994

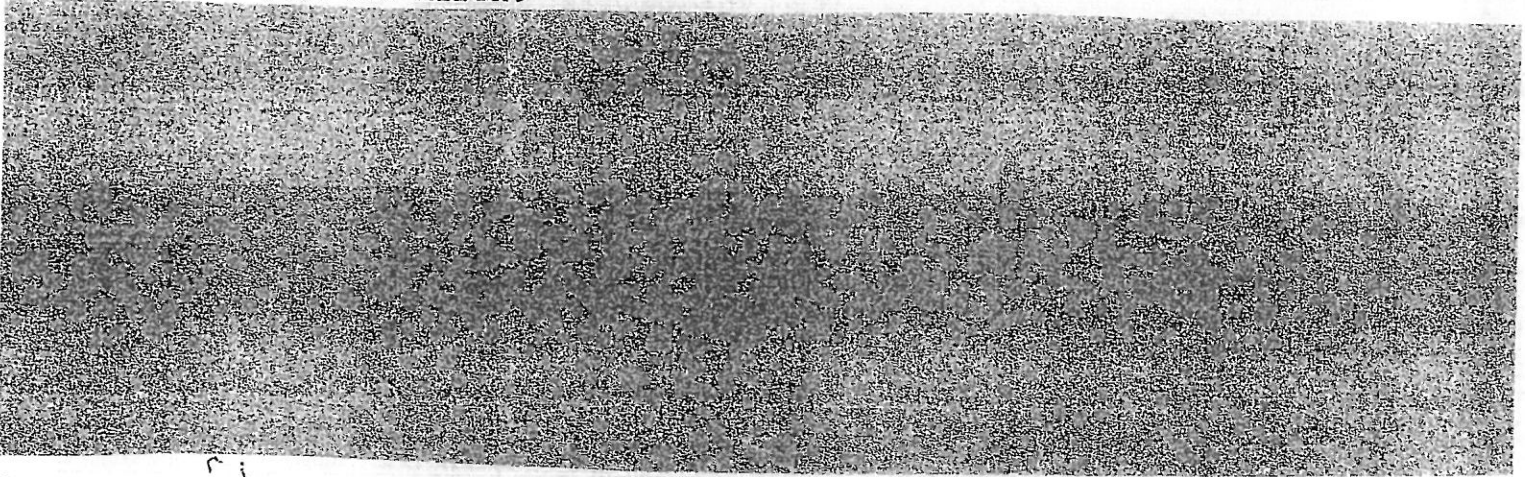
GEORGE M. BISHOP  
BOARD CERTIFIED - CIVIL TRIAL LAW  
BOARD CERTIFIED - CIVIL APPELLATE LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

Mr. Oscar Allen  
Professional Liability Department  
The Home Insurance Company  
2925 Briarpark, Suite 800  
Houston, TX 77042

RE: Lawyer's Professional Liability Policy No. LPL-F871578-1  
insuring Bishop Peterson & Sharp, P.C.;  
Claim No. 640-L-600770-174

Re: 

Dear Mr. Allen:



Another client of Bishop Peterson & Sharp, P.C. that I advised you about before the ~~policy expired~~ ~~Harry Bowles~~, is making claims that we somehow devalued his case. These claims are spurious, but I enclose a copy of his latest faxes concerning his claims. Should you have any questions concerning that claim, please do not hesitate to contact me at your convenience.

Very truly yours,

*George Bishop*

George M. Bishop

GMB:tr  
enclosure

EXHIBIT I



CUNNINGHAM, BURKE & BROOKS, L.L.P.  
ATTORNEYS AT LAW  
12 GREENWAY PLAZA, SUITE 1350  
HOUSTON, TEXAS 77046-1201

K. CHARLES PETERSON

January 16, 1996

*Same la.  
contact  
1/19/96. J  
was in  
mediation  
on 1/18/96.*

TEL: (713) 961-9929  
FAX: (713) 961-9788

Mr. Oscar Allen  
The Home Insurance Company  
Post Office Box 4357  
Houston, Texas 772010

CM RRR Z 734 306 005

Re: Claim Number: 085-600764-173  
Insured: Bishop, Peterson & Sharp  
Claimant: Harry Bowles  
Policy Number: LPL-F-871578

*1/17/96 -  
Lij. has  
ordered file  
from IMAK.*

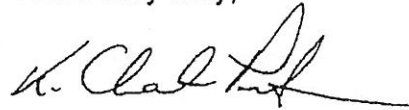
Dear Mr. Allen:

Enclosed with this letter is a copy of a suit by the above referenced claimant, Harry L. Bowles against George Bishop, Charles Peterson, David Sharp, George Bishop & Associates, and Bishop, Peterson & Sharp, P.C. I was served with this suit on December 28, 1995, but have only been able to locate the prior correspondence to you today. A copy of that correspondence is attached.

I understand that Mr. Sharp is also in the process of corresponding with you with regard to this suit.

Let me hear from you at your earliest convenience. I am going to proceed with filing a pro se general denial so that there is no possibility of Mr. Bowles taking a default, and I would appreciate it if you would contact myself, Mr. Sharp and Mr. Bishop so that we may coordinate defense of this case.

Yours very truly,



K. Charles Peterson

Enclosures  
KCP:la  
allen,itr

RECEIVED

JAN 18 1996

REM  
CLAIMS - HOUSTON

EXHIBIT J

David E. Sharp  
12 Greenway Plaza, 10th Floor  
Houston, Texas 77046  
713/627-2720

✓ Call

Frank Ban  
1/20/96  
BT

January 17, 1996

Mr. Oscar Allen  
Home Insurance Company  
P.O. Box 4357  
Houston, Texas 77210

VIA FACSIMILE

77 Bowles

Re: Claim No. 085-600764-173; Claim No. 085-600764-174; Policy No. LPL-  
F-871578 <sup>173</sup>

Dear Oscar:

I am writing about a claim by Harry Bowles about which the Home was previously notified prior to the expiration date of the Bishop, Peterson & Sharp, P.C. insurance policy referenced above. I believe from prior correspondence, including a letter from a Mr. Haschak, that the claim numbers referenced above may have been assigned to such claim.

I have been told that Mr. Bowles has now filed suit against myself, K. Charles Peterson, George M. Bishop, and Bishop, Peterson & Sharp, P.C. I have not yet been served and have not seen a copy of the lawsuit. However, I believe that Mr. Peterson may have been served and, by copy of this letter, I am asking him to forward a copy to you.

**EXHIBIT K**




Mr. Oscar Allen  
January 17, 1996  
Page 2

I am certain that there is absolutely no basis for any lawsuit against me and know of no reason that Mr. Bowles would have a valid claim against any of your insureds. However, I wish to discuss this matter with the appropriate people so that it can be handled in an appropriate manner at the least cost to all concerned, including the Home.

I look forward to your call.

Best regards.

Very truly yours,

  
DAVID E. SHARP

cc: Mr. K. Charles Peterson  
Mr. George M. Bishop